Short Circuit 231

Mon, 8/8 1:41PM 43:02

SUMMARY KEYWORDS

qualified immunity, case, fifth circuit, sue, ninth circuit, supreme court, law, claims, short circuit, cert petition, violated, circuit, issue, patrick, anya, check, constitutional violation, called, constitution, congress

SPEAKERS

Anthony Sanders, Patrick Jaicomo, Anya Bidwell

A Anthony Sanders 00:24

Hello, welcome to Short Circuit, your podcast on the federal courts of appeals. I'm your host, Anthony Sanders, Director of the Center for Judicial Engagement at the Institute for Justice. We're recording this on Tuesday, August 2 2022. And today is a really exciting podcast. Well, at least I'm excited, because we have with us our two leaders of IJ's Project on Immunity and Accountability, Anya Bidwell and Patrick Jaicomo. I believe it is the first time both of them together have been on Short Circuit. So welcome, both of you leaders.

P Patrick Jaicomo 01:05

Hey, thanks for having me, Anthony.

A Anya Bidwell 01:07

Hey, it's so great to be here with you. I wouldn't say it's great to be here with Patrick, but I'm going to try to manage through this.

A Anthony Sanders 01:14

Okay, well, we won't get into the internal politics of the Project on Immunity and Accountability, other than to say that they do great work. And there are many great cases that they're currently litigating at IJ. So we want to start off with a few announcements to our Short Circuit fans. The fall season is coming up where lots of law schools have lots of events. And one thing they sometimes like to do is to invite Short Circuit to the law school to have a live program. So we are going to be doing a little tour this fall of the country. First of all, on Thursday, September 15, I'm very happy that I'm going to returning to the state where I clerked, Montana. And we're going to be having a little event to begin a symposium on the Minnesota -- I'm sorry, the

Montana -- Minnesota is where I live now, Constitution, which is the 50th anniversary of the adoption of the Constitution in 1972. And so the law review is having a two day symposium about that. We're going to have a little podcast at the at the beginning of those events. And so if you're a students at the University of Montana, we'd love to see you we're going to have a fun show there. And it'll be recorded for the rest of our audience. Then we're going to be at our annual Supreme Court preview, which will be on Tuesday, September 27, at the University of North Carolina, and I'll be there with my colleague, Justin Pearson. So we've done that, I think it'll be the sixth year, we've done that. So that'll be very exciting. Then New York City is going to get a double whammy from Short Circuit. So first Thursday, October 6, I'm going to be at Columbia Law School, first time I've visited there, and we're going to have a Short Circuit program. So if you if you go to school at Columbia, we'd love to see you. And then, Anya, what is happening on Wednesday, October 26 in New York City?

A

Anya Bidwell 03:25

You don't have to be a student at Columbia Law to go there. Though, if you are a student at Columbia Law, you're also welcome. But we're going to have Short Circuit Live in New York City on October 26, it's a Wednesday. And it's going to be at this fancy place called The Mezzanine. And anybody, really anybody, who is interested in what we are talking about here and discussing cases is welcome to come and listen to three amazing panelists talk about Second Circuit opinions. It's going to be Maaren Shah, partner at Quinn Emanuel,. She clerked on the Second Circuit. Bruce Green, professor at Fordham, he also clerked on the Second Circuit and then for Justice Marshall. And Professor Alex Reinert, friend of the show. He is a professor at Cardozo Law. And he argued quite a few cases before the Second Circuit, including Twombly versus Iqbal. So do come and listen to us talk about Second Circuit cases, as well as what the Second Circuit really is all about. It's a very, very, very influential court, and it will be really fun to, as Patrick says, to spill some tea.

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Patrick Jaicomo 04:56

I'm gonna come now just to continue riding on your coattails.

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Anthony Sanders 05:01

So that's, that's going to be an evening event, it's in a place in the financial district. So all the folks getting out of your fancy Wall Street firms can can come on up to the event, get some free appetizers, and a free show of Short Circuit. There'll be a link, not ready quite yet. But there'll be a link in future episodes to the registration page. And you will be able to go to IJ.org to do that, and to RSVP in advance. So we would love to see you at one of these events in the fall. And I'm sure we'll have more that we'll let you about as they arise. But for today, we have a couple of cases to talk about -- one from the Fifth Circuit, one from the Ninth Circuit. But first, we got to take this opportunity. So we've had new show music for the last few weeks. Intro music I should say. And I keep saying that. It's it's been composed by our friend Patrick. So Patrick, tell us a little bit about the the intro music that our listeners are now forced to listen to.

