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SPEAKERS

Jeff Redfern, Keith Neely, Anthony Sanders

A **Anthony Sanders** 00:24

A reading from the book of Mark, chapter one, verses six through eight: "And John was clothed with camel's hair and with a girdle of a skin about his loins, and he did eat locusts and wild honey and preached, saying, they're come with one mightier than I after me that latchet of whose shoes I am not worthy to stoop down and unloose. I indeed have baptized you with water, but He shall baptize you with the Holy Ghost." Well, that is a reading that -- we don't know -- may have happened in a certain baptism that we will discuss today. It was a baptism with water. But was it also a baptism of qualified immunity? We'll discuss today 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 Friday, April 12 2024. We'll get to this pretty wild case from the Sixth Circuit a little later, about baptism, qualified immunity, and a few other things. But before that, we're going to have a case that is also pretty wild about venue from the Fifth Circuit. And before all that, though, I will introduce our guests. And joining us today, one of our IJ attorneys, is Jeff Redfern. Jeff, welcome back to Short Circuit.

J **Jeff Redfern** 01:58

Great to be back Anthony.

A **Anthony Sanders** 02:00

Also joining us today is IJ attorney Keith Neely. Now, Keith will be discussing that baptism case later on. But first he has a special announcements about another show, a new baby sister show of ours at Short Circuit, that I think everyone should check out the next time you're on YouTube. So Keith, tell us about this.

K Keith Neely 02:26

Yeah, so this is a show called Beyond the Briefs. And as the name suggests, its goal is to take viewers and show them aspects of IJ's cases that you can't quite pick up when you read the briefs that we always upload to our website. So it's co-hosted by myself and Kim Norberg - IJ's Director of Donor Communications.

A Anthony Sanders 02:27

Who importantly is not a lawyer, so she speaks normal people.

K Keith Neely 02:29

That's right. And the goal of this is to create something that's accessible to lawyers and non-lawyers alike. So Kim and I interview two interviewees in every episode: sometimes it's two attorneys who are working the cases that we're discussing; in some other instances, it's an attorney and a client. And we talk about the legal issues that are discussed, some of the broader policy issues -- why states are creating the kinds of laws that we're challenging. And then sometimes we talk about just interesting stories, that we at IJ know about because, of course, every time something big happens in a case we send out those office wide emails, but folks outside the organization might not quite know: the energy that folks felt when they found out that Rudy Carey was going to get a pardon from Glenn Youngkin. That, because of that, he would be allowed to practice as a substance abuse counselor. That was announced at one of our litigation meetings, and folks got just so overjoyed. And we got a chance to talk with him just recently about that. So I think it's going to be a great opportunity for folks who are interested in our mission to learn a little bit more about what we do. It's both recorded by audio and videotape. So folks actually get to see the attorneys and the clients. And we're going to try to keep up quite a bit of engagement with those who listen. So if folks leave comments on our videos, we will select and respond to a handful of those comments in the subsequent episode. That's something that I do. So if you have legal questions, or if you have thoughts that you want to share, drop a comment and I'll be the one responding to it. I'm really excited about it. And I think it's going to be a great new format in the family of IJ media that we put out. And it's a little bit of a follow up or somewhat in the same vein as our old show Deep Dive, isn't that correct? The next generation of that idea. That's right. That's right. So the seed for the show was really planted in Deep Dive. That was was run by former IJer Melanie Hildreth for many years; it's about just trying to find ways to give people deeper insights into our cases and intoour clients.

A Anthony Sanders 05:18

Great. Well, listeners should enjoy that very much, I think, if you check it out. So as I said, it is on YouTube but also as a straight-up podcast. And now on our straight-up podcast, we will get to our straight up cases. So we'll be back with Keith and baptism a little later. But first, something a bit less biblical, which is choice of venue, appeals, preliminary injunctions -- to tell you the truth, I'm a little confused what's going on -- so Jeff, take us to the Fifth Circuit.

