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SPEAKERS

Speaker 1, Keith Neely, Anthony Sanders, Trace Mitchell

A **Anthony Sanders** 00:24

"Write back and you'll hear a tale, a tale of a frightful trip that started from this tropic port aboard this tiny ship. The mate was a mighty sailing man, the skipper brave ensure five passengers set sail that day for a three hour tour a three hour tour." That was a very out of key. And I'm sorry for that rendition of a key aspect of our culture. But we're going to learn today how that may be fading away. And ladies and gentlemen, we're going to be talking about the sunset of the West, or indeed maybe a sunset in the West 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 Thursday, March 9 2023. Although you probably won't be hearing it for a few days at as it will be. Next week's episode. Joining me here today are a couple of my Institute for Justice colleagues that I'm very excited to introduce to you one of them for the first time. Now first, we're I'm going to introduce Trace Mitchell, Trace is a attorney who works here at IJ. But he also is going to talk about a case that that the opening sea shanty very much will be a part of at least in my mind. And then he also was on a few months ago, where he trotted out a horse racing case that we have a little bit of an update on. So Trace, first of all, welcome back to Short Circuit.

T **Trace Mitchell** 02:16

It's my pleasure. I really hope I don't flounder.

A **Anthony Sanders** 02:23

If we're just if we're going fishing, then that shouldn't be a problem. Maybe even on a fishing expedition. So the update is Trace talk told us about a horse racing case in the Fifth Circuit. It was It wasn't exactly the horse racing case. But it was about a law that Congress passed. And it turned out it sort of regulate the horse racing industry. And it violated the non delegation doctrine. And we thought, well, that's a big deal. That hasn't happened to Supreme Court since then, since the New Deal. And it's going to be going up there. Well, it turns out, there was a parallel case in the Sixth Circuit. And that just came out. But we learned from that opinion,

which I didn't know that Congress actually changed the law. And basically, the FTC has more oversight over the horse racing industry now than it did in this, this law that was found unconstitutional. And so that case is kind of I think that race is over. And I don't know if you ended up in the money or not, but we probably won't be doing any any more horse racing specials. But joining us today, also, I'm embarrassed to say for the first time, at Short Circuit, because he's, he's worked here for almost four years now is Keith Neely. So Keith, he has a many exploits behind him before he joined IJ. But we're going to talk about one of them in a moment. And that is that he was a clerk for Judge Danny Boggs on the Sixth Circuit. So Keith, welcome, introduce yourself. And also, uh, tell us a little bit about this. There's this entry step for clerking for Judge Boggs that most other judges don't have.

K Keith Neely 04:05

That's right, Anthony, and I'm thrilled to be here today. I love the podcast, and I'm from Nashville, Tennessee, originally. So the Sixth Circuit was kind of a natural flow for me. I was very excited to to get a start there and, and to get a chance to work for Judge Boggs. But you're right that he has a unique selection mechanism for his clerks. And it's a 50 question trivia quiz. It's a quiz that he makes in remakes every year I had a chance to take some of the past practice quizzes when I clerked for him because he wanted to get a sense of how tough each quiz was that he was making. And they asked questions ranging from history to science, to math to literature, some of the questions that I remember, what is the weight of all of the air above a standard sized American football field? What in your opinion, are the three most important battles in Western history? I didn't To find these individuals, Thomas Picketty, George Pickett, it's it's a completely broad set of questions. And what he does with those. I mean, partly he uses that to figure out who he wants to interview he wants to see, I think candidates with a broad base of knowledge. But then once he brings you in for the interview, he likes to go question by question and ask, Well, why why did you know that? Why did you know who that person was? Or why do you think that those three battles are the most important because he wants to get a sense ofhow widely you read? What are you passionate about? And I had a really fun time working for him. And it kind of sets the tone for what chambers is like, it's a very intellectual chambers. And we used to joke Judge Boggs has three clerks. And Judge Boggs, of course, in making the quiz can answer all of the questions himself. And we used to joke that it took all three of the clerk's combined to maintain a conversation with Judge Boggs, because he would jump from subject to subject some of which you knew more about, and some of which your colleague might know a little bit more about. So it was it was a whole lot of fun. And every time I see him, he always has some new negative knowledge to share with me.

