ShortCircuit261

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SPEAKERS

Zack Faircloth, Will Langley, Anya Bidwell, Don Tittle

A **Anya Bidwell** 00:23

Hi everyone. Welcome to Short Circuit life at SMU. Thank you to SMU Federalist Society for hosting the event. We have an amazing selection of cases to discuss, ranging from a Second Amendment right to carry guns all the way to a First Amendment right to observe the police with bankruptcy and FDA regulations in the middle. So let me quickly introduce the panelists, and we will get right to it. Don Tittle is a civil rights attorney in Dallas representing plaintiffs in police abuse cases. Given how difficult it is to sue government officials for damages I have no idea how you make a living, yet, Don is very successful at this. He has been involved in many of the largest and most significant cases involving civil rights abuses occurring in Dallas, Fort Worth, and throughout throughout Texas, maybe Don's successful because he understands the inside game prior to becoming a civil rights lawyer and also a lecturer here at SMU, Don worked as an assistant DA in the Dallas District Attorney's office. Welcome Don.

D **Don Tittle** 01:31

All right. Thank you for having me on.

A **Anya Bidwell** 01:34

Will Langley, first of all, is my best friend from law school. He was also my worst nightmare, since he beat me in every class, while often working in what amounted to full time jobs, he secured a job offer from one of the leading national law firms after his first semester of being at UT, which of course, made me even more infuriated with his brilliance. Will now works as a litigator at Winston and Strawn representing clients in complex commercial litigation matters from investigation through trial. As a payback for all my misery, I assigned Will to talk about the bankruptcy case.

W Will Langley 02:23

Well played.

A Anya Bidwell 02:24

We'll, making sure that you all don't fall asleep. Welcome, Will.

W Will Langley 02:30

Thank you for the impossible task. It's good to be back.

A Anya Bidwell 02:34

Zach Faircloth is a resident genius here at SMU. He graduated from SMU law in 2020 where he was in the order of the COVID, the editor in chief of SMU Law Review and the Vice President of events for the Federalist Society after SMU Zack clerked for Judge Reed O'Conner here in the Northern District of Texas, and then for Judge Kyle Duncan on the Fifth Circuit. Since completing his circuit clerkship this summer, Zack has worked as an associate at Gibson Dunn. Welcome Zack.

Z Zack Faircloth 03:09

Thank you so much for having me.

A Anya Bidwell 03:12

Well, let's get right to it. Don, could you introduce the first case for us, United States v. Rahimi out of the Fifth Circuit?

D Don Tittle 03:21

The first case, United States v. Rahimi, is an interesting case because it's a Second Amendment case. It's significant because it is a circuit court's first attempt at applying the framework that was set up in a landmark Supreme Court decision from about six months earlier, the Bruen case. And so that's the significance of Rahimi. So in that case, the Fifth Circuit takes the first crack at applying what the Supreme Court said should be the framework. And so let's start with a little bit about Mr. Rahimi. Rahimi was in some respects a proverbial one man, Crime Wave. For about two months of his life in December of 2020, and early January 2021, he committed any number of criminal acts. Usually it involved a firearm. He sold drugs. After selling drugs to the buyer, he then fired several shots into the house of the buyer. The very next day, he's involved in an auto accident, and he promptly gets out of his car and starts shooting at the person that had that he'd had the accident with. He then flees the scene, then he comes back, then he starts shooting more shots into the car. So presumably the driver wasn't in it. But

anyway, so he's quick with a gun, as they say. He takes a couple of weeks off and of his criminal activity, and right before Christmas, he fired shots at a Constable. He the final act, just after the new year, in early January, he's with a friend at a Whataburger, and the friend's credit card is declined, and that really sets Mr. Rahimi off, and he starts shooting his gun up into the air. I'm gonna assume he was doing the same thing on New Year's Eve, but that's not part of the record. But anyway, he liked to fire weapons. Mr. Rahimi is a guy who, certainly most people would say he very much deserved to be charged with a crime, and I think most people would say he very much should not be possessing a weapon given his criminal history. So he was identified as the suspect of these various crimes by the police, and they executed a warrant on his residence, and they locate a rifle and a pistol. So they also learned at that time that he is the subject of a civil protective order as a result of domestic abuse, in addition to his criminal conduct. He also was had allegedly assaulted his ex girlfriend, and so a protective order had been entered against him, and in the protective order, it included findings of family violence, occurrence of family violence, and a likelihood of future family violence, and that was following a hearing and following notice. He's charged with the Federal crime of possessing a gun, if you're the subject of a protective order involving domestic abuse, that's a one of the prohibitions against carrying a weapon that's codified, and along with things like, if you're a convicted felon, you can't possess a weapon. And there's a whole list of other things. And we're going to talk about some of those other things, because they get real interesting as we look at these cases. But among the other things, just to mention, you may or may not even know this. If you're dishonorably discharged from the armed forces, that section says you're prohibited from possessing a firearm. If you're in the country unlawfully you are it is illegal to possess a firearm. So there's a number of these things listed in 18 U.S.C. § 922(g) and so Mr. Rahimi was charged with the one involving possessing a weapon if you're the subject of a domestic abuse protective order.