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Patrick Jaicomo 06:08

Yeah, first of all, thank you for putting them in that position, because this is definitely the most successful musical project I've ever been attached to.

A Anya Bidwell 06:15

Hey for the record I volunteered Patrick just as he was in the middle of writing a cert petition. I thought the timing was perfect. So there you have it.

P Patrick Jaicomo 06:25

Yeah, absolutely.

A Anthony Sanders 06:26

The two go well together, I think cert petitions and intro music.

P Patrick Jaicomo 06:29

Lot of creativity flying around at that point in time. So yeah, actually, I'm more of a guitar player than anything. But when when Anya volunteered me here, Anthony asked for something that played into the Short Circuit theme. And I had just during COVID purchased a bunch of synthesizers that my wife thought I was never going to use. And so this was an excellent opportunity to rub that in her face by having, you know, having to say well, I have to do this for work. Now that we're talking about it, I wonder if I can write this off on my taxes. But I do think that composed is the right way to put it. Because, you know, all of this is electronic synthesizer music. So it's basically me just pushing in a bunch of buttons and turning a bunch of knobs and then hitting play one time and recording it.

A Anya Bidwell 07:13

You should have just asked Cora to do it for you. Cora is his baby girl.

P Patrick Jaicomo 07:18

My little daughter. She's 10 months old. And she could have absolutely performed this in the same way I did. Because like I said, after all the programming, you just press a button and then record it and then it's over.

A Anthony Sanders 07:28

And you entitled it, I haven't told listeners this, but Cherubs.

P Patrick Jaicomo 07:34

Cherubs like angels. Yeah.

A Anthony Sanders 07:38

Okay. Well, yeah. A little theology for our listeners.

P Patrick Jaicomo 07:42

Yeah, some more behind the scenes information here: I made like five little tiny songs. They're all like a minute or so long. And when you do songs like this, there's no lyrics or anything. So they all have kind of silly names that were just attached for the sake of communicating them. So I wouldn't read too much into the meaning of the title of the track.

A Anthony Sanders 08:00

Well, speaking of theology, our next case involves, I believe, an ex-minister. However, that's really where any parallels to anything angelic go away.

A Anya Bidwell 08:14

What a transition.

A Anthony Sanders 08:15

Yes, please tell us what happened in the Fifth Circuit in Tyson versus County of Sabine?

P Patrick Jaicomo 08:25

Yeah, of course. Yeah, I don't know how to pronounce it. But frankly, if your name is attached to this, I don't think your highest priority is getting the pronunciation correct. So just to give our listeners a warning, there is some kind of graphic description of some adult stuff here coming up shortly. So like Anthony said, we're dealing with someone who used to be a pastor and someone who's very much not an angel. And this is a pretty horrific case involving qualified immunity, the Fourth Amendment, the 14th Amendment. So the story is that a man named Wade Tyson called the police in Sabine County, he was way on business. And he said that his wife was home alone and distressed and we don't get any background on what was going on that distressed her. But because of this, a welfare check was set up for a sheriff's deputy to go out and make sure that she was okay. Now, the thing that first, you know, makes me raise an eyebrow here is that this this former deputy, David Boyd, who's really the, the villain here at the main of the story, he volunteered to go do this welfare check. But he didn't volunteer until the next morning. So he said, I will go tomorrow. And I don't understand if you're so concerned

about the safety of your spouse why the welfare check would take place the next day. But anyway, that's what happened. And so this guy kind of waved off all the other police that might be going out there to do the welfare check instead. Like Anthony said, he used to be a pastor 11 years earlier, but the Fifth Circuit notes for us that he had not been for the decade and that he had basically lost his pastorship because of sexual allegations against him, which is what we're going to get into here.

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Anthony Sanders 09:59

So why not go into police work if you have that happen?