A Anthony Sanders 06:12

And how did you do on the quiz? Do you know?

K Keith Neely 06:14

I don't know exactly what my score was. I know that on the editing portion. Ironically, I did a poor job. Because he showed me his grading sheet and all of the he kind of gave you two short paragraphs with a bunch of homophones in there, and just very subtle mistakes. And I missed a

lot of them, because candidly, I kind of rushed through that part of the quiz. And he said, But you saved yourself with the last answer, because the last question was, give me a quote, What is your favorite quote?

A Anthony Sanders 06:46

It's like senior quote in high school.

K Keith Neely 06:48

But a lot more meaningful, you know that a lot more is on the line with this. And so my favorite quote was the last eight or 12 lines or so of the poem Ulysses by Alfred Lord Tennyson. I think it's "Tho' much is taken, much abides; and tho' We are not now that strength which in old days Moved earth andheaven, that which we are, we are; One equal temper of heroic hearts, Made weak by time and fate, but strong in will To strive, to seek, to find, and not to yield.And he found that to be profound, I think he found it slightly less profound when I told him that the reason I knew of the poem was because I've seen it in an episode of Frasier. So, a little extra honesty, there didn't hurt, but he liked that quote, and I think he liked me as a clerk, and I really loved working for him.

A Anthony Sanders 07:42

That is far more than I've heard about this test for years, that's far more than I've ever actually learned before, and far more Tennyson than we've ever had on on the podcast. The last question I have for you is this. You were at a big firm, and then for a little while you helped a Legal Aid Society, and what is the term that they use for how that works.

K Keith Neely 08:15

That's called a secondment, and so during a secondment, and it's spelled S E C, O N D, M, E N T, which is a term that I've never really heard of before, but during a secondment, essentially my firm that I worked for Skadden Arps in D.C., they paid my salary, and they covered my benefits. But I worked every day at the Legal Aid Society in D.C., and I handled eviction defense cases.

A Anthony Sanders 08:41

So it's kind of is it equivalent? I don't know about your soccer knowledge, but equivalent to having like a Premier League team would have an up and coming player, and they kind of rent them out, or like, loan them out to a different team for a year or two to give them some training.

K Keith Neely 08:56

I think that's right.

A Anthony Sanders 08:58

Maybe not training in your case. But you do something good for a little while.

K Keith Neely 09:02

It's less training, in some cases, it's more substantive opportunities for the junior attorneys because I got to go in court, I got to argue cases, and then the firm's win both because the attorneys get more experience get a little bit more confidence in their abilities, but also all the work that the attorney does for the Legal Aid Society gets billed as pro bono hours for the firm. So the firm gets a huge uptick in these hours. And it's, it's a good cause.

A Anthony Sanders 09:30

So I've heard about this term before. I mean, I'm sure many attorneys listening are like I have this all the time. I've heard about it in but it was an attorney in London. And so I just heard it. I didn't read it. But now I've actually looked a term up. And it's spelt like in past tense, it's you're "seconded" but it's it's seconded. Like a normal American is going to read that Say seconded. So then I looked up some more and apparently it's used to be much more of a British term. But now it's kind of being used in some corporate circles and in America and apparently Legal Aid circles too. So anyway, this is the beginning of my campaign for us to pronounce this "second-did" not seconded.

T Trace Mitchell 10:22

Which I seconded that motion.

A Anthony Sanders 10:25

Thank you.

K Keith Neely 10:27

I'm in camp seconded because I think it makes what I did sound a lot fancy.

A Anthony Sanders 10:33

I'm half British. So I know this, the British have this thing for the French, like they pretend they don't like to print, but actually like, Oh, that's very French, they want to do that. So it's kind of more foreign sounding currencies. It's second it come on. Like you don't say I seconded your

motion, like trace would never say that. So anyway, we're going to move on from secondeds. And now we're going to talk about something very related, which is playground bullying. So Keith, take it away.