A Anya Bidwell 07:53

And so the question before the Fifth Circuit is, should the person subject to a domestic violence restraining order be prohibited from possessing firearms, essentially, right? And what does the Fifth Circuit tell us?

D Don Tittle 08:05

The constitutionality is the question. They acknowledge he's not a great guy, at least at that point in his life. But the Rahimi then applies the framework set out in Bruen, which I think it's worth taking just a brief moment to look at why that's significant. So Supreme Court issued about six months prior to Rahimi being heard in the Fifth Circuit, they had issued this first big opinion on the Second Amendment in more than a decade. And in that the Bruen case, they, as a practical matter, they struck down a concealed carry restriction involving a New York law, making it more difficult to carry, to conceal/carry a gun in public. In New York, you had to prove a special need in addition to just that, you wanted it for self defense. So Bruen a made it unlawful to for New York to have a law like that. But it also said, importantly, that the framework we're going to use to analyze any case involving a restriction on a firearm is you're going to ask the question of whether this restriction is consistent with with historical tradition, basically, is there historical precedent for this type of restriction? And what Bruen says is, that's the only question you're asking. So between Bruen and say Heller from about 12 or 14 years earlier, there'd been a developed body of law where you could ask that you would do this

historical analysis, but also courts could consider how the. Restriction might affect the common good and tailoring. And so Bruen says no more of that we're going with this pure historical analysis. Is there a precedent for this restriction, looking back at history, especially during the time of the founding. So that's Bruen. So Rahimi is the first circuit that really gets to apply those facts, and they apply it to Mr. Rahimi case. And what do they say? So they say that it They, after going through this historical analysis, they decide that it is unconstitutional that the § 922(g)(8) which prohibits gun possession for someone that's subject to protective order that it is, it is unconstitutional to have that type of restriction, and they say that after going through a lengthy analysis of what they call these historical analogs.

A Anya Bidwell 10:57

The government basically provided about five different examples of how this would have been consistent. These kind of prohibitions would have been consistent with what happened at the founding. But the Fifth Circuit does not find either even one of them persuasive.

D Don Tittle 11:12

The Fifth Circuit goes through each and says, either this doesn't apply or this was to more to a class of people not specific. They acknowledged that one was at least similarly relevant. But ultimately, you had to post a bond if you happened to do something with your firearm that, as opposed to actually forfeiting your right. So they consider that not to be relevant. But in the end, upheld that there was no historical analog for this type of restriction, therefore unconstitutional.

A Anya Bidwell 11:44

So they strike down the statute that says that individuals can't carry weapons if they're subject to restraining order.

D Don Tittle 11:53

If they're subject to a protective order for domestic abuse, and in the law, it says even even in those instances, it would only apply if there was a hearing and the person had received notice. And in the case involving Rahimi, there was a hearing, there were these findings, like I mentioned, of family violence occurrence and likelihood to occur in the future. So in some ways, the protections against getting a protective order against you, at least in Texas, would be greater than, say, a restriction that you can't carry a firearm if you're under indictment, which really just requires a simple finding of probable cause. Another one would be a bond if you're on you you're you've been charged a felon, and you're on a bond, a judge could say you can't carry a weapon. That's probably as routine as it gets. It's as far away from a hearing following fair notice as you can get. But there is some suggestion Rahimi that they draw a real distinction between criminal and civil proceedings. So there's, I think there's a suggestion that if it's tied to the criminal process, the forfeiture of your right to carry a weapon, that might pass muster, but

if it's something like a civil commitment or red flag laws, or the idea that someone's been dishonorably discharged from the military and they lose their right to carry weapon. I think those are in extreme Jeopardy, at least in the Fifth Circuit.

A Anya Bidwell 13:30

So there is a separate opinion. Tell us about that, by Judge Ho.

D Don Tittle 13:36

Okay, the concurrence. Judge Ho does, first of all, acknowledge that he's very proud to be a part of the First Circuit case to apply the framework that was set out in the Bruen case. He really makes a strong distinction between a restriction on your right to possess firearm as a result of the criminal process versus the civil process. That's really what I took to be the most important thing out of his concurrence. He draws that extreme distinction whether that'll be followed. Hard to say whether Rahimi would even be followed in by other circuits would really come down to whether, when they do this historical analysis, they reach the same result.

A Anya Bidwell 14:32

And Judge Ho also goes out of his way to say that, I am not saying that, his girlfriend, for example, doesn't have a right to be free from his act. What he is saying is that there are other ways to ensure that you know he is not a danger to her, but it doesn't mean that he doesn't have a Second Amendment right.

D Don Tittle 14:54

Judge Ho makes a point to say that there are already criminal law. On the book that are going to discourage the type of behavior that Rahimi was involved in and and so therefore, that's going to act as a deterrent to that type of activity and therefore, I presume he's saying that you don't need these extra restrictions on a Second Amendment right.

