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Anthony Sanders 00:06
Hello, and welcome to Short Circuit your podcast on the Federal Courts of Appeals. I'm your host, Anthony Sanders, Director of the Center for Judicial Engagement at the Institute for Justice. We're recording this on Wednesday, June 16, 2021. If you enjoy this podcast, you should check out our newsletter, and often irreverent take on recent Court of Appeals opinions, which we publish every Friday, you can subscribe at shortcircuit.org or find it on the Volokh conspiracy blog. And please also check out our sister podcast the documentary series, Bound by Oath. Do you get along with your neighbors? Do you get along with them so well, that you'd want them to pick what kind of home you live in? Well, in Palm Beach, Florida, that's exactly what happens. The town's zoning code doesn't just care about how many bedrooms you have or the setback of your house from the street, but also whether your home fits in with the neighborhood under a bunch of nebulous, contradictory standards. But this is America. Well, Florida at least. So, isn't that unconstitutional? Our Florida native and First amendment expert, Paul Sherman, is here to tell us the sad news. Paul, welcome back to Short Circuit.

Paul Sherman 01:14
Hey, thanks for having me back. Anthony.

Anthony Sanders 01:16
Also, this week, if you've been thinking of picking up your rifle and setting off to a foreign land to fight in a civil war for a cause you believe in like Ernest Hemingway, we've got a case that might make you think twice about that decision, or at least make you think twice about getting your friends to finance that decision. IJ's Justin Pearson, who assures me he has not fought in any civil wars, tells us the ins and outs of foreign civil conflict finance, and the US criminal justice system and plea bargaining in a case from the Eighth Circuit, Justin, thanks for coming on.

Justin Pearson 01:48
Hey, Anthony. Thanks for having me. And as you know, I'm down here in the Free State of Florida, as well, you know, Paul's homeland, which is one of many reasons why I love it down here.

Anthony Sanders 01:57

That's right, we got all kinds of Florida this week. And I want to get right to the heart of that state. The good people of the town of Palm Beach, who, for some reason, were not too happy about a home that Mr. Burns, no relation to the Burns you all know and love, wanted to build. So, Paul, tell us about this house. And what's up with an opinion who with the dissent is 136 pages long?

Paul Sherman 02:30

Yeah, so the opinion is really, really long, although I feel like it doesn't say as much as the number of pages would suggest. So, the case is Donald Burns v. Town of Palm Beach. And it raises some really fascinating, very fundamental questions about the First Amendment and what it covers. And I don't know that it reaches very satisfactory conclusions. But it is nonetheless very interesting case. So, Donald Burns is a guy who lives in Palm Beach, Florida. And right now, he lives in a house that is in the so called Bermuda style. So, think pastel yellow, lots of bright white trim, circular windows, that sort of thing. He wants to remodel his house. In fact, he actually wants to tear this house to the ground and build a brand-new house. That is in the midcentury modern style. I'm actually, my wife and I are huge fans of mid-century modern, we live in a midcentury modern neighborhood here in Virginia. For those who aren't familiar with it, think kind of Frank Lloyd Wright, you know, very clean lines, kind of minimalistic. And that's why this guy wants to build the house. He says that he's had this change in his life philosophy, and he wants it to be reflected in the house that he lives in. The problem that he's having is that to build a new house, he has to satisfy the architectural Review Commission in Palm Beach, which he does as to all of the objective factors. So, things like setbacks and lot size and all that stuff. He satisfies and that's uncontroversial. But the architectural Review Commission and his neighbors just don't like the house. They think it's they think it's too big, and they think it's ugly. And so, he ends up filing a First Amendment case saying I actually have a First Amendment right to express myself through this house. And unfortunately, in a, a rather dismissive and snarky opinion, the 11th Circuit disagrees. So, the fundamental questions that this case raises are, again, I think, really fascinating one of them to begin with is just what is art and why is art protected by the First Amendment? And this is a tension that has existed for a long time in First Amendment law because on the one hand, the Court has said that things get protection or not based on whether they express a message. That's sort of the test for expressive conduct. But at the same time, the Court has said that the First Amendment unquestionably protects the paintings of Jackson Pollock, which you know, who the hell knows what kind of message a Jackson Pollock painting conveys.