J Jeff Redfern 05:53

Okay, so this is Fort Worth Chamber of Commerce versus CFPB. Now, the underlying merits of this dispute are about credit card late fees. But really, this is all about some nerdy procedural stuff that I have strong opinions about. So here's what happens. The CFPB issued a rule regarding late fees. Basically, they have to be reasonable, but there's a safe harbor. So as long as they're below a certain amount, the credit card companies know that they're safe. Well, a bunch of organizations sued, unsurprisingly, including the Fort Worth Chamber of Commerce. And they sue the CFPB in the Northern District of Texas. Now, they requested a preliminary injunction and really expedited briefing, because they said, "Look, this rule is going into effect soon. And we have to do a whole bunch of things to comply with it. So if we're going to stop this without being injured, we need to get it stopped fast." Now, the district court doesn't rule on the PI. Instead, it invites the CFPB to request a change of venue to the DC District Court. And the court actually granted that request. Venue just means you're in the right court to hear a case; it's not quite the same as jurisdiction, which is about the court's power over the case and the parties. So the classic reason that venue might be inappropriate is because all of the witnesses are located in a different venue, so they don't have to fly across the country to hear your case. Now, thething about venue, though, is that it's not about what's the best Court to hear something: the rule in the federal system is supposed to be that plaintiffs get to pick where they file their lawsuits and courts only override their choice if there's another venue that's much better. Well, in this case, the district court thought DC would be better because the CFPB is in DC; most of the lawyers in the case are in DC; and only one of the plaintiffs was from Texas. Here's the thing about this case, though, it's an Administrative Procedure Act case, which means there are no witnesses. It's a case that's decided based on papers that the parties file. So it doesn't really matter where you file it from the perspective of convenience. Now, maybe some of the lawyers are gonna have to fly to the court to actually have an oral argument or something. But it's not like there's going to be a whole bunch of complicated litigation taking place in Texas versus DC; it's going to take place in the offices of the lawyers representing these parties. Now, the district court's concern here wasn't really about convenience; it was about forum shopping. And this has been a big issue lately. There's been a lot ofconcern, particularly in the context of nationwide injunctions, that parties are filing lawsuits in districts -- particularly districts that only have a few judges -- where they think they have a very good chance of getting a judge that's going tobe sympathetic to their case. And then that judge might enjoin a policy nationwide. And there have been proposals about things to do to curb this practice. The thing is, there's nothing really in the case law or the relevant rules about venue that say that forum shopping is bad. People think that maybe it should be bad, and there should be rules against it. But right now, there isn't really anything that empowers a district court to say, "Hey, you, you picked this because you thought it was a place where you were more likely to win." Okay, so the district court transfers that case to DC. How does it end up in the Fifth Circuit? Normally, that's supposed to be: they're divested of jurisdiction, and it's gone. Well, the plaintiffs filed a notice of appeal before the transfer. Now, they said that by not ruling on the preliminary injunction, the court had effectively denied it. And you can see the logic here. If you tell the court I need relief within two weeks or I will be irreparably harm and the court sits on that motion for two months, well, the court has denied your motion whether it issues an opinion or not. So because the plaintiffs filed their notice of appeal before the transfer order, the district court was divested of jurisdiction; it lost the power to transfer the case at all. Now, that's what a majority of the Fifth Circuit panel said actually. So Judge Willett writing for a two to one majority said that the district court no longer had jurisdiction, and it needed to notify the DC District Court that the transfer had been an error -- that it wasn't valid. And it issued mandamus, which is extraordinary relief where an appellate court tells a district court that it has to do a particular thing. Judge Oldham wrote a concurrence, where he also said that the court was wrong to transfer the case, even if it had