A Anya Bidwell 15:18

Zach, you want to add anything?

Z Zack Faircloth 15:21

I just think this is going to be really interesting, especially when you think about so this was § 922(g)(8) right? Is that the right statute and § 922(g)(8) do come up in federal court from time to time, but the reality is, most of these come down as § 922(g)(1) charges. And I'm sure Judge Starr could tell you that not a lot of § 922(g)(1) are accompanied by deep originalist briefing in

the District Court. But guess what on the back end of this case, that's gonna get argued a lot. So I'm very interested to see what some of these district court judges are gonna do when they get these 922 (g)(1) charges that are challenged based on Bruen and Rahimi.

A Anya Bidwell 15:58

It's interesting this kind of analysis where you rely so much on history, and like Don mentioned, it's by no means a guarantee that another judge looking at history would come up would reach the same conclusion.

D Don Tittle 16:18

It's a pretty remarkable framework to set up to think that judges are going to be able to engage in that type of historical analysis. I think there's a certain humor if you think about when the lower courts get these cases where there's a restriction, what are they going to do? Who is going to say, let's so do a research of the history books. Who are they going to get to do that? I mean, perhaps, the person with a history major is finally going to have a purpose for their degree. But it just seems like every court could basically just reach a different conclusion on almost the same set of facts.

A Anya Bidwell 17:08

It gets a little bit at Justice Breyer's dissent in Bruen right where he said, lawyers are not historians. That's not how lawyers think so. We are taught to see both sides and argue both sides and be advocates, rather than just analyzing the facts in a straight manner, so and looking at history as just a particular one way to look at it. So it'll be interesting to see what judges do with this.

D Don Tittle 17:40

Yeah, it's going to be very interesting. There's so many ways that Rahimi could be followed by other circuits. It might not be. It could easily not be setting up a conflict. And then, of course, just like you go down the list of these individual prohibitions, and it's not hard to see how some could fall, I think the one that Zack mentioned about convicted felons, I think would be the one that's most likely to stand. I think even Justice Kavanaugh and Justice Roberts in their concurrence in Bruen, make a point to say that some of these that have long standing tradition, they're not intending to interfere with those. That would've been my interpretation, but I think they're all gonna be challenged like you say.

W Will Langley 18:27

I think that's exactly right, and I don't anticipate that a circuit court will necessarily go there, but there will be a district court out there that strikes down 922 (g)(8), and then they're gonna have to grapple with it.

A Anya Bidwell 18:42

Yeah, the one last thing I'll mention about the opinion. It's kind of interesting. It mentions that the Fifth Circuit was the first circuit court, even before Heller to basically say that there is an individual right to carry a weapon. So the Fifth Circuit, in many respects, seems to be sort of paving the way for Second Amendment jurisprudence, and is very aware of that.

D Don Tittle 19:02

Yeah they are. I'm not sure with so many states having laws against being able to carry a weapon if you're the subject of a protective order, on this, on a, you know, family violence and let's face it, that's the kind of thing, like a convicted felon that many people would say that person should not be allowed to possess a weapon. I'm going to be surprised if other circuits go the same way as Rahimi.

A Anya Bidwell 19:31

There is a quote there that Rahimi is neither responsible nor law abiding.

D Don Tittle 19:41

He was really lucky. It was quite fortunate in timing, because his conviction was first affirmed, and he got the fortunate break of having Bruen decided within a few weeks, and then his his conviction got vacated and now overturned. So he's he's had quite a run of luck. Hopefully takes a different course.

A Anya Bidwell 20:03

Alright, let's move on to the next case, from the Second Amendment to bankruptcy. You're welcome. Will thank you for saying bankruptcy.

W Will Langley 20:10

One more time, just to make sure everyone's sleeping. So In Re LTL Management LLC, if you're not familiar with this case, it doesn't sound terribly interesting, right? LTL Management doesn't sound familiar. You've never heard of them, and that's because they didn't exist until just recently. You may, however, have heard of Johnson and Johnson. And Johnson and Johnson has a little bit more of an interesting and a much longer history, and they produce consumer goods that you're all familiar with, I assume, Judge Ambro in the opinion in Re LTL Management LLC referenced Band Aid, Tylenol, Johnson and Johnson's baby powder, which is the center of this discussion. We've all heard of those right. Band Aid and Tylenol got me through my childhood. So you know credit, where credit is due. But in recent years, these cases have arisen dealing specifically with Johnson and Johnson baby powder and another related product. But let's focus. We'll try to keep it simple, because bankruptcy is complicated enough without me doing it any