Justin Pearson 05:26
But it is clear that there's some sort of message you might not understand it, but I think people understand that a message is being conveyed, even though you may disagree over what that is.

Paul Sherman 05:34
Yeah, it will, and but, you know, I think a lot of art just exists for the aesthetic experience of looking at it. And that's another thing that this case touches on, is the legitimacy of government efforts to regulate aesthetics. And this is something that comes up a lot in zoning cases, because lots of neighborhoods want to have this kind of cohesive style throughout the whole thing. So, the majority in this case, really kind of tries to have it both ways with the plaintive. They, you know, so he, what he tried to do was satisfied the people in his town, and one of the ways that he tried to do it was by putting up or proposing to put up hedges and fences around his house, so that the new style of house would not be so objectionable to his neighbors. And the court basically faults him for this and goes “oh, well, you know, he says, he's trying to convey a message, but he's also trying to hide his house behind bushes. So no one's going to understand this message.” And he's really in a bind, because the subjective factors that the law has for which houses are permissible, and two of them are: one is that it can't be too similar to the houses around it. And another is that it can't be too dissimilar from the houses around it. And there's no guidance whatsoever on what it means to be too similar.

Anthony Sanders 07:07
Yeah. Right they’re next to each other in the code.

Paul Sherman 07:10
Yeah, yeah. And, you know, this guy, he had professional architects design it, he had them testify, and there are other midcentury houses in this neighborhood. You know, what really seems to have bothered folks, in large part is, is not so much the style, although that that is part of it, but also the size of the house. So, his current house is, I think, like 10,000 square foot, which, you know, that's a huge house. And he wants to replace it with a 25,000 square foot house. And the majority kind of snarks on him a little bit about this, they say, like, “oh, he wants this minimal lifestyle. So, he's building this house with, like, a wine cave, and, you know, all this other, you know, stuff in this huge mansion that he's building.” But you know, so ultimately, the majority says, this house doesn't convey any kind of message at all. And, and so, you know, we think he gets minimal, if any First Amendment protection and he loses. The dissent is much more impassioned about the First Amendment issues. And it goes through sort of this tour of architectural history, it talks about famous midcentury designers like Mies van der Rohe and the

Farnsworth house, and takes a much more libertarian view on kind of the self-expressive component of the First Amendment. And I think, you know, again, this case highlights this fundamental tension in the Supreme Court's case law about how art is treated, because if, if Jackson Pollock really is protected, it seems like this house should be. And yet, if it's all about conveying a specific message that a viewer is likely to understand, then the majority seems to have a point. And there's also some really fascinating fighting between the majority and the dissent about the kind of evidence that should be considered in the case. So, the dissent, goes through and looks at all of this historical research on architecture. And the majority says, none of this is in the record, you can't be looking at this, you know, we just have to look at the record compiled by the parties. And this is also kind of an open question in constitutional litigation. That's the role of what is sometimes called constitutional facts in deciding constitutional cases. These are facts that are not unique to the parties. They're just kind of facts about the world that courts can consider. And normally courts don't have to apply the rules of evidence to those facts. They can just kind of take, they can acknowledge, you know, history and things as they are in the world when they decide these cases. You know, ultimately, I think the court is too dismissive. Have the First Amendment claims in this case. But at the same time, these are these are not easy issues. And I think a lot of the problems that arise here come from this desire to push everything into the First Amendment box. You know, if nothing else, this case teaches you that standard of review is really what decides these cases. And people want to get into the First Amendment box because it has a good standard of review. I think if we treated all of our rights, a little more consistently, we wouldn't have to get into these fights about whether this is speech or not speech. If we just said, you know what, you also just have the right the property right to build an ugly house. But that's not where the law is right now. It's not where the majority goes. And so unfortunately for Mr. Burns, he loses this one.