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Patrick Jaicomo 10:02

Well, it's as you'll see here, it's going to end up playing in I think once the case goes back down to the Monell municipal liability claims against the county and the police department here because they knew that this guy was a shady fella. So he shows up to do his welfare check. He's not carrying a sidearm notably. He has a shirt that says Sheriff. He's in his personal car. And he goes to speak to this woman whose name is Melissa. And he has this really weird interactions with her throughout, he ends up being there for two hours. When he first gets there, he says a bunch of creepy stuff about you know, her being alone at the end of the lane. He asked if the neighbors can see her house or if she has any security cameras, and he kind of searches around the house looking for security cameras. You know, none of this is good. And all of it is sort of foreshadowing about what's going to happen here. So he has this long, uncomfortable conversation with this lady. At one point, he follows her into her house after she kind of wants to make some space and goes to get some water, but they end up on a kind of secluded porch to her house. He talks to her for a long time, makes a bunch of sexually suggestive comments, talks about how he and some other officers saw her at a restaurant, and how they were all talking about the things that they would do to her. And he talks about her breasts. And at some point his wife calls him, which he answers on speakerphone, and doesn't tell his wife that he's at this lady's house. He lies to his wife and said he's running errands. And then he asked his wife to send him sexual pictures. It is so, so, so bizarre, but the culmination here is he basically, you know, gets this nervous woman pinned on her porch, and then coerces her into exposing her breasts and genitals. At which point he then masturbated standing nearby, ejaculates, and leaves. And you know, all of this, it's just completely horrific and awful. And so she files a lawsuit against this guy and against the county. And all we're going to talk about here is is the guy because these are the issues at play here in the Fifth Circuit's decision. So ultimately, the district court dismisses this woman's case. And this is a qualified immunity case. But the key here is that both the district court and the Fifth Circuit are focused a lot on the actual constitutional merits here. And so ultimately, the district court says there's no constitutional violation here at all, which is, you know, jarring to say the least. And so the case goes up to the Fifth Circuit, they lay out all these horrific facts, and then they go into the Fourth Amendment. And so there's a lot of good and a lot of bad, in my opinion, when it comes to this particular decision. So in the Fourth Amendment context, they go through this story that I just told you, and they basically say, well, nobody claims there was a search. So that's curious to me, because of the whole surveillance cameras thing. But the issue is whether there's a seizure here, because obviously, this guy didn't physically stop this woman from leaving, he didn't tell her she couldn't leave. But she argues, hey, there's a seizure here, by implication, this is a show of force, you knew that this guy was representing the police as the woman at the house,

this was a welfare check. So he should have known that this was a you know, a more fragile than usual person. He came and made a bunch of really weird comments that made her feel uncomfortable. He also saw some paraphernalia for marijuana use through the window to the house. And then apropos of nothing other than having seen that started talking about how he has written tickets to people for having marijuana paraphernalia. And thereby very strongly implying, basically, if you don't go along with me here, you're going to be in trouble too, which then leads to him having her undress and all the rest of it. But the court basically says, None of this rose to the level of a seizure. There's nothing here, essentially, that would signal to a reasonable person that they weren't free to leave. And I just think that that is frankly, unreasonable. I think that any person in this position would have felt like they were pinned in. And if they didn't go along with this, as a woman alone in a house, at the end of the lane -- all things this man points out -- that something worse is going to happen. But the Fifth Circuit didn't buy that. Strangely enough, though, they move on to the 14th Amendment claim, which is a substantive due process claim, a much more theoretically complicated claim. And they do say that this was a constitutional violation of her bodily integrity in a way that shocks the conscience. And they go through all these other cases where there have been sexual assaults. And they say this is that kind of constitutional violation. Now, the thing that I don't understand here is in doing that analysis, they specifically say, over and over, he coerced her into doing this. He essentially made her do something against her will that was traumatic to her physically and mentally. And if the coercion was so strong as to shock the conscience, I don't see why the coercion wasn't enough to make the woman feel that she had been seized and wasn't free to leave.

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Anthony Sanders 14:42

Which is supposed to be a much easier standard, the Fourth Amendment standard.