further. So Johnson and Johnson makes and sells baby powder, and they have done so for many, many years. Recently, people started to observe a potential connection between Johnson and Johnson's products and various illnesses, including ovarian cancer or mesothelioma. And it turns out that some studies have shown, and I'm being careful how I say all of this, because this is all disputed, but various juries have reached conclusions about this, but there appears to have been traces of asbestos in the talc that comprised Johnson and Johnson's baby powder. Why am I telling you about all of this when we're talking about a bankruptcy case? Well, turns out a lot of people use Johnson and Johnson's baby powder, and a lot of people brought claims against Johnson and Johnson related to that baby powder, and that's where our story kind of begins, because for many years, there wasn't a lot out there. It wasn't this mass tort litigation regarding the baby powder was not a thing. And then in about 2010 that all started to change. And even though they had some several unsuccessful lawsuits against them, people kept coming. Lawyers kept bringing these claims, the plaintiff's bar is nothing, if not determined, and eventually they kind of hit it big with a case called Ingham. And in the Ingham case, there were a number of plaintiffs, and they originally had an $4.69 billion verdict that was reduced to $2.24 billion in damages for injuries related to the baby powder. And at that point, Johnson and Johnson sort of saw the writing on the wall and they thought, Well, if that's just one case with 20 plaintiffs. What else is out there? It looks like there might be a lot more coming. This wave might not be over anytime soon. And so you can imagine if you were the GC of Johnson and Johnson coming in to report that the US Supreme Court has denied cert on our appeal of this $2 billion verdict. And it looks like the other lawsuits aren't stopping, but we have a potential solution here, and this is where this case is interesting, because it shows as Anya was talking about how lawyers think versus maybe how historians or others think about things, lawyers are problem solvers, and this is a problem that Johnson and Johnson was facing, is how to deal with this wave of litigation and the potential billions upon billions of dollars in judgments. And so they found some creative law in Texas that's pejoratively called the Texas Two Step.

A Anya Bidwell 24:20

So this is a Third Circuit case, but it involves Texas two steps. So Right? That's the connection.

W Will Langley 24:27

Thank you for bringing that up. And Anya, feel free to bring up anything that I overlook, because there's so many details that I'm trying not to overwhelm anybody, and trying to stay focused on what's important. But that's a good point. This case originated in North Carolina and then was moved to the Third Circuit, which is the home of Johnson and Johnson, and so that's where they ended up in New Jersey, dealing with this case. But the Texas Two Step is refers to a fairly complicated procedure that I'm not going to go down the weeds on because I'm frankly, not qualified and you're not interested.

A Anya Bidwell 25:00

You mean, you don't know how to do it Texas Two Step?

Will Langley 25:02

I don't know how to do the actual Texas two step, nor the bankruptcy procedure or the reorganization procedure, but suffice it to say, Johnson and Johnson took what was one entity, and again, I'm glossing over a lot, because there are various Johnson and Johnson consumer products entities and health and things like that. But I'm going to stick with Judge Ambro here and say, just call the original entity Johnson and Johnson and Johnson and Johnson turned into new Johnson and Johnson and LTL. And LTL Management got the short end of the stick in the deal, you might think, because they took all of the liabilities related to the talc claims, whereas New Johnson and Johnson got all of these great products that have been selling for hundreds of decades and over 100 years. But to be fair, new Johnson and Johnson didn't leave LTL Management without anything to show for its new existence. They actually promised that we'll make good on the judgments for these tout claims. So if you lose in court if you get all these judgment against judgments against you, come see us and we'll make it right. And that sounds like a pretty good thing, right? Because the alternative would be spinning off LTL and leaving them out there to handle all these doubt claims, and then when people come to enforce their judgments, there's nothing there to be had, because LTL doesn't sell anything. It doesn't generate any revenue. It exists for the sole purpose of filing bankruptcy, and that's what this, this kind of this case really becomes about, is that the bankruptcy proceeding so LTL was meant to take all of these liabilities from these many, many talc cases, and to go through bankruptcy proceedings so that they could have sort of an orderly resolution of all of these cases and get that all squared away while Johnson and Johnson kept on selling their products, and they were transparent about this. So again, we're not when I'm telling you about all this, I'm trying to stay as neutral as possible, just like the judge did. I'm not assuming anybody's got ulterior motives other than the ones that they're stating, but basically, LTL was created for that purpose. Let's take all the liability from the talc claims, put it in this entity. That entity will file for bankruptcy, and then the bankruptcy court will handle the proceedings, and we'll get all of this resolved in an orderly fashion. And that's what they tried. And you might think that the when I tell you that the Third Circuit dismissed the bankruptcy case. I forgot a kind of key point here bankruptcy. One of the most important things about a bankruptcy is, when you file bankruptcy, you get a stay. You get protection from a lot of different claims and from people pursuing judgments against you. So this stay went into effect when LTL filed the bankruptcy, when the Third Circuit reversed and dismissed that bankruptcy, that stay is over, and so now all of these cases are free to open back up, and we can go into some details about how much Johnson and Johnson is spending in defense costs and paying judgments. But it's a big deal that that happened. And you might wonder if there was something about the Texas Two Step that came into play here, if Judge Ambrose suspicious about that or whatever, but it actually just turns out it's really simple. You know that old saying, it's never too soon to file for bankruptcy. No. There's a reason that you've never heard of that saying because it can be too soon to file for bankruptcy, and that's what Judge Ambrose told LTL management. He basically said, Look, you're looking at all of these forecasts of how much litigation is coming your way, how many judgments you're going to be paying. That may all be the case, but as things stand today, you're not in bankruptcy. You're not a threatened organization, and that's simply because Johnson and Johnson was standing behind LTL, so this sort of clever arrangement by also making sure that they didn't get into the F word of fraudulent transfer Johnson and Johnson actually made sure that LTL couldn't go into bankruptcy, at least according to judge Ambro on the Third Circuit. So if that wasn't too confusing a road down there is anybody tracking anything that's going on at all? Okay, I'm getting some head nods. This is not good podcasting to ask you that way, but that's so this case, in some ways, is very simple and very straightforward. You can't file for bankruptcy until you're bankrupt. You can't file for bankruptcy saying, Well, I think that we're gonna get a lot of bad, judgments coming down the road. So