Justin Pearson 10:51

Yes, I agree with everything that Paul just said. And there were really two things that jumped out at me. First, you know, as Paul talked about, this is a really difficult issue, because you can’t want a new house because you want it to be bigger, and also care about the message that you're trying to convey, like those are not mutually exclusive things. And so, it leads to this really mixed, complicated question of whether, you know, whether we should apply the First Amendment or not. I don't have a great answer for that. But I will say that I found the dissent to be more persuasive. And so, I share Paul's concerns that the majority opinion was too dismissive of this argument, which really leads me to my second point, which is that in this zeal to say that the First Amendment didn't apply here, I thought that the majority opinion actually made some mistakes. And I thought that one of them was it continuously forgot that it was reviewing a summary judgment granted to the city. And so basically, what happened

here was, you know, both the majority and the dissent, agreed that the lower court got the test wrong and applied the wrong test, and therefore all the subsequent analysis was wrong. And they agreed on what that test should be for determining whether to apply the First Amendment here. But then in applying that test, the majority opinion, it basically acts as if maybe it's reviewing a summary judgment that was granted to the property owner instead of to the city, it draws every inference in favor of the city against the property owner. And sometimes it does, even more than draw inferences, it actually just says things that appear to be factually wrong in the record. And so, for example, the majority opinion focuses a lot on this idea that it's not clear in the record, who exactly would see this house. But if you read the dissent, it points to certain points in the record, and including actually quoting them verbatim, “where the property owner talked about how parts of the house were designed for welcoming guests.” Also, the citizen review board that rejected his application, talked about how they were worried that when he has the parties that apparently he likes to have that might create too much noise for the neighbors on that board. And on top of that, you know, I thought the dissent pointed out pretty persuasively, that those things that the property owner agreed to do to kind of shield the house on three sides didn't apply to the beach, front side of the house. And so, anyone on the beach, or anyone in a boat would clearly see this house. And so, A: just from a factual standpoint, I thought the record was pretty clear that people would see this house. And B: to the extent that the majority opinion wanted to draw inferences based on something not being in the record, they were drawing them in the wrong direction. And so, at a minimum, what I personally would have done, would have been to remand the case, to vacate and remand to the district court to actually engage in some fact finding regarding these issues that the district court didn't really address because it was applying the wrong test. But if you really felt compelled, as apparently, you know, the majority did, to rule one way or the other without remanding it, then I think they probably got it wrong, because they made these factual mistakes, instead of actually reading the record a little closer and reminding themselves that this was a summary judgment granted to the city, which means everything's supposed to be viewed in the light most favorable to the property owner. And that's definitely not how they approached it.

Paul Sherman 14:00

Yeah, and, you know, some of the inferences that the majority drew just struck me as plainly silly, you know, so there's this fight in the case about, well, who's even going to see this house if it's shielded from the street? And, you know, the dissent makes the point that well, you know, he says that he wants to, you know, there will be guests. And the majority just dismisses that. It's like, well, there's no record evidence that he's that he's going to have guests at his house. You know, and he said that he wanted

to change his house, not so that he could have guests over, but to reflect his new minimalist lifestyle, and it's like, you know, come on.

Justin Pearson 14:40
Well, if there's nothing in the record one way or the other, then you shouldn't be granting summary judgment on appeal. Like that's not how summary judgment works.

Paul Sherman 14:45
Exactly.

Anthony Sanders 14:48
I thought that point was just a giveaway that what was really going on here was the majority was, as we say at IJ, being judicial abdication-ist. I mean, we talked about this term judicial engagement, we've popularized it right here at IJ, and the Center for Judicial Engagement. All that really means at bottom, it's not that the government will always lose in a constitutional case, it's that judges take facts seriously. And they don't put a thumb on the scale and on the side of the government. But here rather than just putting a thumb on the side of the government, a First Amendment case, nonetheless, that the court just ignores the facts. So, it doesn't make have to make the hard decision. And the hard decision is the one that Paul outline whether a home that someone's going to live in as a utilitarian purpose, can also have this First Amendment expression component. It's a hard case. I know judges don't want to make hard decisions sometimes in cases. But if the facts and the laws set it up for you, that's your job to decide. And instead, they say, well, no one's going to see it. Although we admit some people will see it, but those people are just mad about how tall it is, not how it looks. So that's not a First Amendment thing. And then yeah, I guess he might have guests over sometime. But that's not in the record, you know, just about every human being on Earth, other than the most extreme hermits are going to have people over to the home, but it's not the record. So, you know, we can't assume that's going to happen.