jurisdiction, because forum shopping isn't one of the factors that judges are allowed to look at. Basically, he said: "maybe forum shopping is bad, but right now, there aren't any rules against it. And we aren't allowed to make any up." Judge Higginson dissented. He thought that not nearly enough time had passed for an effective denial and that whatever cost the parties were going to incur were not things that the rule was doing to them directly; it was thingsthat the parties were deciding to do, in order to prepare for the rule coming into effect. I'm not totally sure why that's relevant. Normally, if government action directly charges you money or indirectly causes you to have to spend a lot of money, it's an injury either way. And that should be sufficient. But I guess his concern here was that the parties could manufacture an effective denial by just saying, "we need a decision really, really quickly." He also thought that DC was the right place, because everyone lives there -- at least most of the people who were involved with this case. But he didn't really explain why that was relevant in an APA case. Now, this is the part of his dissent that really interests me. Hehad a very cryptic last sentence where he noted that the DC court had already docketed the case. And he suggested that perhaps the court will ignore a notice from the Texas court saying that the transfer had been an error. This is kind of wild to me. Basically, he's saying that DC and Texas federal courts should get into a fight about who actually has this case. Now, if that happens, the only way it gets resolved is by going up to SCOTUS. So this is a big flag that he's waving,saying, "I'm not happy with the way things are going, and I hope that there's another way that we can stop it." So here are my my takeaways from the case. The venue thing is really interesting. I have a lot of sympathy for the idea that it doesn't look good when plaintiffs are able to effectively pick the judge that hears their case. And as every litigator knows, oftentimes picking the judge is the most important thing you can do. If you get the right judge who agrees with your theory, you don't have to be the best lawyer in the world to win your case. And it just doesn't look good when you've got liberal groups filing cases where they know they're gonna win and you've got conservative groups filing caseswhere they know they're gonna win. But I do think that Judge Oldham's right; that there's nothing in the rules that says you can't do that. And for now, plaintiffs are allowed to decide where they want to file their case subject to a pretty highbar -- or what is at least supposed to be a pretty high bar for reassigning it when it's really going to be inconvenient to litigate it there. The effective denial thing is also pretty interesting. I think that it's going to be very context specific; you're going to need to have a real showing that you are being hurt by not getting relief sooner, and that you really made it clear that you were doing everything you could to get your PI heard faster. I think that Higginson in dissent is concerned that the majority's approach is going to make it easy for parties to consider anytime a court is slow rolling a decision to be an effective denial. I'm a little bit skeptical of that, because parties can always ask for extraordinary remedies, but it doesn't mean that they'll get them. And I think that if a party is filing a silly appeal of a slow PI decision, I don't think that appellate courts are going to have trouble slapping those down. I think that this is going to generally be a pretty rare remedy. But I could be wrong. So that's that's my take on this case. Who knows how the underlying merits are gonna turn out? I don't know anything about credit card late fees.

A Anthony Sanders 14:31

Well, that's probably a good thing Jeff.

J Jeff Redfern 14:35

I should say, I don't know anything about credit card late fee rules, but this this venue thing is interesting. And I do think that at some point, we're going to need to get some kind of action

either from the Supreme Court or from Congress to clarify the venue rules, because there's nothing in the rules about forum shopping. I think forum shopping is something that people have legitimate concerns about. And I think there are also real concerns about the lack of clarity regarding what the standards for transfer are. Plaintiffs think that they're allowed to file wherever they have a have jurisdiction, a long as it's not a truly bad place for the case to be heard. But sometimes district courts, particularly in administrative procedure act cases, are looking for excuses -- it looks like -- to get rid of cases. And sometimes you look at the analysisin these cases, and it looks more like the district court is picking what would be the best place to hear this, rather than saying, "the plaintiff made a really incorrect decision in trying to litigate here." So it's still supposed to be the plaintiffs choice in the first instance. And that's not always getting through to the district courts.

A Anthony Sanders 15:53

Keith, do you support the plaintiffs choice here?