let's go ahead and start this process. Get the bankruptcy underway. Judge Ambrose said, That's not good faith. He wasn't saying they didn't act in good faith by creating a company entity to handle this and to go into the bankruptcy. He's just saying it's not good faith to file before you actually have these claims against you. So let's let the facts play out a little bit more, and we'll see where it goes. Depending on who you ask, it's either that simple, or there's something much more complex going on here with this, the viability of the Texas Two Step and this sort of non traditional debtor where I'm gonna try this. It's maybe risky. Do we have any Rick and Morty fans out out there?

A Anya Bidwell 30:39

All right, we have Zack. He's a Rick and Morty fan.

W Will Langley 30:43

So tell me how you feel about the accuracy of this again, without talking about anybody's motives. Do you recall the episode where Rick and Morty go to the spa planet?

Z Zack Faircloth 30:54

Yes.

W Will Langley 30:56

If you recall that episode...

Z Zack Faircloth 30:58

We'll post the link on our website. No, that's the show notes, right?

W Will Langley 31:03

You can find it out there. But so Rick and Morty is this grandfather and grandson duo. I'm not gonna explain it anymore. Rick and Morty go to this spa planet, and they have all of the like bad feelings flushed out of them, and it relaxes them. It's supposed to be like a great spa treatment, but instead of just having all of that stuff washed away down the drain, it actually reconstitutes as a horrible version of Rick and a horrible version of Morty. And that's kind of what this made me think about a little bit with this case, is that, there's sort of an interesting process of taking all of these liabilities that you know are going to overwhelm this company. Johnson and Johnson is still selling band aids, they're still selling Tylenol, they're still selling all these products that you've heard of. And so they didn't want to go through the whole company to go through this major restructuring, so they created another company to handle the restructuring, and said, like I said, we'll stand behind you. But of course, Judge Ambro decided that when you have access to the ATM pin number for your parent company, you're not

bankrupt, because you can always just go get cash when you need it. And so that's where this case ended up. Long story short, I'll stop it there so that we can ask any follow up questions, if there are any interesting avenues to pursue, if any of that made sense.

A Anya Bidwell 32:30

So basically, the judge says that there is no financial distress, right? And because there is no financial distress, you can't file for bankruptcy. Judge Ambro kind of recognizes the irony of this. Can you talk about that a little?

W Will Langley 32:49

He does. He recognizes exactly the problem that I said less articulately than Judge Ambro. So after all this, I really think of all this as sort of an appetizer to whet your appetite to go read the opinion, because there's a lot there. I mean, this is a mass torts case. There's a lot going on with the mass tort claims themselves, and then the bankruptcy and all of the other ramifications. Let me just not even qualify it that way. I will say it's a pellucid piece of writing, piece of legal writing without qualifications. I think Judge Ambro wrote an outstanding opinion, agree or disagree, it's well written. It's very clear, and , trust me, you've already read much worse material that's part of your law school curriculum. But going back to the irony question. The irony is Johnson and Johnson created this entity. Johnson and Johnson created this entity for the purpose of going through bankruptcy and handling all of these claims, but by virtue of not sort of sending it out there with nothing and saying attack this shell company, where they said, we're actually going to stand behind it and we're actually going to pay the claims. By doing that, they then prevented it from going into bankruptcy. So the irony is that they defeated the purpose by actually following through and offering to stand behind or to guarantee any of the judgments related to the tort claims.

A Anya Bidwell 33:11

As far as bankruptcy opinions go, it's a fun read. But of course, had they not created that trust?

W Will Langley 33:37

Had they not yet created the payments or set up the assurances, then you'd be back at that F word, fraudulent transfer.

A Anya Bidwell 34:30

We have some other F words to talk about, in my opinion, on qualified immunity, but I'll save that for later.

W Will Langley 34:37

Wow, with an advertisement like that. So yeah. So that's a great point, and this is kind of a it's just a fascinating scenario. There's so much to explore here. We don't have time to even begin to get into all of the complexities of this. Like I said, I hope I whet your appetite a little bit and didn't leave you profoundly confused, or if I left you profoundly. Confused. Let me assure you that Judge Ambro explains it much better than I do. So go read this case, and you'll you'll learn a lot about bankruptcy, about corporate restructuring and mass torts, and it's actually a pretty interesting read.