Justin Pearson 16:23
Can you imagine doing that in any other First Amendment case? Anthony, can you imagine someone saying, “Well, you know, there's a law banning you from painting, but you lose on summary judgment unless you've established exactly who is going to see that painting.” Like, that's not typically how things work. Right.

Anthony Sanders 16:37

And there's a broader thing here, which Paul was talking about is that, you know, I see this as not beyond a First Amendment case, and I wish it could be adjudicated not a First Amendment case. There are some earlier not that long ago, but earlier, say mid-20th century, zoning cases, where in state courts, where states just say things like, look at pure aesthetic interest just is not a legitimate government purpose, you can have zoning for a lot of things that we had IJ would object to like, to only have single family versus multifamily or to keep out commercial businesses or whatever. But you can't have zoning to just have an aesthetically pleasing place. Because that's just not even a First Amendment thing. It's just not a legitimate governmental purpose. And yet, here we have this board with these contradictory guidelines, that's picking and choosing what kinds of homes they like, and they're just your neighbors. I mean, they get neighborhood impact, too. And obviously, the neighbors I think, probably didn't like the construction or, you know, something, they have some kind of hang up about this kind of architecture. And so, they get this kind of power, and we have to go to the first amendment to stop it whereas really, this isn't something government should be allowed to do. So that is my take on government powers for the week, Paul?

Paul Sherman 18:02
Yeah. Well, you know, I was going to say another thing is that the government could deal with these concerns without trenching directly on the First Amendment. You know, one of the things that the majority says throughout this opinion, is that it's really about whether you can have an elephant next to poodles, right? Like, you've got this gigantic, 25,000 square foot mansion, every other house in the neighborhood is much smaller than that. And can the government legitimately regulate about that. And, you know, there's all kinds of content neutral things that the government could put in a zoning code, you know, it could say, no house that you build in this neighborhood can be 30%, smaller or 30%, larger than whatever the average square footage in the neighborhood is, right? Like that's completely content neutral, you could have any style of architecture, and it would deal with what appears to have been the primary concern among the neighbors, which was the size of the house, not the style of the house, it was really the architectural Review Board, that seemed to have a much bigger problem with the style of the house.

Justin Pearson 19:12
Right. And just to, to follow up on that, as well as Anthony's related point about, you know, allowing kind of your neighbors to decide what how your house looks. I think it's also interesting to remember that this is in the town of Palm Beach, otherwise known as Palm Beach Island, which is one of the oldest in terms of its population and richest places in America. And so when you think of all of the pitfalls and just

unpleasantness that would normally accompany this type of, you know, citizen Review Board type process, you have to, you know, multiply that by 1000 when you're talking about Palm Beach, typically multi, multi-millionaire retirees who have lawyers and every whatever expert and I can't imagine going to these, these review board meetings you couldn't pay me enough money to attend one. It must have just been miserable.

Paul Sherman 20:02
I'll just throw in a little bit of IJ trivia, IJ Attorney, Arif Panju actually served on an architectural review board in Austin, and he was the most permissive person ever on that board. So,

Justin Pearson 20:15
Right but even that probably would not have been as bad as trying to do that on Palm Beach Island. It's kind of a surreal environment in its own right.

Anthony Sanders 20:23
Well, maybe that's a call to arms from Paul, that if you're out there, and you want to let your neighbors live their lives, get on an architectural Review Board. Because if you don't, someone who's maybe not some permissive of you will. Another call to arms came out of Syria a number of years ago and wanted people to come and fight for the various causes that you've probably heard about in the news there. Well, Justin is going to tell us about one particularly unlucky fellow who helped out a friend of his who went to fight in that war. The case is United States v. Harcevic from the Eighth Circuit. And it's a cautionary tale in a number of ways. Justin.

