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SPEAKERS

Tori Clark, Anthony Sanders



Anthony Sanders 00:24

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, September 21, 2022. And it is very good to say that we are back in our virtual studio today. Last week, you may have heard we had a great show from the hills of Montana in Missoula, where we were there as part of the celebration of Montana's constitutions 50th anniversary. Next week, we're going to be at the University of North Carolina for our annual Supreme Court preview. So make sure you stay tuned for that. Joining me will be IJ's very own Justin Pearson, managing attorney of our Florida office, and our good friend and returning contestant in our trivia competition, Professor Andy Hessick, who is a professor at UNC. And then the week after that, we're going to be at Columbia Law School in Manhattan, New York City, for a little bit of a Short Circuit live with the students there. We've been very kindly invited by the Federalist Society chapter at Columbia. And I think this is the first time we're announcing this, we're going to be joined by none other than David Lat. David Lat, of course, is most famous for having been a previous guest on Short Circuit about a year and a half ago, he joined us when he started his new newsletter. He's also known for things like starting Above the Law, running the blog a long time ago that got very famous Underneath Their Robes. He's a best selling author, novelist. But he will also be a returning guest on Short Circuit, which we're very excited about. And also joining us will be a New York practitioner, Mike Yaeger, who is an expert in sentencing law, and we may have another guest for the panel as well. So they're going to preview or review a few recent circuit court cases. And we're going to join the students at Columbia for that. And then a couple of weeks after that, as you have heard us discuss on the podcast in the last few weeks a couple of times, we're going to have a Short Circuit live that is open to the public, also in Manhattan, this time down in the financial district. And so if you want to come see a Short Circuit and you live somewhere in the New York City area, you can sign up in the show notes. Again, it's free, doors open at 6:30, recording at seven, and there's going to be some food and drinks and you can come see some some folks talk about recent Second Circuit cases. This is a second circuit special hosted by our very own Anya Bidwell with Professor Alex Reinert of Cardozo, Professor Bruce Green of Fordham, and Maaren Shah, who is an adjunct professor at Stanford, and also a partner at Quinn Emanuel. And if you go to Colombia, you can go to both Short Circuits. So it's going to be quite a number

of Short Circuits on the road. But this week -- it's time for a breather. So we're back in the virtual studio. And joining me today is from all the way from Texas, is IJ's Tori Clark. So Tori, welcome back to Short Circuit.

T Tori Clark 04:00

Hey, Anthony. Thanks for having me, again.

A Anthony Sanders 04:02

Tori, as I said, one of our attorneys in our Texas office. And so she is going to be discussing the case today, but funnily enough, I'm going to be talking about the the Fifth Circuit case, which Texas is a part of. She's going to be talking about a case from the 10th circuit that's out in the Mountain West. And it's a case with, as we often do in Short Circuit, some very disturbing facts. So Tori, tell us what's going on in this prison in Utah, and what the 10th circuit had to say about it.

T Tori Clark 04:36

Yeah, thanks, Anthony. So this case is called Paugh versus Uintah County. And like you mentioned, it's got some really tragic facts. But the 10th circuit's analysis, I think, on a legal basis anyway, is reason for some encouragement. So facts of this case: There's a young guy named Coby Lee Paugh. He was in his late 20s. And unfortunately, he struggled with alcoholism. So in 2015, he was placed on probation for an alcohol related offense. And one of the conditions of his probation was that he couldn't drink alcohol. But while he was on probation, he went on what the court described as a multi day drinking binge. And after that, he realized that he needed help. So he sought help, he took himself to the police station and turned himself in for his probation violation, thinking they would help him. But when he was arrested after he turned himself in, he had a dangerously high blood alcohol concentration, like point three to four, something really crazy like that. So officers immediately took Paugh to a hospital, and the doctor prescribed Paugh a medication to help with his withdrawal symptoms. But the doctor instructed the officers that if Paugh started getting worse symptoms, the officers should bring him back to the hospital. So officers took Paugh of the jail that night, instructed the jail staff on the doctor's orders, including the medication, including the fact that he was supposed to go back to the hospital if he got worse. But the staff didn't do any of those things. They didn't take Paugh of the hospital, even though over the course of the night, and the next day, he got progressively worse and worse. The jail staff saw that, but they just ignored it. They also didn't give him his medication. He was supposed to get it every few hours. But based on the jail staffs testimony, the max number of times that Paugh got the medication was like twice over the span of like two days. (And even that's in doubt, we'll come back to that in a second.) The next night, so a night and a day, jail staff ignored Paugh even more. They didn't do any kind of physical check on him for something like six hours, even though they could hear him vomiting, could hear him in distress and they knew that he was having issues. But still they just ignored him and didn't check on him. And so unfortunately, about 6am the next morning, they went in to give him his medication and they found him dead in his cell, and his lips were blue, which means that he was probably dead for a while before they found him. And it gets worse if that's possible. They did an autopsy on Paugh after he passed, and it didn't show any trace at