K Keith Neely 15:56

Well, it's funny, I remember in civil procedure how forum shopping was often discussed as an unspoken implicit horsemen of the civil procedure apocalypse. That we can't have plaintiffs with unfettered control over where cases are heard. And, of course, there are limits with personal jurisdiction and with subject matter jurisdiction in federal courts. Butthe problem that Jeff keyed in on with these sorts of cases -- and these sorts of cases being Administrative Procedure Act cases -- is that you can plausibly bring them in just about any federal court in the country. And then, at that instance, venue is playing perhaps the most meaningful role that it plays at any point, in any case brought in the federal judiciary. And so in this context, I think it is important to think about: given that personal jurisdiction doesn't really impose much of a restriction in this sort of a case, given that subject matter jurisdiction doesn't really impose any sort of a restriction in this sort of a case, are we comfortable with a world in which venue doesn't impose any sort of forum shopping restriction, either? And that seems to be the method of analysis that the majority and the concurrence use in this case. They kind of think to themselves, "Well, we can't have forum shopping. So let's reason -- I don't want to say reason backwards from there, because any judge who hears that would probably have a conniption -- but they seem to start with this implicit premise that forum shopping is bad. And Higginson, at the end says, "there's nothing in the relevant rules about venue that talks about it in this way." Or, excuse me, I got that backwards. The majority and the concurrence say that. And then Higginson at the end says, "Hold on we have to have some sort of rules to prevent this."But the most bizarre thing to me is that kind of cryptic line that Jeff identifies at the very end. I've never heard a dissenting judge refer to a majority opinion as a "suggestion." He says, "I am confident that the District Court for the District of Columbia will give the suggestion that it should disregard a case docketed by it its closest attention. That's very unusual. And if a litigant were to file that you'd maybe get sanctioned, right? What do you mean, it's a suggestion? It's an opinion.

A Anthony Sanders 18:33

Well, in a sense, is he right? They're not ordering the district court of the District of Columbia to do anything. And I don't know if they could, right?

J Jeff Redfern 18:48

So my take on this is that the the Federal District Court in the Northern District of Texas tells DDC: "Hey, sorry, that was a mistake; that notice has no legal effect on DDC." It's letting DDC know that the Fifth Circuit has ruled on this issue. And I think that is something that DDC probably has to respect.

A Anthony Sanders 19:13

But if they don't, so let's play this out, this is so fascinating. If they don't, the case gets played out. Maybe in the District of Columbia Federal Courts the credit card companies do an expedited appeal on this issue. Or maybe it just plays out through the course of the case and goes all the way to the Supreme Court. Or the Supreme Court could 1). Decide venue; well that's fine. But 2). they decide that by keeping the case, the District Court of the District of Columbia committed legal error. Because they disregarded what the Fifth Circuit said or because the Fifth Circuit has no power over that court. Is it actually just kind of an issue of comity, as we've lawyers say sometimes?

J Jeff Redfern 20:06

So I think the Fifth Circuit does have power in this case. It doesn't have appellate authority over DDC, obviously. But I think if another federal court has made a ruling in the same case, I think every federal court has to respect that.

A Anthony Sanders 20:23

So it's almost like res judicata.

J Jeff Redfern 20:26

Yeah, or issue preclusion something like that.

K Keith Neely 20:30

And wasn't the premise for the majority's opinion that the district court in Texas didn't have jurisdiction to order the transfer in the first place. So if that's true, then, to the extent that the DC District Court has received this case, could it could it have lawfully received it in the first instance if the district court in Texas didn't have jurisdiction to send it?

A Anthony Sanders 20:52

Because legally, it was a nullity? That court's superior court has said it was. So Judge Higginson

is maybe not quite right about that suggestion thing.

J Jeff Redfern 21:06

So here's my wild policy suggestion about this venue stuff, at least in APA cases. I think venue is the wrong tool to address the problem that people are really concerned with. Venue historically is about place. It's about are we actually going to force these witnesses to, earlier in the century, get on a train and grow across the country to litigate a negligence suit or something. What people are really concerned about isn't where these cases are being litigated. It's who's deciding them. It's the judge shopping, not the place shopping. So I would say that in an APA case, where you really don't need witnesses, you don't need in person proceedings hardly at all, the court can decide on the papers or can hold one hearing if it wants to have an oral argument. I would say that you can file it any place venue is appropriate, but then there's going to be a random assignment of the district judge from some judge in the entire circuit. And they will be effectively sitting by designation in that other district court. So you don't know who you're going to get. And you can't play this kind of gamesmanship. But yeah, if you want to walk down to the federal courthouse in your backyard to file your papers, you can do that.