Justin Pearson 21:06
Thanks, Anthony. Yeah, I think this is an interesting case for a few reasons. But I think the first thing that jumped out at me was it involves a plea bargain. And longtime listeners of this podcast and just people interested in these issues in general, will recognize that the way plea bargaining is used in our legal system is very problematic. There are all sorts of issues with charge stacking and the trial penalty. And as a result, over 97% of defendants enter into a plea instead of you know, losing in front of a jury of their peers. And so, because of that, anytime I see a case about plea bargains and challenging a case where there was a plea bargain, I think it gets my spidey senses tingling. And it turns out that this case had some unusual facts I thought made it interesting. As you mentioned, Anthony this has to do with the civil war going on in Syria. Basically, as many people will remember back in 2011, there was the so called Arab Spring. And one of the things that resulted from the Arab Spring was a civil war in Syria

that's going on today. And so, the defendant, in this case, Armin Harcevic, he decided to donate $1,500. And it appears that he sincerely thought he was donating to the cause of fighting, you know, one side of this civil war, but the Civil War, you know, the two different sides in Civil War actually involve coalition's of different groups, some legitimate, some terrorist to be honest with you. And so, he basically donated money to a middleman who then donated money to support this person, who I think Armin thought was going to be fighting for a legitimate military organization as one of the coalition members on one side of the Civil War. It turns out that apparently, that money then went to, instead, a terrorist organization, that's a different coalition member in the Civil War. The US government was able to trace that $1,500 back through the middlemen, to Armin and basically brought charges against him for funding a terrorist organization. Now, where it gets really interesting is in this part of the opinion, then you learn a little bit about international law and American law, and you know, how it's a crime to fund terrorist organizations, and also that there's an exception for, that there's an immunity from that, if you're funding a lawful combatant in a recognized civil war. And there's no dispute this is a recognized Civil War, the US government has recognized that there's a legitimate civil war going on in Syria, and that there are lawful combatants involved in that Civil War. And so, the defendant and his attorney, you know, they make the argument that what was really going on here was that he was trying to fund a lawful combatant in a recognized civil war, and he loses his motion to dismiss is denied. And so then at that point, the defendant enters into a plea deal. But it sounded like and again, it's a relatively short opinion. So, it's hard to say maybe he was guilty, I don't know. But it sounds like he had a pretty decent argument that he was actually attempting to fund a lawful combatant, and he was covered by this immunity. But regardless, you know, when the judge denied his motion to dismiss, I think he perhaps understandably, took the plea deal. I think, frankly, you know, with everything we know about how plea bargaining is done, and how those deals are reached, it's frankly surprising that he even made it past the motion to dismiss stage before taking that that deal. You know, as we know the way the prosecutor’s approach this is to stack up the penalty to be so large, if you don't take the deal, that it would literally be irrational not to take the deal, even if you happen to be innocent. Like that's how extreme the two differences are. And so, he takes the deal, it was a standard plea agreement. It wasn't a conditional plea, which means, you know, there are times where if you get the government to agree you can enter into a conditional plea that preserves your right to appeal certain issues. Not surprisingly, the government doesn't like to do that. And because of the different levels of negotiating leverage, we have here, it's not surprising that he entered into a standard plea. But you know, after entering into this play, he had this decent argument that no, he was really just trying to find a lawful combat, not a terrorist organization, he didn't know what the middleman was going to do with it and not do what he thought. And so, his attorney tries to file an appeal. Of course, most of his arguments raised were

waived by the plea bargain. But he tries to get around that by arguing that this is really an issue of subject matter jurisdiction, that because he was trying to fund a lawful combatant, then under US law, international law, the court literally didn't have subject matter jurisdiction over this issue. Unfortunately, for the defendant, the Eighth Circuit rejects that argument for two reasons. First of all, it says that this type of argument is really just affirmative defense, not a question of subject matter jurisdiction, and that the law is clear that the district court has the ability and the jurisdiction to decide that question. And second of all, it points out that even if he were right, that he could potentially argue this as a subject matter jurisdiction claim. He's already prevented himself from doing that, because of the various material facts that he admitted and was required to admit, when he entered his plea included facts that directly contradict what he's trying to argue now on appeal, which he can't do so. So, however you look at it, he's out of luck, he has waived this potentially decent argument. And whether it's right or wrong, whether he was guilty or not, I don't know. But what I do know is that this is a useful reminder that typically, when people enter into pleas, that's Game Over, including, you know, the ability to appeal, that's usually waived. And that in and of itself might not be so troubling, but when you combine it with the fact that again, over 97%, of defendants entering a plea deals, and we know oftentimes innocent people enter into these plea deals because of these tricks that prosecutors use, like stacking charges and the trial penalty, I think that combination is very troubling. And I think this is a useful reminder of that fact.