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Patrick Jaicomo 14:47

So that does worry me a little bit just because, you know, they've kind of focused everything in this case on that. And then turning to -- this is where we're kind of coming into the immunity and accountability stuff -- turning to the second prong of qualified immunity was it clearly established. That's where you'd think you'd run into issues on this particular issue, because this is a fairly niche application of the 14th Amendment. And so that means there's not probably an earlier case involving the same facts and circumstances that would, quote unquote, clearly established this for purposes of qualified immunity. And so here, what the Fifth Circuit does is in a robust way, they seem to have actually gotten a message from the Supreme Court about this obviousness exception to qualified immunity, where the Supreme Court in another Fifth Circuit case, said some things are so obvious, everybody knows that they're unconstitutional or they're wrong. The Fifth Circuit then decided another case that involved obvious problems and got slapped down again by the Supreme Court. And so now they're finally starting to apply it. And so here they said, anyone who would do this sort of thing and shock, the conscience knows that what they're doing is wrong, and therefore, we don't need an earlier case. It's obvious that this was unconstitutional such that Officer Boyd or Deputy Boyd does not get qualified immunity.

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Anya Bidwell 15:57

Yeah, and they even use that phrase, offends the Constitution, right. And that's something that

comes straight out of Taylor versus Riojas, the first case that Patrick was referring to where you have feces-filled prison cells. And where the Supreme Court basically says you don't need a case that specifically says that six days in a cell like this is unconstitutional, because it offends the Constitution. And it's amazing to read Judge Clement basically saying that this offends the Constitution. There was a worry for a while that maybe, you know, Taylor and McCoy, the second case that Patrick referred to, maybe they're only about prison conditions case law, right. And then we had Judge Ho writing in Villareal versus City of Laredo, basically talking about, you know, doing something in violation of the First Amendment trying to shut up free press, essentially, offends the Constitution. And now we see that in this context as well, where, again, it's not a prison context. And Judge Clement even uses that phrase of offending the constitution. So that's really encouraging to see.

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Patrick Jaicomo 17:07

Yeah, and I'm happy to see it, because obviously, I think it's an important exception to qualified immunity, which frankly, shouldn't exist. But even to the extent it does exist, its purported basis is essentially to give fair notice to government officials that what they're doing is wrong. And we've seen case after case after case, where government officials have done something that any idiot would know is completely wrong and unconstitutional and still get qualified immunity. So seeing this extension here is great. And then another thing and this is the last issue in this case, is that the defendant argues Hey, I wasn't actually acting under color of law, because I was just there for my own sexual interest. And so you can't sue me for violating the constitutional rights. And thankfully, the Fifth Circuit doesn't take the bait on that. They say no way, you showed up because of a welfare check. You held yourself out as a police officer, you had a sheriff's shirt on blah, blah.

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Anthony Sanders 17:53

You talked about giving her a ticket or arresting her.

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Patrick Jaicomo 17:56

Exactly. And so here, they don't buy that. But I mean, this is it's not, it's not really a throwaway issue. I mean, there have been plenty of other cases, especially those involving sexual assaults or rapes, where the ultimate result has been, well, this wasn't the officer doing something under color of law. This was just them doing something for their own personal benefit, and so you can't sue them for violating the Constitution. Now, there might be other state law claims that you can bring against them. But usually, by the time this is being sussed out, it's too late to bring those claims. And so here, here, we don't have that problem.

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Anya Bidwell 18:28

I'm thinking back to that case, Patrick, that we saw about a year ago, and that involved federal officials, right, a CBP officer and horrible, horrible case of sexual assault of migrants. And there the case was whether you can sue them under the Federal Tort Claims Act, whether you can sue that officer, and the issue was very much was he acting within the scope of his

employment. And, you know, the Fifth Circuit said, we really feel really bad for these girls, one of whom I think, got killed. But we, you know, can do nothing about this, because the officer was acting outside of scope of his employment, even though you know, he was a CBP officer at the time he was doing it to them and representing himself as such.

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Patrick Jaicomo 19:12

Yeah. And there's another case that I think is still pending on a certified question to the Montana Supreme Court, where a Bureau of Indian Affairs officer either sexually assaulted or raped a woman while he was doing some sort of check. And the federal court under the Federal Tort Claims Act certified a question to the Montana Supreme Court asking about whether this guy was acting, you know, in the course of his duty or something like that.