K Keith Neely 11:04

Fourth Circuit decision. This is the playground bullying case, some might call it South Carolina's attempt to criminalize recess. That's another way to think about this case. But it's Carolina Youth Action Project v. Wilson, Allan Wilson being the Attorney General of South Carolina. And this is the Fourth Circuit case that was recently decided. And before I get into it, I do want to say full disclosure, the judge who wrote this case, Judge, Toby Heytens was my professor in law school, taught me civil procedure. And I took a course with him on the 2012 or 2013. Supreme Court October term. So how are grades in civil procedure great, and the October term class not quite as great, but he also co taught that with another professor, so maybe I just pissed off the other professor. So I come into this case with a little bit of a bias, which is to say, I think the majority in this case got it right, in no small part because it was written by Judge Heytens. But this case deals with a pair of South Carolina laws and the case talks about them as a disorderly conduct law and a disturbing schools law. So what are these laws purport to do? The disorderly conduct law says, it's a misdemeanor, if you want to conduct yourself in a disorderly or boisterous manner at any public place, or use obscene or profane language on any highway or at any public place, or have relevance here in hearing distance of any schoolhouse. Then there's the second law district, a disturbing schools law, and it says it's a misdemeanor for any person willfully or unnecessarily to interfere with or disturb in any way, or in any place, the students or teachers of any school or college in the state, or to loiter about such school or to act in an obnoxious manner there on. So from just a first step moment, here, we're dealing with some fairly broad laws. And if you couldn't guess by now, we're dealing with a First Amendment type case. And we're dealing with a vagueness challenge, because these two laws at first blush seem to criminalize essentially any school conduct across the state of South Carolina. And to give you a sense of exactly how prevalent prosecution and enforcement under this statute was you have to understand that the way this law worked is a school could refer a student at any time for violating either one of these laws. referrals, then went to the prosecutor's office, and the prosecutor's office decided whether they wanted to bring charges. But regardless of whether charges were brought or not, the referral was listed on the student's permanent record, and stuck with the person even after they graduated school. So a South Carolina student who was referred under the statute, could have this information come up a decade later when they're applying to be a member of the South Carolina Bar under the character and fitness component of that. So how widespread is this? How many referrals were there and the court talks about this? For a six year period ending in July 2020? There were 3735. referrals for the disorderly conduct law for students are between the ages of eight and 18. So we got about 4000. referrals for the disorderly conduct law 9500 students are referred for prosecution under the disturbing schools statute, including as the majority points out students as young as seven years old, seven year old students were being referred by the school under the statute for prosecution. And as the majority points out later, even if you take into account how many Students were being referred under this, those referrals weren't being handed out evenly, you were seven times more likely to get referred as a Black student than you would as a white student. So these are referrals that are disproportionately impacting certain populations in the state of South Carolina. So we have a couple of issues in this case that the majority and the dissent seem to fight over. The first is a standing issue. And then the second is, well, is this law actually vague? So let's start with the standing because it's kind of an interesting fight that they seem to be having here. Because in these sorts of cases, first of all, it's very difficult to get

prospective standing for an enforcement case like this, where all you have is proof of past enforcement. That's something that's been an issue that the Supreme Court has wrestled with in the section 1983 context in the lions case that had handed down I want to say in the late 80s. So they're bringing a suit for prospective relief, hey, don't continue enforcing the statute against the students, which by the way, it's a class action lawsuit on behalf of hundreds of 1000s of South Carolina students, but they also want past injunctive relief, they want the state to stop holding on to these referral records, and essentially, to expunge those records from these individual students accounts. And the majority says, Well, of course they have standing to do this. They're students currently in South Carolina schools, they've had this rule each each of them had this rule enforced against them in the past each of these laws in some capacity, of course, they stand to suffer continued enforcement of this law. And the dissent says, Well hold on a second, when you're making a vagueness challenge. You can't be clearly within the class of people, or you can't have committed conduct that the law plainly prohibits. In other words, you can't raise a vagueness challenge solely on the basis of the idea that the law is vague as applied to someone else. So if the law clearly applies to you, don't have a vagueness challenge. And the dissent says, I think the law clearly applies to some of these students. And I'll just give you one example that the majority and the dissent both kind of fight over, I guess, clarifying question first, Anthony is cursing aloud on the Short Circuit podcast.

A Anthony Sanders 17:26

I think if we give full warning to parents with young children in the car, we can do that.

K Keith Neely 17:34

Okay, well, let's consider that full warning now.

A Anthony Sanders 17:37

So parents, turn down your speakers if there are young children with you, and then we're gonna let her rip.