A Anya Bidwell 35:17

All right, with that, I think we should go to another fascinating topic, and that's FDA regulations.

Z Zack Faircloth 35:23

Anya shouldn't have any any grudge with me, but she gave me the FDA case. So let's go. I'm going to start by quoting from the Federal Reporters. These are the books up in the library, right at 40 F.4th 433 in the Federal Reporters, "Jimmy the juice man, strawberry astronaut and Suicide Bunny, bunny season." That's in your Law Reporters now, and that's the case we're going to talk about. It's Food and Drug Administration v. Wages and White Lion Investments, LLC. So if you want a kick, I highly recommend listening to this oral argument where Judge Jones opens the questions with, "Do you really think we don't vape?" She probably does. So what happened here is, back in the early 2010s vaping started to catch on. There was a push to regulate it by the FDA, and in the past, the FDA had asserted some authority to regulate tobacco. Well, any of you who will take administrative law here will ultimately read the case FDA v. Brown & Williamson Tobacco Corp., which effectively said that, no, FDA, you can't just reach out and grab tobacco as a drug. There's got to be some congressional mandate for that. Well, Congress responded to that in 2009 by passing the Family Smoking Prevention and Tobacco Control Act, or the TCA. There are about 15,000 different acronyms in this I'm not going to venture to try to name all of them. So the TCA is the governing statute here that controls how tobacco products are approved with the FDA. So what happened here is our vaping companies petitioned with the FDA, under the TCA, for approval of their vaping products. And when they went to the TCA, when they went to the FDA, what the FDA had done is set set aside a set of rules on how they would get approved. We're going to look at your marketing plan. We're going to understand the effects of your vaping product on the broader community. They did this through obviously promulgating rules and regulations. They did this through guidance memos. They did this through public statements to all the vaping companies and said, This is how we're going to get all of these vaping companies previously unregulated, into the FDA regulated space, and we're going to do this all by September 2020, which is a relatively tight turnaround. So fast forward, over a million applications flow in. I believe they're called PMTAs. Over a million of these fly in, and the FDA says, Oh no, and the FDA has really no way to efficiently process these based on how they've previously told every manufacturer out there how they would actually process these applications, namely a very individualized look at each individual application, the marketing materials and the gigabytes, gigabytes and gigabytes of data that Each one of these applications have with them. So instead of simply going through and individually approving each one, they issued an internal memo. The internal memo said we're going to try to get through these in batch. We will look for certain check boxes to see if the boxes are there. If the boxes are not there in the application, we'll deny the application. That's it. So what happens? Over 50,000 applications are batch denied, and of these 50,000 applications, many, many of them file lawsuits and different circuit courts across

or different district courts across the country asking for relief, saying, Hey, we were told that this was going to be the process, but instead, they gave us that this is not that. And so we get to federal court. And in the federal courts, we evaluate agency action under the Administrative Procedure Act, under under the APA, the standard for review is arbitrary and capricious. So did did the agency behave in an arbitrary and capricious way? So all of that is the backdrop to this. One thing I think is really important for you is law students. I know we have podcast audience to law students out there is in law school, you're taught to parse through what all those things mean, and figure out what kind of what the legal answer is to that and how we navigate the legal landscape. Well, the beauty is, there's much more to that. There's actually a lot of procedure. And believe it or not, judges are people. I know that's shocking. You're not taught that in law school, but judges are people, and so each one's gonna have their own personality. And so that's where we get to the Fifth Circuit. This came up through District Court, got to the Fifth Circuit on what's called a motions panel. At the motions panel, they get a first chance to stay whatever the District Court did, do they let it go? Or do they do they stop it? And in the motions panel, Judge Oldham writing with, I believe, Judge Elrod and judge Wilson said, yeah, the FDA got this wrong. You can't just slip a roo and change the process on on these vaping companies without telling them ahead of time they submitted what you asked and then you didn't review it. Fast forward to what's called a merits panel at this circuit, where the panel of Judge Haynes, Judge Costa, my now colleague and Judge Edith Jones heard the case and they came out the other way. Judge Haynes, writing with Judge Costa, joining, said not so fast. Yeah, they didn't follow exactly what they said they were going to do, but they followed it for the most part. And we know that Congress delegated this power to the FDA, because the FDA is the experts, and we'll defer to the experts on this. And Judge Jones wrote, in her typical fashion, a blistering dissent saying, No way. She opens up with there are six of us who have looked at this, and four have said, Yeah, this is, this is incredibly problematic. And she goes through and parses through what exactly the agency had promised, what exactly the agency delivered, and why that departure was arbitrary and capricious. Just a few weeks ago, the Fifth Circuit, listening to Judge Jones, decided to take this case en banc. They're not alone, because this is going to be an emerging circuit split. The Sixth Circuit has touched this in breeze smoke. There's another case out of the Eleventh Circuit in Beatty. And then there's another case of the D.C. Circuit Prohibition Juice Co., my favorite, where Judge Katsas writes a concurrence and says there's an emerging circuit split here, maybe Supreme Court, you should take a look at that. So what's going to happen is, in May, the entire Fifth Circuit is going to sit down and hear this argument, and they will ultimately decide whether or not, the FDA, they may have not behaved perfectly, but it was within the realm of not arbitrary and capricious or no, this is certainly arbitrary and capricious, FDA will ultimately have to go back and review 50,000 applications. My guess is, if they take a panel opinion en banc at the behest of Judge Jones, you're likely going to see the Fifth Circuit say, No way FDA, and this will ultimately end up at the at the Supreme Court, as it's it's got a Judge Jones dissent, Judge Katsashas said something about in the D.C. Circuit, we've got in the Eleventh Circuit, Judge Price, Chief Judge Prior has something say on it. So this is getting a lot of big opinions from a lot of big names in the conservative legal movement, and I expect that you'll see this at the Supreme Court within next couple of years. Wow! You heard it here first, I think. I'll just throw in and say you'll probably also hear the Johnson and Johnson appeal in front of the Supreme Court very shortly.