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Anya Bidwell 19:38

Let's answer it for them right now. Yes. He. Was.

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Patrick Jaicomo 19:40

So this is a little bit of a detour before we go to our use case. But that issue of whether something is within someone's scope of authority, reminds me of a certain cert petition coming out of Minnesota right now, if you'd like to say a few words about that, Patrick? Yes, he was. But this is the last thing I'll say about this. This sort of argument is the core of unaccountable government officials. They will say anything and everything to get out of these claims, and this is very similar to the arguments made by the defendants in Monroe versus Pape when they were trying to get out of liability for what they did. And that was the case that sort of established the modern Civil Rights Era as claims where you can sue police officers if they violate your rights, even if they're doing something that they're not supposed to be doing. And in that case, that was the argument in the Supreme Court. Hey, these cops busted into this guy's house without a warrant. They violated all sorts of state laws to do it, and therefore you can't sue them for acting under color of state law, because they were violating it. And the Supreme Court said, No, that's not what under color of law means. And thankfully, that's, that's absolutely correct. But we need to make sure that none of that gets eroded, because things like this will then go completely unrectified. Yeah. So we have a case that Anya is counsel of record in that we filed with the Supreme Court, asking it to take up the issue of whether qualified immunity applies to government officials who are acting outside the scope of their authority. Or in layman's terms, government officials who aren't doing their job at the time they violate people's rights. And two circuits, the Eighth and the 10th, which basically is the entirety of the plains states, have held that it doesn't matter whether government workers are doing their duty when they violate your rights, all that matters is that they're government workers. And the other circuits that have addressed this issue have held differently and said, You need to be able to point to something or there needs to be some reasonable basis for you to say, I was doing my government work when I violated so and so's rights, and only then can you get qualified immunity. And so this is very exciting, because just the other day, yesterday, actually, the Supreme Court called for a response in the case, which means that at least one of the justices is interested in hearing the case. And now the other side will have to file a response explaining to the court why it shouldn't take the case. So we're very happy about that.

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Anya Bidwell 21:56

We kind of come full circle with one of the newspaper articles that mentioned the petition interviewed Professor T. Anansi Wilson from Mitchell Hamline School of Law. He's a Founding Director at the Center of the Study of Black Life and the Law. And he said that this reminds him of the Fugitive Slave Act, right. And he said, I'm quoting here, I'm concerned for government officials to be deputized in a way that gives them police power, that they will go unchecked, and that will fall on people of color. So it's kind of it's still it still has those undertones of, you know, oh, you're not acting under the color of law, therefore, you cannot be held accountable. And so you basically have citizens, for example, deputized and being able to get away with this kind of stuff. So it's much more about these kinds of issues than just dry, you know, scope of authority. And what does it mean,

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Patrick Jaicomo 22:56

The core of CSI is that a county engineer with no police powers at all basically acted like a cop and pulled over some trucks on the highway. And so that's the exact sort of extension that we're very concerned about if qualified immunity does apply.

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Anthony Sanders 23:09

And we'll put a link up to that CSI cert petition in the show notes, if you want to check that out. Anya, you just mentioned some of the the issues at the roots of of civil rights law. And the kind of granddaddy of them all of civil rights statutes, is the 1866 Civil Rights Act, which currently today part of it is codified as 42 USC Section 1981. And we don't get as many cases about 1981 as 1983, which some of our listeners will be familiar with. But we did this week in a case out of Hawaii, so Anya take us to the island of Oahu, and what apparently building inspectors do there?