K Keith Neely 17:46

In one of these cases, you had a female high school student, she's one of the plaintiffs in this case. And she was being bullied by some of her classmates, they were calling her. Manly, they were making fun of her sighs this was happening in the library. She loudly asked them, hey, stop talking about me, which is, I think, a pretty reasonable response. But apparently, she told it loudly enough that the librarian, some of the school principal, and the principal says you got to leave the library, and then call the school resource officer to come over. So now she has all this attention being drawn to her, the bullies who have been attacking her start to laugh, they start to clap, they start to enjoy the fact that she's the one getting punished here. And so as she's leaving, she announced, I'd rather be home than in this hell told the classmate fuck you. And then as she's walking out, and they're all applauding, she says, Fuck all of you. And on that basis, she was referred for criminal prosecution by the school. So the dissent says all while she's plainly being disorderly, she's she's plainly being obscene in the school. But the majority,

I think, rightly points out, and this is one of the issues that it found with the law, that a different resource officer, or a different principal or a different librarian, on this day, might not have called over anyone else might not have written a referral. And the point that the majority was getting at here, and you often hear this in discussions and vagueness challenges, it's this idea of how much discretion are we investing in the enforcing officer, and when the enforcing officer has unlimited discretion to decide whether someone's violating the law or not, you have a vagueness problem. And I thought that was a really clever way for the majority to kind of dismiss the dissents, I think, ridiculous position that this students conduct was criminally prosecutable under the language of the statute. And in fact, one of the lines that the majority uses in the opinion as it says, Look, this is a glorified smell test and put pointed to testimony and pointed to testimony provided by a police officer or a school resource officer responsible for enforcing this law, who just said, I'll send a referral, if they say something loud enough for me to kind of want to look over and look at them. The officer literally said but if they're just having a loud discussion, I'll let it go. It's hugely problematic, both because the text of the statute allows that. And the mirror image of that, I guess, the other side of that coin is that it gives these enforcement officers virtually unlimited discretion. And I thought that was a really fantastic point. And when it got further than to the text of the statute, so first, we have this conflict over standing, who has standing to bring this case, do they have standing to seek all the relief that they that they seek in this case? And then the other issue was whether or not the statute was actually they. And where I think the dissent lost me is that dissent draws a comparison between this statute and other types of disorderly conduct statutes that are routinely enforced in South Carolina as well as in states across the country. But the difference between the statutes that the dissent cites and the statute in this case is that those statutes and the majority makes this point. Those statutes have what are called scienter requirements, another pronunciation debate that we might have to get into at another time. But essentially, the vagueness of those statutes is captained by the fact that the person committing the act, the person acting in a disorderly way, has to do so intentionally, knowingly or recklessly. There's some sort of mental component that the that the person has to maintain in order to fall within the purview of this criminal prohibition. But in this case, you don't really have that. Or if you do you have one that's incredibly weak, to the point where it's practically meaningless and non existent. Let's start with the disorderly conduct one, the disorderly conduct law has no mens rea, no mental state requirement at all. It simply says if you are disorderly or boisterous. Now, what does that mean in the context of children playing at a school, or use obscene or profane language in a school house, I'll be the first to admit I cursed in high school. I don't think I'm alone on this podcast, and perhaps using foul language in a school at some point, but I was never criminally prosecuted. And the disturbing schools law is even worse, because it says willfully or unnecessarily interfere with or disturb in any way and it goes on and list the things that you can't do. Unnecessarily what does that mean? In the context of the student, for example, who yelled fuck you all, to the bullies who were jeering at her as she was being led out? I don't know, off the top of my head, whether that would be unnecessary. I don't think it's certainly goes to the point where you're looking at criminally prosecutable conduct. And and that's kind of the point that the majority makes is that these are instances where you really should be punishing students within the school system for violating the code of conduct, you shouldn't be referring them to the local prosecutor's office, for them to be charged with misdemeanors that then stay attached to their personnel file for the rest of their lives. That's ridiculous. And so you have kind of the vagueness challenge meets the First Amendment challenge. The majority says, especially when you're dealing with the First Amendment protected conduct case like this, where you're having students who are expressing themselves, you can't be that vague, you just can't do it. And the dissent says, I think we need to essentially bend over backwards and allow the state to regulate this and to find ways in which to hold these students accountable. I think the majority was right, in this case. Both because I think the

First Amendment issue is really important. I also think the Vegas argument carries a lot of weight with me, and just this common sense idea that you can't start criminalizing playground conduct in schools, simply because you're trying to enforce some level of discipline. So I really liked the majority here. The dissent wasn't that persuasive. And I'd be really curious to hear what y'all thought of this case.