Paul Sherman 26:51
Yeah, I think it's also a just a useful warning to lawyers. Preserve everything, man, just don't, because when you read this case, you get to the point where his lawyers just like, “Oh, this argument is purely jurisdictional.” And he just he presumes that that's going to be correct. And, you know, he rolled the dice, and he was wrong. And his client is the one who is out of luck, not him. So, you know, lawyers, preserve everything.

Justin Pearson 27:23
Yeah, that's a fair point. And you know, because of what we know about how prosecutors obtain, you know, pleas, I kind of assumed that what happened here was that the attorney tried to get a conditional plea, tried to preserve, and the prosecutor wasn't going for it. And because of all the issues I just mentioned, they basically entered into the unconditional plea anyway. But you're right. It's at least possible, Paul, that the lawyer just dropped the ball and was so confident that this was a subject matter jurisdiction claim that he could make that he didn't push for a conditional plea. We don't know, all we know, at the end of the day is that, you know, the defendant entered into an unconditional plea. And so,

the Eighth Circuit said he was out of luck. And we can only kind of guess as to what might have happened behind the scenes.

Paul Sherman 28:04
Yeah, I guess the lesson is don't assume, you know, don't assume that your jurisdictional defenses is going to win.

Anthony Sanders 28:13
There's so many variables that could have been going on in this case that it's really hard to second guess what was happening. I get the sense that the legal argument whether it's an affirmative defense, or subject matter jurisdiction, defense, was going to be pretty tough. Because it seems like if it is an admitted Civil War, the law I mean, I can't really understand this law of armed combat, I tried to figure it out from the 10 pages, but it's tricky. But it was going to be a pretty hard argument for him. And of course, we don't know the, you know, the nitty gritty facts, but it could just be that, that the lawyer knew all this and also knew he wasn't going to be able to negotiate for a conditional plea without going to trial and the trial penalty and how it would look to the jury. And you know, he's got this Bosnian immigrant he's trying to protect against, you know, whatever the jury would be in St. Louis. And so, he says, you know, we're just going to make this kind of long shot jurisdictional appeal when we get to the Eighth Circuit and see if it works. And you know, maybe at the end of the day, this is what they expected. Or maybe, maybe it was a screw up. But it's it as he said, Justin, it goes to the whole, the whole plea bargaining system, puts lawyers and defendants in this box.

Justin Pearson 29:39
Yeah Anthony, I think that's all right, and just, you know, whether he would have won or would have lost and no matter how hard it would have been for him to win, wouldn't have been better if a jury of his peers decided that? Decided whether they believed him? You know, it reached those factual findings as opposed to a plea bargain that we don't know but quite possibly was coerced through the tactics that we know prosecutors use every day. Again, he may be guilty, and maybe a jury of his peers would have found him to be guilty. But I wish that had been how things played out as opposed to through a plea bargain. But sadly, kind of plea bargains are the norm, it's just so rare for cases to go to a jury. And that's really not the way the system is supposed to work.

Anthony Sanders 30:23
Well, one other thing, the sentence he actually got was 66 months. So, five and a half years.

I didn’t look in the docket. And you can't really tell from the opinion, when he first was in prison, it could be that most of his sentences already run, and that the trial penalty if he had gone to a jury, and last they expected would have been, you know, worse than that. And so, rolling all these dice is including how long you're going to be just remained locked up. You know, at the end of the day, maybe even though he lost, this was a better, which is terrible, right that you plead guilty even though you don't think you're guilty, you appeal, you lose. And yet that maybe would have been better than if you had gone to trial and lost. So, you know, really brings home, and I don't know if that's true, but I think it well might be true considering how federal sentencing works. And it just shows you that the 97% solution is no solution. And we hope that in future years, the judiciary and Congress maybe can continue working on fixing these problems. Well, listeners, I hope you have enjoyed the First Amendment and lawful combatant law that we've given you today. I hope you've been engaged with what my colleagues have had to tell you. But I would ask you to continue that and remind you that in the future, all of you get engaged.