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Anya Bidwell 23:58

Yeah, this is a fascinating case, Anthony. And in some way, it is similar to really our Bivens work at the Project on Immunity and Accountability, because there is this preliminary question, with section 1981 rather than 1983, of whether you have the right to sue in the first place. It's also a fascinating case because it's an example of conservatives voting against granting qualified immunity. Right. You have a sort of conservative appointees, Judge Bybee, he is writing for the majority and very much in favor of not granting qualified immunity. And the facts really are pretty straightforward. There is this Japanese guy who is also a Green Card cardholder, he bought a house in Kaneâ€˜ohe, Hawaii. It's a beautiful neighborhood by the way. I lived on Oahu because I went to university there. And that was my first stop. So a lot of it brings up those memories. And so he lives in this house in Kaneâ€˜ohe, he wants to renovate the house. He is acting in violation of the building code because he wants to rebuild a structure that's not allowed because it's too close to the ocean in his backyard. And he's not disputing that. And he hires a white contractor, and a white architect to help him with the house and with that structure. As city of Honolulu code inspector then comes into the scene. And he issues two notices of violation about this particular structure. And after he issues the first notice of

violation, the white contractor who is part of this case overhears the code inspector, say to a neighbor, here, and I'll quote it. He says, I keep shutting them down. But these Haoles don't listen. That's why I try to keep it local. When he says Haoles, essentially, I was a Haoles when I was in Hawaii. It's anybody who is non Hawaiian, is coming from the mainland. And here, he really is referring to those two white contractors. So he's saying, that's why I try to keep it local. Right, and I keep shutting them down. So that is essentially what makes the homeowner sue, under Section 1981, for interfering with the right of contract based on race. He's basically saying you only issued this notice of violation, even though I'm not disputing that I violated that. But you only issued it because I hired this to white contractors, and you want me to hire Hawaiians. So you discriminated based on race. And what's really interesting is that Section 1981, we're not seeing a lot of this. But it does come up especially in cases involving the right to contract because 1981 specifically says, and bear with me, I'm gonna read it because I think it's pretty fascinating. 1981 says, All persons with the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws, and shall be subjected to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, to no other. So what section 1981 does not have is something that 1983 has, which is this explicit authorization to sue, right. 1983 says, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. That is not included in Section 1981. And this is part of the dispute here. And 1981, of course, was enacted before 1983. And it was very much a response to the Black Codes that southern states were enacting in order to basically pretend that slavery was not abolished. So the first question is very much about whether there is a right to sue in the first place. And the Ninth Circuit with Judge Bybee writing for the majority, says that, yes, very much. There is a right to sue. And we realize that we are the only circuit, the only circuit that saying that. There are 10 other circuits that said that there is no right to sue under 1981. There is one circuit that's kind of non committal. And the Ninth Circuit is the only circuit that says you have a right to sue. And that's -- Yep, go ahead.

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Anthony Sanders 29:13

And this is a right to sue a government actor, right a state actor. The Supreme Court has said there's a right to sue a private actor if you're discriminated against on the basis of race by a private person.

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Anya Bidwell 29:27

That's, that's exactly right. And really what's at play here is the supreme court decision from 1991 called Jett, where Supreme Court explicitly -- I'm sorry, it's a 1989 decision -- where the Supreme Court specifically said that the reason the right to sue under 1981. And Congress comes in in 1991. Two years later, back in the day when Congress was actually much more responsive to Supreme Court decisions, then it's now. And in 1991, Congress actually, you know, incorporated, Section 1981 into the Civil Rights Act of 1991. And that's what according to the Ninth Circuit gives people the right to sue under 1981, because it was incorporated into this later statute. So according to the Ninth Circuit, the Supreme Court decision Jett was overruled by Congress. But other circuits do not read it that way. So it will actually be very interesting to see whether the government petitions for cert in this case, because the Ninth Circuit is such an unabashed outlier. Which we very much appreciate at the Institute for Justice, because we file Bivens suits a lot, and we fight Bivens all the time. And this idea of implied right of action and,

you know, courthouse doors being shut to plaintiffs who try to sue federal officials, that's very much familiar to us. And in this case, you know, the majority of circuits seem to say that doors are shut to people who try to sue state and local officials under Section 1981. So that's the first issue. Can you even sue under 1981? And the Ninth Circuit says, we don't care what other circuits say we think there is a right to sue under 1981.

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Patrick Jaicomo 31:10

Yeah, and it's interesting, it's interesting, too, because this is a very similar dynamic to what we see in Bivens, where in 1988, Congress passed the Westfall Act and explicitly acknowledged the availability of claims under the US Constitution against federal officials. And despite the Supreme Court on multiple occasions, having said that, that means something about bringing claims against federal officials, it's yet to ever, you know, indulge itself in figuring out what the heck that means, just like the other circuits in this circuit split, essentially, are not ascribing any value to what Congress did in the 90s.