A Anthony Sanders 24:51

Trace, were you ever criminally prosecuted for your bullying behavior on the playground?

T Trace Mitchell 24:58

I'll tell you, thank goodness I was not but as you point out there, under this language, there's almost certainly a number of situations in which I very well could have been. And that's really disturbing to me. It bothers me not just from a First Amendment perspective. But as Keith points out from a public choice perspective, even taking as as potentially good the intent behind this law and, I questioned that given the the First Amendment ramifications, but the enforcement is going to have these sorts of disparate impacts. And it's going to be so subjective. And so based on whether an officer's upset at that time, whether they don't like you in particular, and that's just not how the First Amendment works in this country, nor should it. And so I think that this is something that really bothers me, because if I were growing up in this time it makes me think of that that famous oft quoted line that each American breaks three federal laws a day. Well, I'm sure each student in the system breaks this law 30 times a day, if not more.

A Anthony Sanders 26:06

Yeah. And that the, the vagueness aspect of this challenge, I think gets through because it is such an absurd or absurdly overbroad law. I use overbroad in the colloquial sense there. But usually a vagueness challenge does not get very far, no matter what kind of law you're talking about. We at IJ often talking about should we also bring it say a vagueness challenge in some other kind of challenge we're doing and nine times out of 10. We it's just that the courts will accept almost any law, as the as the majority kind of points out that they'll usually have very broad language in a law criminalizing conduct. It's it's when it gets into this First Amendment territory, even though it's technically not a First Amendment claim, that you start to have these, these worries. And so to me, I was glad that the majority found this is vague law, of course, it's a vague law, and which is why I found the dissent. So preposterous, I think even more, maybe Posterous. Then Keith found it. I also loved how the dissent went out of its way to say there's no standing here in certain regards. It and the facial versus as applied difference that we've talked about many times here on Short Circuit before, and that drives public interest, lawyers, nuts. All of that was just, it was like every trick in the book to not actually get it. What's going on is what you saw on this dissent. So if you want to know how to uphold the Constitution, you should do it the dissent says except the opposite. In future cases.

K Keith Neely 27:54

I think that's right

I think that's right.

A Anthony Sanders 27:56

Trace, you're going to take us a little south of South Carolina, I'm on not a three hour tour. But I tour unfortunately, where you would be the government would know where you are at all times. Although it seems like the court didn't like that very much.

T Trace Mitchell 28:18

Precisely. I'll try not to carp on for too long. But I don't want to Skipper anything too important. Going through this. And so this really is a fascinating case for a variety of reasons. The first of which is I'm from the Gulf of Mexico. I was born and raised in Fort Myers, Florida. This is where I would go to the beach once a month, just about and I would go to this beach and see these boats out there just the waiting off the coast. And then the second reason is that for admittedly administrative law nerd, you can't find a more interesting case. I mean, this, this involves the APA. This involves constitutional concerns. This involves Publics and notice this involves Chevron, heck, we even get a Harry Potter reference throughout.

A Anthony Sanders 29:09

Which we'll talk about in a little bit.