all of the medication that the doctor prescribed. Even though the medication has a really long half life, so it should have showed up in his bloodwork. Instead, the autopsy did find some Benadryl in his system. So it's likely based on these tests that jail staff just never gave Paugh the medication he was prescribed for the withdrawal, and they gave him Benadryl instead. And this was obviously devastating and later expert testimony was that if Paugh had either gotten the medication the way the doctor had prescribed it, or if jail staff had taken Paugh of the hospital, he likely would have survived. So this was completely preventable. All the jail staff had to do was follow the doctor's orders; at least one of the doctors multiple orders and they did none of that and Paugh died. So after that really horrible loss, Paugh's family, his parents and his sister, sued the jail officials among others under Section 1983. And specifically Paugh's family claimed that the defendants violated the Eighth Amendment by being deliberately indifferent to Paugh's medical needs. But the jail efficient officials, like many government officials argue that they were entitled to qualified immunity on the claim, either because they weren't deliberately indifferent and didn't violate the Constitution, or even if they had violated the Constitution, that the law on deliberate indifference wasn't clearly established enough to overcome immunity. But the district court held that officials weren't entitled to immunity. And so the case went up to the 10th circuit on an interlocutory appeal, which is something that is available for officers who are denied qualified immunity at the trial court stage, even if they don't have a final judgment yet.

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Anthony Sanders 09:29

Something very few people get to do. But if you're a government official, and you're sued, you can't.

T

Tori Clark 09:35

Yes, it's a unique privilege and they actually get several bites of the apple because they can appeal qualified immunity at the motion of dismiss stage and then even if they lose at the motion of dismiss stage and lose that appeal, they can again appeal qualified immunity at the motion for summary judgment stage, so they get multiple bites at the apple even on interlocutory appeal. On immunity, which part of what makes it really formidable, right when you just get all of these chances. So the primary issue on appeal before the 10th circuit here was whether the jail officials were entitled to qualified immunity. And for those who may not be familiar with that doctrine, qualified immunity breaks down into two basic questions. The first question is whether there was a constitutional violation at all. And the second question is whether the right issue was clearly established such that any reasonable officer would have known that what they were doing violated the constitution. So first, the constitutional violation. Like I said, government officials violate the Eighth Amendment when they act with deliberate indifference to inmates medical needs, and there's an objective and a subjective component to this analysis. Objectively, the inmates harm has to be sufficiently serious to rise to a constitutional violation. And you would think that the officials here would have just conceded this point, because the inmate here literally died, you know, how much more serious can you get? But in one of the least convincing legal arguments I've ever heard the defendants actually contested this, they said that the plaintiffs hadn't met their burden of showing that alcohol withdrawal syndrome was sufficiently serious, even though there's no question at least not according to the opinions that the alcohol withdrawal syndrome is what killed Paugh. So obviously, the court batted that reasoning down with a lengthy string site of cases, saying that

death is sufficiently serious harm under the Eighth Amendment. So moving to the subjective part of the analysis, the court has to look at whether the defendants knew of the risk to the inmate and disregarded it anyway. Now, I'll note here that the court didn't actually rule that: Yes, the defendants actually knew this and disregarded it, because we're up on a motion for summary judgment on appeal here. So the court, all the court has to do is decide whether there's a material fact question based on the summary judgment record. But the court here said, "Yes, that there were tribal issues of material fact that at least should go to a jury." The officers argue that: well, it wasn't clear that Paugh was in serious need of medical care, because his symptoms were really similar to other people who were intoxicated. But the court said, "No, Paugh's need for medical care was obvious, if not from the symptoms, it's themselves, in light of the doctor's orders that Paugh should get additional treatment." You know, the doctor specifically said, "Here's a pamphlet, here are the things you should be looking out for." They saw those things, and they just ignored them. So the court said that it was obvious that he was in serious medical distress. And then the court went through the record evidence and decided that there's a material fact as to whether each of the individual defendants knew of the need for care and disregarded it. So with all that the court concluded that the jail officials violated the Eighth Amendment. But like we said, when you're dealing with qualified immunity, a constitutional violation isn't enough. So even though the court decided that the officials violated the Constitution, they're still not liable unless the right issues clearly establish. And that is a pretty high bar, the clearly established standard. And courts in this analysis are instructed to not defy the right to generally, they have to defy the right with sufficient specificity that would give the officers fair notice of the fact that their conduct would be unconstitutional. And some courts have taken this standard to the extreme and sometimes even hold that like the smallest differences, like attacking someone with a baton versus attacking them with pepper spray, make a difference as to whether the officer would understand that their conduct was unconstitutional.