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Anya Bidwell 31:43

Yes, yes, it's very much, you know, we use Congress speaking as a reason, you know, as an excuse for us to not do our job as a judiciary. But if the Congress actually does speak, we still don't want to do our job as a judiciary, so we pretend not to hear. So it's kind of goes both ways for them, right. And plaintiffs can never win. So that's kind of the first level of analysis here. Do you have a right to sue under 1981? Ninth Circuit says yes. The second level of analysis is whether they actually stated a claim, right, for the right to sue for racial discrimination. And the interesting thing here is that there is a requirement under 1981, or at least that's how courts read it, that race must be a but for cause, right? So in this case, plaintiff needs to show that had it not been for the race of the contractor and the architect that this code enforcer would have never issued that notice of violation. And the code enforcer says he can state the claim here because he himself admitted that he did, you know, violate the code. So if he violated the code, and I enforced it, how could you know, how could that be a but for cause? How could race be a but for cause? And the Ninth Circuit says, Well, that is really stretching, it's too far, you know, there are selective enforcement cases all the time, just because you have a statute under which you can, you know, cite this person for violation doesn't mean you didn't do it, doesn't mean that race did not come into this at all. So they're saying that what the code enforcement is asking for is too much. And that plaintiff doesn't really need to show that there are no other potential reasons other than race. And that reminds me of, you know, kind of First Amendment retaliation jurisprudence, too, right. We have this case, Castle Hills that were litigating in the Fifth Circuit. And there a woman was thrown in jail under a law that technically allowed her to be thrown in jail. But there's plenty of evidence to show that she was thrown in jail, because she spoke out against the city manager. And so the question is very much like, sure, there is this law that allows you to arrest her, but we see that you never arrest people for this kind of stuff ever. You know, we did FOIA requests and looked at all this data. And there's just nobody likes Sylvia, who was ever -- our plaintiff, Sylvia -- who was ever arrested for something that they say she did. So it is really strange. And it could really it seems to show that she was arrested, not because she violated that law. She was arrested because she spoke out against the city manager. So the same logic is here. And the Ninth Circuit is really not buying it. That just because you have this excuse of code violation that you did it, not because of race.

P Patrick Jaicomo 34:59

Yeah. And that's exactly the point that you're making Anya is, you know, what the Ninth Circuit says here is, it would be crazy if every time there was a claim like this, you could point to a violation and say, well, it couldn't have been because of racist animus because there was an objective basis. And their logic is sound. But the exact opposite standard applies under their jurisprudence for First Amendment retaliation where the Supreme Court has said, If there's probable cause, you cannot sue even if there is some evidence, you have to prove special evidence. And like Anya said, in Castle Hills, even the evidence we provided poring through 10 years worth of arrest records was insufficient. And so you know, this whole issue of it being a pretense, this Ninth Circuit's right. But in other areas of law, those sorts of pretenses are allowed all the time.

A Anya Bidwell 35:47

And you're giving me a really good idea on, you know, an argument to include in our petition for en banc review. Now that we talked about it. Because we will be filing an en banc review petition.

A Anthony Sanders 36:00

Well, I'm glad the listeners can can hear this workshop.

A Anya Bidwell 36:04

Oh, yeah.

A Anthony Sanders 36:05

for the en banc petition

A Anya Bidwell 36:07

Maybe we'll even post our draft online.

A Anthony Sanders 36:10

It's also interesting that to make the point there they cite one of the oldest civil rights cases, Yick Wo versus Hopkins, what's popularly known as the Chinese Laundry case, where the city San Francisco cited all these Chinese laundries for violating a law, which I think admittedly, they had, but didn't cite any of these these white laundries that had done the same thing.