T Trace Mitchell 29:12

It's it's a fascinating case overall, just kind of starting off. To go back in 1976, Congress enacted the Magnuson–Stevens Fishery Conservation and Management Act kind of like the horse racing act we talked about last time, there's so many of these that I couldn't even fathom I couldn't come up with in my own head, but they're out there and they exist. And the purpose of this act was to as the name implies, help control and manage fishing within the United States so that overfishing isn't too much of a problem and and safety and health regulations are being followed and all that good stuff that you want from a an industry regulating, sort of piece of legislation. And so in order to do this, it sets up local codes councils throughout the country. And those councils have the ability to impose certain requirements on fishers. And so the Act creates within the Department of Commerce to kind of major organizations in charged with enforcing this the National Oceanic and Atmospheric Administration. So that's NOAA, and then a sub agency within them the National Marine Fisheries Service, which I'm going to call NMFS because I'm enjoying saying NMFS. I'm sure that's what the lawyers say. And so these agencies are in charged with kind of enforcing and affecting this statute. And so in doing so, in 2018, they proposed a rule that did a couple different things. So the first thing and really at the heart of this case is that they required you to install an infectious approved vessel monitoring system. So this is a GPS tracking device that at least once an hour, 24 hours a day, every day of the year, sends your information to this agency, it collects the data. And this was imposed on anyone covered by the Act, including charter fishers. So this GPS at all times records your location data and sends it to the government. The second is that they would charter boat owners would be required to submit reports to Office detailing all fish harvested and discarded and quote unquote, other information requested by the agency. And this is really interesting,

because while it doesn't define other information, the proposed rule did say that this had to do with socio economic data. And that ends up becoming somewhat important to the courts analysis here. And then the third thing that the rule does, less at issue in this case also important is that they must submit trip declarations to the agency indicating kind of the purpose of the trip, whether there was for hire people on the trip, whether it was recreational non fishing across the board all this interesting information. And so they submitted this out for public comment, they receive public comments, and then they ended up enacting this regulation, largely identical. The one change that was made was that the reporting would include five economic values. This is under what was called socio economic values, the final rule set five economic values, which are the charter fee, the fuel price, estimated amount of fuel number of paying passengers and the number of crew for each trip. And so this went into effect and a collection of charter boat owners and the organizations that they work for suit. They saw originally a preliminary injunction halting this, but then obviously, ultimately overturning the ACT entirely. And so they go through and their main focuses rely around these two main thrust of this rule, which is the GPS tracking and the business information requirements. And so, when it comes to the GPS tracking, the appellants, argued that this violated the Fourth Amendment because these are warrantless seizures, searches and seizures of information, just taken from you without any justification. They said, This violates both the APA and the Fourth Amendment for a variety of different reasons. And so the court kind of took that up and started with the APA and said, before we reach the constitutional issue, because, the court has something called the doctrine of constitutional avoidance in which if something's going to pose a constitutional question, if they can avoid it, they're going to do so they're going to try to find another way out of this case. And so it said, Let's just start by looking at the text of the statute itself. We're going to apply the familiar Chevron two step process. And let's see, does this interpretation makes sense? And so the chevron process, as a lot of our listeners almost certainly know, starts with the first question, which is, is the statute ambiguous? Is there ambiguity such that it could come out in the other side's favor? And the court says? Not really. So it says that there's no provision and that explicitly allows the government to collect this information. And so while that doesn't necessarily foreclose it, there's nothing that the government can point to that says we are explicitly allowed to do this under the text of the statute. And so instead, they defended it by saying that really we're allowed to collect certain data, and we're allowed to prohibit certain equipment and so as a result of this As we can be covered by the text of the statute, and so the court says, Okay, well, let's see if this counts as equipment under the the definition provided in the statute. But before it did that it said, let's presume that it is equipment, you haven't facilitated that you need this information by any means. All of the data that you're collecting that you say, is allowed to be collected by the act is already being collected. The fishers report all of this information explicitly, and at oral argument, the court asked, you can name just a single instance of this information being inaccurately recorded? No. So the government could not point to anything, where they actually needed this GPS, location data. And so then they take that and say, This is not even equipment within the the kind of means of the statute, because there's nothing necessary or appropriate in conservation or management of the fishery that's being done through this GPS location data. So for that reason, they say, we're really we don't buy this argument. And then they turn and say, the other kind of major issue is that the, there has to be some analysis of the benefits and cost in order to say that it's reasonably necessary or appropriate. And not only have you not really done this analysis, I'm going to do it for you. The cost drastically outweigh the benefits. For all of the for all the reasons we just said, there aren't really any benefits, right? You haven't pointed to any data it's collecting that would not otherwise be collected, or any inaccuracies that show the need for this sort of technological innovation, that would record it more accurately. So there aren't really major benefits. But there are major costs, it would cost $3,000, just to install this. And then between 40 and $75 per month and service fees. And