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Anthony Sanders 14:12

He was sitting down, not lying down, and therefore it's totally different.

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Tori Clark 14:18

Precisely. And that's pretty much the argument that defendants made here. They argued that it wasn't enough to look at cases where jailers purposefully ignored other kinds of obvious medical needs, like symptoms of a heart attack. And the defendants actually even argued that a case dealing with heroin withdrawal in a jail wasn't similar enough to alcohol withdrawal to count. They said, "In order for this to be clearly established. We have area the plaintiffs have to show that there are cases specifically about alcohol withdrawal in jail in order to overcome this bar." But the court shut that down pretty quickly actually. And they held that it is clearly established that would a detainee has obvious and serious medical needs, ignoring those needs necessarily violates the detainees constitutional rights. So in the courts view, it didn't matter that none of the previous cases specifically dealt with alcohol withdrawal. And it also didn't matter to the court that some of the previous cases dealt with medical officials instead of jail staff. So I think the biggest and best thing the court did here was it defined the right issue in such a way that superficial factual differences like those didn't matter. And I think that's particularly important and significant in a context like this, where the analysis kind of by its nature is so fact intensive. You've got subjective and objective components, you have all kinds

of different medical issues, you have all kinds of different ways that jail officials can be indifferent to those issues. But the court places the clearly established inquiry at a level where courts can focus on the animating principle behind the right itself. Because the the Eighth Amendment is concerned with cruel and unusual punishment. And it would be a cruel and unusual punishment, to kill you for something like a probation violation. And that's essentially what happened here. But in a free society, you shouldn't have to be afraid of dying in jail, just because a government official decides to deny you medical care that you need. And so I think the court's decision here does a good job of distilling down the qualified immunity analysis to that basic idea.

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Anthony Sanders 16:39

Yeah, absolutely. That is the biggest step. And there's a lot going on in this case, and there's a lot of detail and the court goes through many different defendants and permutations of what each defendant did on whether they satisfy qualified immunity or not, and just about all of them don't. But threading the needle between that you have to have a sufficiently similar case, and then the general principles, the idea that you need to look at the general principles of what the right is, there's so much case law out there now, and there has been for some time, that any court can kind of lean on one or the other that well, there's no case that has exactly the same facts. And we've talked about so many cases here over the years where the court did that there are not exactly the same facts and therefore qualified immunity doesn't apply versus this standard of you can abstract from that, which usually you do in law, you abstract general principles from specific facts and past cases. This is, of course, a little bit different than what we've also talked about recently, where the Supreme Court had those couple of cases in last term reminding courts that sometimes something can be so bad that it doesn't have to have a specific holding in the past. And that was one of his cases about a someone in a cell with fecal matter all over the cell and left there for several days. But here, it's more that this right is clearly established, the Eighth Amendment. It's just you have the exact permutation of these facts. And I hope courts keep doing more of what the court is doing here, if they're behold to this case law. And I think this is a good example of how a court can do that and do it very carefully. Sometimes the idea of less is more when you're when you're issuing an opinion. And there are 55 pages here of very intense facts. But given the the number of defendants perhaps that was needed here, and I don't think this case is going anywhere else. But if this case did go en banc or to the Supreme Court, I think that the reviewing court would have a lot of trouble trying to reverse the reasoning, because it is so detail.