A Anya Bidwell 36:36

Oh, and finally, so the the kind of the third level of analysis is whether the law was clearly established. And what's interesting there is, first of all, that they are using Saucier v. Katz, the Ninth Circuit. And I don't see sorcier being used very much these days, because Saucier is known for creating this one to framework for qualified immunity analysis, where you must first announced where there was a constitutional violation, and only then whether it was clearly established. And then of course, Pearson overturned that case, but they're still harking back to Saucier, which is great to see. And then they're also using the standard of fair notice, and a broader standard of qualified immunity application, where they're saying, you know, any official would have been on fair notice that discriminating based on race, and interfering with the freedom of contract, as a result is unconstitutional. So you have two conservative judges, conservative appointees on this panel. And all unanimously are saying that, you know, there was a fair notice. And we don't even need to look that closely into the case law. And we don't really need to look at, you know, similar fact patterns with building codes or, you know, whatnot, that that it's pretty obvious that you're not supposed to discriminate on the basis of race, when it comes to freedom of contract, and therefore qualified immunity does not apply. Very kind of interesting to see this much less stringent application of the clearly established analysis. This much common sense when it comes to applying qualified immunity. This is very much like the pretext argument, where, again, the Ninth Circuit's obviously right here where, you know, if the point is fair notice, you can take situations where anyone would know what they're doing is bad and say we don't need to dissect it. But that's the opposite approach that the Supreme Court has forced the circuit courts to take over the last 30 years where it is repeatedly slapped down lower courts who have denied qualified immunity, saying things along the lines of everyone knows that you can't unreasonably seize someone or everyone knows that you can't stop someone from first speaking or retaliate against them. Every one of the cases that's been decided on that basis, the Supreme Court reversed and said, We will not look at things on a general constitutional amendment level, we need to zoom into the specifics of the case. And so this is a refreshing change of pace. And like I said, frankly, is in line with the common sense of what most people would think, if you said, well, we need to have fair notice through clearly established law that that would mean. You guys should read our law review article on Tanvir versus Tanzin, where Patrick and I are actually saying that the Supreme Court is starting to walk away from this very specific application of qualified immunity. And Taylor versus Riojas is one such case that we mentioned earlier. So you know, hopefully things are going to be changing for the better.

P Patrick Jaicomo 40:02

We're still the optimists. But the paper is called recalibrating qualified immunity if you want to read it. And

A Anthony Sanders 40:08

We'll put a link up to that. Also, in the show notes. I don't have too much to add on this to what to what our, our leaders here have discussed.

A Anya Bidwell 40:18

Dear leaders if you will

Dear leaders if you will.

Anthony Sanders 40:19

Well, one thing that that stood out to me as a former employment lawyer, is there's this kind of odd entrance of the McDonnell Douglas test, which is the case that you get an employment law about discrimination. It's used in a variety of contexts, where essentially, it's a bit of a common sense analysis where if someone says my employer discriminated against me, and you in you have to make what's called the prima facie a case that, you know, I was not given the promotion, and someone else has given a promotion, and you know, I am of minority status and the other person wasn't. And so there was, say, the discrimination of whatever kind there was, then it goes back to the employer to say, no, actually, you know, they were a terrible applicant, we and we promoted a really good applicant. And so it's not racially based. And there's this kind of burden shifting analysis that happens. And I guess other circuits have applied that in Section 1981 cases. And the court here just says that it's a different area law. It's kind of weird to apply here. But especially it's weird to apply in qualified immunity, which is where it came up. And I was glad that the court said that because, yes, you know, whatever you think of this, the McDonnell Douglas test it it's just a whole different thing than qualified immunity. And so I was glad that it didn't make it any more confusing in trying to figure out what qualified immunity itself means in the context of this of this age old statute.

Anya Bidwell 41:58

Yeah, that's a great point. I think the court really tried to focus on what matters here.

Anthony Sanders 42:03

Well, maybe we can put up put that underlying both of these cases today: focus on what matters. And sometimes the federal courts of appeals actually do that. Well, thank you. Both are leaders of the Project on Immunity and Accountability for for joining me today.

Patrick Jaicomo 42:20

Thanks for having us.

Anya Bidwell 42:22

Always fun.

Anthony Sanders 42:23

And we'll look forward to having them on again in the future, whether it's at a live Short Circuit, remember to check that as news becomes available for the for event in New York City on October 26. But also when we when we have our non-live episodes such as today. But for the

rest of you in the meantime, I want you to all remember to get engaged.