that's what we're right. Correct. That is per boat, for boats that make on average, right around $26,000 a year. So that is a huge chunk of your pre tax profits just skimmed away right there. And they said, in addition to this massive financial burden, which on its own, probably outweigh the benefits of magnitude over, we're not even starting to talk about the privacy cost here. There are constitutional concerns and privacy costed issue. And when you incorporate those, given that there's virtually no benefits, the cost benefit just cannot come out in that favor. And so they said For this reason, the statute isn't ambiguous, and it doesn't allow this, but they said we're gonna move on to the second step anyway, and say that even if this statute was ambiguous, we're going to construe it in a way that doesn't provide you this, because you're raising a lot of constitutional concerns here. And another component of the constitutional avoidance doctrine is that if we can interpret a statute in a way that avoids constitutional concerns, we will. And so they say because it's not kind of the basis on which we reach our holding, we're not going to say that this definitively violates the Fourth Amendment. Though it kind of whispers out the side of its mouth, it does. But it says we are going to interpret it such that it doesn't raise those concerns, because there are huge Fourth Amendment concerns here. The government responded and say, well, but you're getting the Fourth Amendment analysis wrong, because fishing is a closely regulated industry, and closely regulated industries have lower expectation, privacy expectations in their Fourth Amendment rights. And so it did this based on kind of a number of different factors. And the court didn't buy of any one of them. It said, first of all, the Supreme Court has greatly narrowed the closely regulated industry test in a case called Patel. And in Patel, it said, there's really only four areas that we've ever found to be closely regulated industries, none of which look like fishing, we're talking liquor sales, firearms dealing, mining and the operation of an automobile junkyard, things that poses huge risk and are dangerous. And they talk about that extensively throughout the Patel decision. And it said very clearly, closely regulated industries are an exception and not the rule. And we want to interpret this exception narrowly, so that the exception does not ended up swallowing the rule. And so after looking at it, they do take the government's position that Patel didn't really hinge on how dangerous these industries were. The Fifth Circuit says, Yeah, you're right about that. But even being right about that, you're nowhere close to a closely regulated industry. And you're not for a couple reasons. One, you define the industry far too broadly. You say all of fishing is the relevant industry, but this charter boating. Charter boating doesn't even necessarily involve fishing and a lot of its circumstances. It's just we'll take you out for a tour. It's a three hour tour. Exactly. And so not only is that inappropriate, but even when it comes to fishing, charter boats make up an infantile dismally small percentage of the fish ultimately caught within the Gulf. And so they say, For this reason, no, you're not a closely regulated industry, we're not going to find definitively that this is a Fourth Amendment violation, because we don't need to, because we've already determined for a number of different reasons that this violates the APA, explained another reason that it violated the APA for non constitutional reasons. And that was that the notice and comment period resulted in an arbitrary and capricious regulation. And that is because these Fourth Amendment privacy concerns were raised by a number of different commentators. And the agency just didn't consider them. And there's a lot to do with APA that says, Look, if you're going to raise major issues with a potential rule, the agency has to at least consider them right we're not going to bind them. They don't have to do what you want. But they have to think about them and give a response to which they did absolutely nothing here. The second reason is, rules have to go through at least some basic level of cost benefit analysis, you didn't do a cost benefit analysis. And if you had, you would realize that the costs greatly outweigh the benefits for all the reasons stated above. And so interestingly, it found that it violated the APA for both of these reasons. One unique thing that's dropped in a footnote here that I do think is worth highlighting, is that the Fifth Circuit, unlike a lot of courts, made these either or, and so while it could have rested on the first APA violation, it found when it comes to the lack of ambiguity, it says in our court, this isn't dicta.