T

Tori Clark 19:13

Yeah, absolutely. And again, that goes back to what I was saying about how significant it is in this case that the court framed the right in a way that reaches not only this case, but all of the jail staffers that are still party to this case, because you're right, the the court does go through each individual officer, and each individual officer violated Paugh's rights in a slightly different way. By "Well this person actually talked to the medical staff but they gave them wrong information. And you know, this person was the person who was responsible for giving the medication they did do that." But the courts legal analysis, in terms what right right each of the officers violated is the same. The court said that each of these officers violated this right. And it didn't matter so much factually exactly what each of them did to violate that right. I thought that, like I said, did a good job of keeping the focus on "okay, like, what is the right issue here?"

And would this have been obvious to this person that Well, you can't just completely ignore someone who is obviously, in medical distress." Which you would think would be obvious to everyone. But under the qualified immunity analysis, that outcome isn't always obvious. And we definitely can't take it for granted.

A Anthony Sanders 20:44

Finally, for our appellate practitioners out there, the very end has this very short statement about the county's appeal. Do you want to tell the listeners just a tad about that?

T Tori Clark 20:58

Yeah. So the county also was denied summary judgment on their Monell claim. So the county was not entitled by itself to interlocutory appeal. But what it could do is if the officers interlocutory appeal had issues that overlapped with the county's issues, then the county could basically hitch their wagon to the officers interlocutory appeal, and be able to litigate the issues sooner than they otherwise would have. But the court strikes that down pretty quickly also. They they look at this, and they say, "No, there are no overlapping issues at all. And so we're not going to exercise pendent jurisdiction here, you just kind of have to wait your turn and appeal whenever it's your time."

A Anthony Sanders 21:51

Yeah, and because people often forget that cities and counties, which can be sued under Section 1983 for damages unlike states, they don't get qualified immunity. They have these what we what we've called in the past other kinds of immunities, and we go into this in the in the last series of bound by oath, that the the Monell standard, as he called for when a city or county is liable for something like this, and they have to have a policy. And there's a few other criteria. That in itself is a kind of immunity, but there is no actual qualified immunity, which although we have talked about this, in previous Short Circuits, some courts kind of creep in there now in one way or another when they confuse the two. But this Court did very good job and say, "No, that's different. And we're also not taking jurisdiction of this appeal and go back to trial court."

T Tori Clark 22:50

Yeah, yeah. And it is kind of, like you mentioned, it's interesting that courts overlap those analyses, because the Monell analysis, like what plaintiffs have to show to succeed on a Monell claim, is, at least I think, in most cases, pretty different from what they have to show to hold government officials liable.

A Anthony Sanders 23:12

It's a whole different kind of thing.

T

Tori Clark 23:15

Yeah like you said, Monell claims really focus on the policy of the municipality involved and the bigger picture, what the county itself did beforehand in order to create the situation where the officials violated constitutional rights. So it was interesting that the county tried to get themselves in there and avail themselves of this major perk for government officials. But yeah, ultimately, the court pretty succinctly said, "No, you can't do that."

A

Anthony Sanders 23:55

Well, another major perk for the government is a rule that you have to pay your taxes before you challenge them. And that's something that we're now going to turn to for the case I'm going to talk about. It's a Fifth Circuit case from a couple of weeks ago, and it's Franklin versus United States. Hopefully nothing like this has happened to any of you listeners. But if you have thoughts about maybe leaving the country, because the government might be looking for you, for some reason, you might want to start taking some notes. So this man, James Franklin, he owed taxes and they don't really go into exactly what the taxes are, but he owed them on not reporting income from a foreign trust. So the the United States if you have income, as you all know, in the country, get it on your W-2 or you have your own business to make money, you got to pay taxes on that. But also, if you have investments outside of the country, and you get income on that, you also have to pay taxes on that. Well, he didn't report those taxes. So there were taxes assessed on him. And then penalties on top of those taxes that totaled a lot of money about \$420,000. He then did an interesting thing, he did a Freedom of Information Act request on his tax files. And why he did that probably because it's hard to get discovery on the IRS, if you go to court, but for whatever reason, he did a FOIA, as we call them, and he got back some documents. And he thought from the documents, at least, that he got that there was a technical violation in how the IRS assessed the taxes that there wasn't a sign off by the right officer in the chain of command in the IRS basically. So he found he had an argument here for why the taxes themselves were assessed incorrectly. And that would mean the penalties were assessed incorrectly. So then he goes to court. But what he doesn't do... He goes to court through a collateral attack on the taxes. It doesn't seem like he went through the normal IRS appeal process. But I think that's a little bit neither here nor there for how the court rules. And so he goes to court and says these taxes were assessed unlawfully. And here's the evidence I got from this FOIA. But the government then comes back and says, "Okay, well, there's a few problems with that." And they actually said there were some documents that showed that it was assessed correctly, and there was the sign off. And his response, which I have a lot of sympathy for was, "Well, you never gave that to me. And so, what, why didn't I get these documents previously." But in the end, that doesn't matter, either. Because the the big argument here is that the IRS has is that you didn't pay your taxes before you challenged them. This is something that is true with the IRS, that isn't true with a lot of other things you challenge that the government does. So if the government is regulating you in some way, you can challenge that before you violate the law and have it adjudicated. But if you're challenging taxes, you have to pay those taxes, and then go through the process of challenging them. You can't withhold the taxes and challenge, the court simply doesn't have jurisdiction, if you do that. And the reason, of course, is that the government wants its money, maybe it has to give you back some of the money or all of the money later, but it would like the money in the meantime. And that is essentially the court says inherent in sovereign immunity of the United States. So he didn't pay the money. And so the court says, "Look, we're not going to adjudicate your arguments." He claims that he's challenging the penalties, not the underlying taxes. And I