A Anthony Sanders 22:29

So in some circuits, that's not too big a deal. So the First Circuit is just a part of New England. But like the Ninth Circuit, that can mean you're doing it in Arizona instead of Alaska.

J Jeff Redfern 22:42

But you're not really in an APA case. You're filing your papers on ECF.

A Anthony Sanders 22:47

Well what if you had an evidentiary hearing -- one of those very few. I guess that's the only worry, right?

J Jeff Redfern 22:54

Yeah, I mean, it's so rare in an APA case. I think you could say in the rare APA case where we need to have an evidentiary hearing that randomly assigned judge goes and flies to have the hearing in the right venue.

A Anthony Sanders 23:07

There's so many layers in this case, and what I might take from reading Judge Willett's opinion is I was fairly convinced by him. But it is really like lightning struck that all this came together. And yet, it would be okay for everything to happen: for the for the appeal, for the divesting of

jurisdiction, for the effective denial -- because it really was dependent on the weirdness of this rule being issued. And usually you get six months notice, and it was much less notice it seemed. The other irony is this is the Northern District of Texas, where there's been all this talk about conservative groups' forum shopping and that's because of one division in the Northern District of Texas that only has one judge. And he's been looming in the background in a lot of these cases. But this wasn't that judge. This just happened to be the Northern District of Texas. Which, I think they weren't forum shopping for the judge -- obviously, because he transferred the case -- they're forum shopping for the Fifth Circuit. And they could have filed that elsewhere in the Fifth Circuit and got another plaintiff, I guess, and then we'd have the same issue. The other thing that really did turn it for me, though, is this venue motion was only filed on the invitation of the district judge, which is a little odd and venue can be waived. So if he hadn't said that and the federal government hadn't bothered to file the venue motion, then none of this would have happened. So it's like he just didn't want this case, which judges aren't supposed to do.

J Jeff Redfern 24:57

Right, this is this is a huge issue. The Supreme Court just a few years ago had a major decision telling courts not to litigate cases for the parties, other than a few things like jurisdiction. They're supposed to leave it up to the government to make these arguments.

A Anthony Sanders 25:12

And he did that after he had been sitting on the PI motion for a few days, which, I wonder if that's really what did it for the majority, even though that's not really talked about in the opinion at all? That just smells a little funny to me. So, we will see. This is an ongoing drama, and we will continue to cover it on Short Circuit if there is more drama -- and I wouldn't be surprised if there is. So now we're going to turn to more biblical matters. And that is forced -- or is it forced -- baptism. Baptism, not just in water, but in qualified immunity. Or is it?

K Keith Neely 25:55

Ok so this is one of the most unique qualified immunity cases I've ever come across. And I think I can safely say that the panel thought the same thing, because it's rare that they open an opinion: "this case arises from a traffic stop that ended like no other of which we are aware." So let's take us back in time a couple of years, we're in East Tennessee and a deputy sheriff stopped a woman suspecting that the window tint on her car was just a little bit too dark. But when he got to her car, he could smell marijuana, and she admitted to having what the opinion characterizes as a marijuana roach on her person. And in most instances, this sort of an encounter would be met by a citation maybe, or a more formal criminal charge: booking/sent to jail. But in this case, when this Sheriff got a little sniff of the devil's lettuce, he went in a more biblical direction. He thought this was a good opportunity to mention that he thought that God was speaking to him in that moment. And that he thought that this was an opportunity for her to be saved and offered to take her to a nearby body of water to baptize her. And he made it clear that if she went along with him, that he would only write her a citation and then let her go. So that's problematic on a whole number of levels, right. From a Fourth Amendment

standpoint, you have this issue that there's no legitimate government interest in moving someone -- I went back to the district court opinion, it was a 12 minute drive from where he pulled her over to the body of water.

A Anthony Sanders 27:46

You have to get to the lake, I guess?