These are multiple reasons. And we're telling you each of them, so if one falls, the others backed up, and each of them is legally sufficient and binding in and of itself. So that's fascinating, because a lot of courts, what they'll do is they'll say we think all of these things, but here's our holding, and here's the reason for it. And so all of that just kind of gets thrown out that isn't doesn't go directly to the reasoning. The Fifth Circuit says none and No, no, we have a bunch of bases, and you got to listen to them all. The one area didn't do this was specifically with the constitutional violation. And so for that reason, it found that this is an APA violation and had to be struck down. Then very shortly, it jumped over to the business information requirement, and said, this isn't a logical outgrowth of the proposed rule, because you said you were going to collect socio economic data. None of this is socio economic, you've stated that these are economic considerations. In your rule, you said it yourself that this is not socio economic, it's just economic. And when we look at this, we don't see any social element here at all. We only see economic considerations. And so for that reason, you didn't put people on proper notice. It wasn't a logical outgrowth. And that's a problem. All that was interesting, it resulted in the regulation being struck down. But the thing that I find potentially most interesting is the concurrence. And the concurrence is fascinating, because it says all That's right. But forget about this Chevron BS. The court has stepped away from Chevron in recent years, they note that pretty extensively and say, Look, really, we should just be doing standard statutory interpretation here. Chevron's kind of based on bad law. This is where we get the the Lord Voldemort line, where it refers to it as, "The Lord Voldemort of administrative law." And so it says sidestepping all of these valid reasons for striking down the rule, the court shouldn't have applied Chevron. And that's to me fascinating. So what we end up with is a case where unanimously it's held that this violates the APA and needs to be struck down. But for for slightly different reasons.

A Anthony Sanders 44:16

We're going to have to wrap up in a couple minutes. But first, Keith, anything quick to add to Trace's succinct analysis?

K Keith Neely 44:27

There's not a lot to add to that. Except to say that what was most interesting about this opinion, were a lot of the lines in the footnotes. Trace has already touched on a couple of them the fact that they went out of their way to make all these APA holdings independent, not dicta, the fact that they just as went out of their way to not make a holding on the Fourth Amendment claim that juxtaposition, which ironically, was two pages next to each other. That struck me as a little odd. And the Lord Voldemort references it's funny But what really got me in into the same footnote as the Lord Voldemort reference? That's footnote three they they talk about Chevron and they say we recognize that the concurring judge and many other distinguished jurists, as well as some who are less distinguished, and then they cite to an en banc decision of the Fifth Circuit. And when I read this, I briefly forgotten that this was a Fifth Circuit opinion. And so I thought, oh, my gosh, is one circuit just taking a dump on the Fifth Circuit right now in right now? And then I realized on now, they're just kind of poking fun at themselves. But I, I find it interesting that the fact that Chevron is still an open debate, circuit, judges are still very afraid of implicitly overruling it, which I understand to a certain extent, but also when you have a job with unlimited tenure, it strikes me as a little odd that circuit judges aren't a little bit more adventurous in this context to say Chevron is bad law and see what happens. But I think the

Fifth Circuit was a little skittish to do that the concurrence wasn't so much, which that addressed it. But as Trace said, I think this is a great opinion. And the only other thing I'd point out, by the way, is that this was litigated by our friends at the New Civil Liberties Alliance, which is a nonprofit law firm in D.C.. And one of the attorneys there to bring this full circle is a Boggs clerk. So one of the attorneys on this case Sheng Li, as a fellow Boggs clerk, so there are trivia masters all around us.

T Trace Mitchell 46:31

If I were the court, I would have been more more like the professor and really done my homework.

A Anthony Sanders 46:31

Obviously did very well with trivia, or at least with poetry. We're going to close out very quickly here. But here's why. What I wanted to bring up is that we have these dueling uses of Harry Potter. We have an entire case about charter tours. There's no reference to Gilligan's Island whatsoever. Trace did I miss it? Is there some oblique thing? Mary Anne? A Ginger? And the rest, as they said in season one. But yes, the professor. Exactly.

T Trace Mitchell 47:16

Exactly.

S Speaker 1 47:17

I think it's fair in this case, to say that the the opinion here treated the government's lawyer like Gilligan, because they shot him down at every turn.

T Trace Mitchell 47:25

Very good point. That there's definitely something fishy going on.

A Anthony Sanders 47:30

When I read this, I was like, how do you miss out on that? And I even looked up like the to the judges, Elrod and Oldham, they're both Gen Xers like me. So they would know all about Gilligan's Island, but I suspect their clerks. Their clerks are much more steeped in Harry Potter than Gilligan's Island. And that's kind of the sunset of the West that I see occurring here. But thank you very much. Nevertheless, for that, that really interesting opinion. And thank you also, Keith, for yoursfrom the Fourth Circuit. We'll see you all next time. We're going to be talking about rental housing and some constitutional implications of its regulation. But until then, I hope you all get engaged.