A Anya Bidwell 43:28

So the Johnson and Johnson case, there was an en banc petition filed, and judges ordered a response, so we are waiting on that. In this case, en banc petition was granted, and like Zach mentioned, it's going. The oral arguments will be held on May 15, which will be fascinating. I

always wonder how it is to be a lawyer arguing in front of en banc panel. I mean, it's not a panel en banc court.

Z Zack Faircloth 44:02

And I think the Fifth Circuit has the largest en banc sitting, if I'm not mistaken.

A Anya Bidwell 44:08

Sixteen judges at a time. Can you guys imagine arguing in front of sixteen judges?

Z Zack Faircloth 44:15

No is the answer.

A Anya Bidwell 44:18

Sometimes they have oral arguments in en banc courtrooms where it's just a panel, but the courtroom is an en banc courtroom. And as an advocate, you stand there and you think, Oh, my God, these are three of them. Like, imagine they're just encircling you. Like how are you even gonna see if somebody wants to ask you a question anyway? That's a worry that I don't have for now, but they will no way. FDA, all right, so with that, let's move to our final opinion of the day, and it involves qualified immunity. It's out of the Eighth Circuit. It's called Molina v. City of St Louis. It is a preview of what's to come. Next week, we're going to have another Short Circuit live in Washington, D.C., at Georgetown, and we will celebrate and mark the publication of a book on qualified immunity and other doctrines that make it difficult to sue government officials. The book is called Shielded, and it is written by the most prolific and respectable scholar on qualified immunity in the nation, a UCLA professor, Joanna Schwartz. She will be at the Short Circuit Live next week, and I assign her a qualified immunity case, so she'll talk about that, and other guests will be talking about things like municipal liability and blanket immunity for federal officials. So that's a preview of coming attractions. Judge Strauss on the Eighth Circuit wrote for the majority, remember how we talked about the F word.

W Will Langley 45:59

We were promised more profanity.

A Anya Bidwell 46:01

Yes this opinion has a lot of profanity in it, not because Judge Strauss is choosing to use profanity in his opinions, but because they're actually very important for the outcome of this decision. So here are the facts. There is a large protest in St. Louis in 2015 motivated by a police killing of a Black man. There are three plaintiffs. Two are lawyers. We really are talking about lawyers a lot today. Two are lawyers, and I will get to the third one later. But these