K Keith Neely 27:48

I guess so. And then the district court opinion goes into more detail: the officer himself stripped down to his underwear;the whole thing was actually recorded by another officer who then showed up on the scene. And she was mostly fully clothed, fortunately. But this was it was very bizarre. Did she -- this wasn't really in the opinion -- complete the baptism, it wasn't just touch the water on the forehead kind of baptism? Oh no, this was a Protestant full baptism: we're going to dip you in the water, we're going to bring you back up, you're going to be soaked. In fact, where the police actually originally pulled her over was in the driveway of her ex mother in law's home. And so when the deputy propositioned to baptize her and she ultimately agreed ostensibly to get a lesser charge, she actually had to go in the home and get towels and come back out. And then drive behind the deputy for 12 minutes all the way to this body of water, where then he stripped down, he dipped her in the water, and brought her back up.

A Anthony Sanders 29:02

So unlike Keith, I didn't do the research into the district court opinion and all that, so I am learning this just as you listeners are. And that's pretty wild facts.

K Keith Neely 29:14

Yeah, again, it's unlike any that I've ever seen before. It's unlike any that the panel has ever seen before. And so there are a number of constitutional problems with this. There's the Fourth Amendment interest in the fact that he seized her;he moved her on this 12 minute drive to this lake; he put his hands on her in the water to conduct the baptism. All of this,as the District Court explained, the government has no legitimate government interest in baptizing people. So good luc justifying that seizure deputy.

A Anthony Sanders 29:49

I'd love to have a rational basis case where that's the legitimate government interest that's raised. That wasn't this case.But I don't think that would work even there.

K Keith Neely 29:57

No, no. And then of course there's obviously the First Amendment Establishment Clause issues.

This is not something that government should be doing, especially when the government is offering it as a means to reduce your criminal penalties. So the district court, I think, did a great job in this case denying qualified immunity. The procedural posture here is summary judgment. Now, qualified immunity has this unique exception to the general rule that non-final orders cannot be immediately appealed. Typically, you can't raise interlocutory appeal for for these sorts of issues. But with qualified immunity, you always can. But there's a limit to that. And that limit is that the issues of qualified immunity that you can litigate on interlocutory review are only questions of law. So if we're dealing with disputes of fact, then the appellate court doesn't have jurisdiction, and therefore cannot hear the interlocutory appeal. And that's what the appellate court here decided to do. It recognized that on this appeal, at summary judgment, what this officer was really trying to do was to re-litigate the facts that the district court had already determined to be contested, to be relevant, and that therefore the appellate court lacked jurisdiction to enter any sort of order regarding qualified immunity, sending the case back down to be litigated fully by the District Court. The other kind of weird wrinkle in this case is that the victim in this case, the woman who was arguably forcibly baptized, since passed away during during the pendency of the case. So this case is now being continued by the administrator of her estate. And so there's going to be, I think, a lot of weird trial issues if you go back, because essentially you're going to be left trying to litigate this case at trial on transcripts. And I don't quite know how that will work. But maybe this might just betray my own ignorance of the variousrules of evidence regarding the unavailability of the declarant and all that. And I really have no idea how they're going to resolve this case.

A Anthony Sanders 32:15

Yeah, I myself have to go back to evidence class with Don Marshall that maybe some listeners had at the University of Minnesota. He taught there for many, many years and I remember long discussions about which exceptions to the hearsay rule are okay if the declarant has died and which aren't. I don't remember any of that stuff. But yeah, that will have to be that will have to be litigated. So Jeff has had to leave early. So it just befalls me to critique Keith's presentation of this case, which I have no critique of whatsoever. But the the thing that it seems to me it was going on with this appeal is, I'm guessing the attorneys for the for this sheriff -- was he the sheriff?

K Keith Neely 33:08

He was the deputy deputy sheriff.

A Anthony Sanders 33:15

They realized that, even with qualified immunity, this is not going to be considered not clearly established law that you can't essentially forcibly baptize. And so they contested the facts as best they could. But because that's something you actually can't do with qualified immunity on appeal is contest facts, they just ran out of options there.