don't know if that would have made much of a difference. But they say really, all your arguments are about the underlying taxes. And if the taxes themselves are illegal, then you would know the penalties. And so really, you're just going to cover the underlying taxes, which again, you have not paid. And so he is said to be out of luck. Now, there's one part of his case, though, that they do consider because as part of his violations, where not reporting and paying taxes on this foreign income, is they took away his passport. So that effectively means that he can't leave the country. Now, the court doesn't really go deep into this rule about taking away his passport. But I think it's pretty obvious. If you have a lot of money overseas, and you don't pay taxes on it here. Maybe you have an incentive to leave the country and not come back for a long time. So and live your life with your foreign income wherever, whatever country you can get into. So they took away his his passport. And then he claims that this violates his right to travel. And this gets into some interesting review of the right to travel. Now the right to travel. You hear a lot about it. During the pandemic, you heard a lot of people say things about the right to travel and some of these restrictions affected your right to travel or that if you had to get vaccinated to go on a plane that would affect your right to travel. But the right to travel doesn't come up that much in constitutional litigation. But the Supreme Court has said that there is a fundamental right to travel, at least within the United States and it's just kind of inherent in our national union that you have this right. It actually was specifically in the Articles of Confederation. But it's not in the US Constitution as a textual matter. I think that maybe is the only right that was in the articles but isn't in the Constitution in any way. But the Supreme Court has said, at least applied to the national government, the Fifth Amendment, due process clause encompasses the right to travel and during the years between what we call now the Lohcner era, and in the early 20th century, where some rights were protected under the due process clause, like the right to earn a living and the right to contract. And then the era when some rights came back under the due process clause with the Warren Court and the right to privacy. This was one of the very few rights at the Supreme Court, even during that interim period where the Supreme Court wasn't really into any unenumerated rights said wasn't an unenumerated rights. So right to travel. It's broadly recognized both you find conservatives and progressives who say it's protected by the Constitution, even though it's not textually in the Constitution. So he argues that "Look, this is one of the most fundamental rights right to travel and if you take my passport away, I can't leave the country." Well, as we all know, though, just because you have a right doesn't mean that you're going to win a case where there's an impact on that right from the government. And the court doesn't exactly address whether there is a right to international travel, which again, the Supreme Court has kind of hinted at, or there's some dicta at least the court claims that it's dicta that says there's a right to international travel, even though it has more squarely ruled on domestic travel, there's some circuit court cases, wher they've said the courts, or at least some judges have said that there's a right to international travel. And of course, these days a right to international travel, you need a passport wasn't true, maybe 200 years ago, but it is today. And so he says, "Well, you are violating my right to international travel by taking away my my passport." And the Court essentially says we're not sure if it's a if it's a fundamental right or not, if it is a fundamental right, it would get, of course, some kind of higher scrutiny. If it isn't, it just gets rational basis, and you're going to lose, but they say even if it does get higher scrutiny, and they apply a kind of intermediate scrutiny, you still lose because the government has to get its taxes and you haven't paid them. And this is a way of elbowing you into paying those \$421,000 including the penalties, or whatever it is. And so, in the end, Mr. Franklin does not get his passport back. And it looks like that might be the the end of the road for him. Tori, I'm guessing you have never had your passport taken away by the United States government. But do you have any any other thoughts on this?