lawyers they are wearing, they are part of the protest. They're wearing bright green hats with the words National Lawyers Guild Legal Observer emblazoned on them. And many folks would know what the organization actually is, but many folks wouldn't, and that becomes relevant. And and one of the So, one of the lawyers, he was just standing there peacefully observing, and the other lawyer was also recording the protest. And during the protest, police launched an armored vehicle known as the bear, and that bear barreled down the street toward the two lawyers and other protesters shooting tear gas chemicals at them. So that's where the third plaintiff comes in. His name is Peter Gross, and he is much more aggressive than the other two plaintiffs. He actually follows the bear on his bicycle and yells, and that's where it becomes complicated for me. He yells, "get the f out of my park." So the Judge Strass actually uses the full word, but for the purposes of not having to put a disclaimer on the web page of the Short Circuit podcast, I'm just gonna say the f out of my park. So he says, "Get the f out of my park." And the officers respond to these words and to him following them on the bicycle by launching a tear gas canister that hits him on the hip. So the question before Judge Strauss and the other judges is, does qualified immunity protect the officers who tear gas these three plaintiffs from First Amendment liability? And his answer is counter intuitive for folks who are not familiar with qualified immunity, his answer is that guy who is following police officers on the bicycle and telling them, "get the f out of my car" has First Amendment rights, and qualified immunity does not shield officers from hitting him. But when it comes to these two other plaintiffs who are standing there peacefully observing the police and who are also recording the police and are being very polite about the whole situation. Qualified immunity protects police officers from liability, even though they used excessive force on them. So how does Judge Strauss reach that conclusion? So he does this traditional analysis of qualified immunity, first, whether there is a there's a constitutional right, and second, whether that right is clearly established. So first, is there a constitutional right? Well, perhaps there is a constitutional rights to record the police. There is a constitutional right to observe the police, but Judge Strauss says that right, however, is not clearly established, right? So you'd think, Oh, come on, that's pretty clear, right? You're standing there peacefully at a protest. They shouldn't be doing this to you. But he says, No, the right is not clearly. Established, and that's because there is this Supreme Court case called Colton v. Kentucky from 1972 and it says that there is no constitutional right to observe the issuance of a traffic ticket. So from there, he says, So observing police conduct really is not expressive and the right to observe is not clearly established, given Colton v. Kentucky. The interesting thing, and it becomes crucial for the dissent, is that there are two Fourth Amendment cases, not First Amendment, Fourth Amendment cases in the Eighth Circuit, that plaintiffs cite, and in those cases, first one is Walker in Walker in 2005 the Eighth Circuit says that qualified immunity does not shield an officer who arrests an individual for silently watching the police encounter from across the street. So it seems pretty clear statement. And then there is a second case from 2020 Chestnut, where the Eighth Circuit says, if the Constitution protects one who records police activity, then surely it protects the one who merrily observes it. So how does Strauss distinguish those cases? He says that those are Fourth Amendment cases that the claims were about fourth amendment and reasonable seizure and therefore qualified immunity shields the officers here, those are not First Amendment cases. And you know, the other interesting thing that Strauss talks about is this idea of the message right emblazoned on the hat, National Lawyers Guild Legal Observer thing. So he says, Well, maybe that's an expressive message. And in that case, then they were exercising their First Amendment right. And then he compares that to that famous message, "f the draft." Again, he uses the full word, I don't.

W Will Langley 52:02

On air.

A Anya Bidwell 52:06

Many study sessions with Will and me preparing for the finals. I use that word a lot. That's true. But so he says, No, that "f the draft" is a clear message. So you can see how that's an expressive activity, First Amendment right. But this whole thing about the National Lawyer Guild Legal Observer, he says some people would know what those folks do, and would know that it's an anti protest message, but many won't. So that's not a clearly established right. So at the end of the day, there are some other things in that opinion that I won't go into detail about, but really his main conclusion here is that the right that these two lawyers exercised is not clearly established by observing and peacefully recording the police, but the right that this other third plaintiff exercised was clearly established when He was following them on his bicycle and telling them, "get the f out of my park," that was a clear expressive activity, and they should have not used tear gas on him, and so qualified immunity does not shield them. In that case, with that guy and Judge Benton issued a dissent. In his dissent, he says, What the heck? We have these two cases, chestnut and Walker, right? And maybe they were Fourth Amendment cases, true, but it doesn't mean that the right to peacefully observe the police was not clearly established with regard to the First Amendment. He says, in order to conclude that there was no reasonable suspicion to seize people in those cases, the court had to determine that the plaintiff there were engaging in the constitutionally protected First Amendment activity. That's why there was no reasonable suspicion, because they were engaging in First Amendment activity. So the court did reach a First Amendment conclusion in a Fourth Amendment case. So he says, You should have not distinguished it this way. The court did determine that there was a First Amendment activity, and that's why there wasn't a reasonable suspicion that resulted in a Fourth Amendment violation so Chestnut and Walker clearly establish the right to observe the police. What's really interesting to me about this case is that it shows that judges can use qualified immunity in the most counter intuitive of ways. In this case, qualified immunity shields the officers who attack non aggressive people who are just standing there, presenting no threat to the officers peacefully observing. And qualified immunity is not granted to police officers, who you could actually argue were trying to defend themselves because the guy was actually on a bicycle following them and screaming aggressive words. So we hear from many conservative judges that qualified immunity should be at its strongest when it comes to split second situations where police officers are in danger, but in this type of a case, the outcome is exactly the opposite. Qualified immunity shields police officers who it shouldn't shield and doesn't shield police officers who it should shield. So it's a very counter intuitive to my thinking conclusion.

W Will Langley 55:53

So to sum up, you can chase the bear. You can curse the bear, but don't watch the bear, and certainly don't poke the bear. Is that what I take away from the case?

A Anya Bidwell 56:07

That's what infuriated me about Will, when we're in law school, I would be just going on and on about stuff, and Professors would be like glazing over. And then he would raise his hand and he'd say, so to sum up and the professor would say exactly right. So I guess I'm just going to

say that, exactly right.

W Will Langley 56:29

Thank you, Anya.

A Anya Bidwell 56:32

Well, unless anybody else wants to comment on this beautiful qualified immunity case, I think this is a wrap for us. Thank you all so very much for doing the panel. Thank you guys for being here. I know you're really here for Chick fil A, but we do appreciate you sticking around and listen to this podcast on platforms available near you, or whatever it is, they say. Thank you.