K Keith Neely 33:43

When I first started reading the fact pattern of this case, my initial concern was we could see

one of those qualified immunity decisions that says, "this is probably wrong, but we've never had a prior on-point case that specifically involves offering to baptize a woman in exchange for reducing her sentence, so qualified immunity applies. And fortunately, the appellate court denied to even address the merits in its opinion. And the district court -- and this is a little unusual -- went so far as to say, "look, it doesn't matter that we can't find prior on-point cases, this is something that every reasonable officer should know. You can't arrest someone and then offer them lesser criminal penalties in exchange for allowing you to baptize them in the middle of the night in a nearby lake." It's the rare time where a district court embraces the this is just so ridiculous exception to the sort of clearly established test.

A Anthony Sanders 34:43

And yeah, the obviousness exception that is super rare to see. It's only these absolutely horrific cases, usually, where it comes up. And I wonder if the fact that this happened at the district court and it didn't happened on appeal, but you get the sense -- it's kind of in the background -- that these three judges know that: "Oh my, this is so obvious." That to some extent that is there, because if they had ruled that while there's no prior case, so qualified immunity -- which they totally could do because there's all these other terrible cases where the guy was kneeling down and not laying down and the other case was laying down and so there's there's no qualified immunity -- this would be all over the press. If this Court had done that, there would be all this pressure to get it to the Supreme Court or to go en banc; the court would look ridiculous. It wouldn't just be talked about on Short Circuit, it would be talked about everywhere. And I wonder if the the highlight that so many of us have put on qualified immunity in the last few years makes it that there are certain limits. Those limits are pretty broad, I guess, but maybe they're a little less than they were before becauseeveryone knows this would be some kind of constitutional violation.

K Keith Neely 36:08

I mean, there's certainly something to say for the the bizarre optics of cutting the other way in this case. And of course,the sheriff could still be entitled after a jury verdict or a bench trial to still raise this issue on appeal -- and to try to makesomething of it. I think the other aspect of this case that's unique, and that may have encouraged the appellate court todecide the case the way they did, is it's usually very rare to see a Section 1983 claim built on an underlying Establishment Clause violation, especially one as clear cut as this. And although the Supreme Court is generally reticentto touch the issue of qualified immunity -- or at least they have been over the last few years -- one area where they've been really eager and happy to create precedent is in the religion clause space: the Free Exercise and Establishment Clause space. And I wonder too if the judges on the panel weren't thinking, this is enough of a hook that the Supreme Court would would take this regardless of how we tried to address it on the merits because it's just such an unusual posture for a Section 1983 case.

A Anthony Sanders 37:21

So I just noticed that she has an establishment clause claim, but it looks like there's not a Free Exercise Clause claim.

K Keith Neely 37:30

I believe that's right. I don't think that she raised a free exercise claim.

A Anthony Sanders 37:37

Because I can see both.

K Keith Neely 37:40

Yeah, it sounds to me like it like rests more firmly in Establishment Clause, like the state can't force people to subscribe to one religious belief over another, of course. You're right, though, that it's two sides of the same coin really, because that also sounds in free exercise as well. But you're right, that the only claim that is up on this appeal -- and I believe theonly claim that you raised in the district court below -- was an establishment clause claim.

A Anthony Sanders 38:12

Yeah, although I think there's a Fourth Amendment.

K Keith Neely 38:15

Correct, when I say the only claim I meant the only religious clause claim.

A Anthony Sanders 38:20

Well, we'll watch this case. I would not be surprised if there's some kind of settlement with the estate on remand; you're right, the trial would be a little odd. There's this video, although it doesn't sound like the video is of the actual proposition: "Hey, I'll let you only get a citation if we go to the baptism."

K Keith Neely 38:46

And there is some dashcam footage. The problem is that the dash cam footage has no audio. And so you you can infer some stuff from the video, but you can't really infer everything that you need to infer in order to really decide the case without some sort of further testimony.

A Anthony Sanders 39:06

Well, we'll see what happens there. We'll see if there's more baptism Short Circuit in the future. And of course, I'm sure we'll have venue for Short Circuit in the future sometimes. So thank you to Jeff, who had to leave a little early. Thank you, Keith. Everyone should check out Keith and

Kim's new show Beyond the Brief. And in the meantime, I hope that all of you get engaged.