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Tori Clark 33:16

Yes. Yeah, I have never had that unfortunate thing happened to me. But you know, knock on wood, who knows in the future? But as I was reading this case, you mentioned COVID earlier, and I felt like COVID was the elephant in the room here. I'm not saying that COVID was the reason the panel came out this way. The SCOTUS precedent that the court relied on predates COVID. But as I was reading, I just kept thinking, without knowing any of the case law just knowing the issue, I kept thinking there's no way the courts gonna hold the international travel is a fundamental right, no matter what the case law says. I think the past few years of crazy international travel disruptions, and everything that's come along with COVID, have really conditioned us to think of international travel as more optional than maybe we did before the pandemic. So I think just like on a gut level, it would have been really surprising to me for the court to hold that international travel is not just a constitutional right, but a fundamental constitutional right. And so I wonder even if it didn't affect the court outcome, I wonder how it shaped the contours of the court's analysis here. And also on the travel issue, I thought it was really interesting, and also really troubling that the court could double down on this distinction between rights and freedoms. I didn't quite get what was up with that. Yeah, it's really odd. And it comes from a SCOTUS case, the Califano case from the 70s. So it's not like the the Fifth Circuit here just like pulls it out of nowhere. But instead of just kind of quoting that language and moving on the court repeats it and emphasizes it and says, "Well, you don't really have a right to international travel, it's more of a freedom to international travel." Which is so confusing, because if you go back to property class with me for two seconds of what the court seems to be saying, is that liberty under the Constitution is comprised of this bundle of sticks. And then if you look at a particular stick in the bundle if it's not a fundamental right, that is subject to strict scrutiny, then it's not a right at all. It's a freedom. And then the courts discussion of freedom sounds an awful lot like something that the government grants individuals out of the goodness of its heart, and it's not something that individuals have a right to are entitled to independently.

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Anthony Sanders 36:08

And usually that's called a privilege. The you often see that in cases and statutes, even where the legislature will say, "Well, this is a privilege, and therefore you only get the protections we give you." But they don't call it a freedom. Rights are about protecting freedom. I get that it, that language was used maybe inarticulate in this case, but for this court that pick up and run with that is strange.

T

Tori Clark 36:38

Yeah, the difference between a right and a freedom, or privilege. None of that is true in the sense that, even if a particular aspect of liberty isn't a fundamental right, it's still a right that the government can't infringe on. Even if it's only subject to rational basis review, it still has to be rationally related to a legitimate government interest. And people who are familiar with IJ where I know, Anthony, IJ works a lot on strengthening rational basis review. And when it's done, correctly, kind of in the way that IJ has been advocating for a really does have teeth, it really does require the government to prove that they're not just restricting your liberty for no good reason. So the court here seems to be to me kind of building on what was already kind of a rickety hierarchy of categorizing different rights as fundamental or not or somewhere in

between. And this kind of "freedoms" category almost seems like the court is moving towards creating yet another category for liberties. But this one they're not even rights at all, much less fundamental rights.

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Anthony Sanders 37:59

Well, this is just speculation, but I wonder if part of what was driving that is another elephant in the room, which is Dobbs, because you're right COVID looming in the background is huge for international travel. The court does, in which I didn't discuss does invoke the Washington versus Glucksberg standard, which is a standard that it has to be a historical right that's recognized at a close level of particularity, before we're going to recognize it as a fundamental right. And Dobbs, of course picked up Glucksberg and use it pretty strongly in its analysis, and its overturning of Roe versus Wade, none of those recent developments enter into this case, but in using Glucksberg in that way, for me, this is a right, right to international travel, is something human beings have done since they became Homo sapiens without slowing down in a nation of immigrants. And so it's a weird thing to use Glucksberg. And if they just had gone straight, "Look, we're going to assume it's an intermediate, and you get intermediate or heightened scrutiny because of course, people have always had international travel and yet you can restrict it for blah, blah, blah, blah, blah." That would have been different but this odd kind of skirting around the elephants in the room, as you put it, I think can maybe explain some of this.

T

Tori Clark 39:39

Yeah, definitely. And reading this I was looking out for a Dobbs reference looking for at least sighted and my sense is that that was a specific choice by the judges to not wade into that particular aspect of the controversy. But while still affirming the Dobbs style analysis by reaching back to Glucksberg, even though like you said, international travel is not only kind of historically in all of human history been really important, but we owe the existence of the United States to international travel by some of the founding fathers who had to go to France and like go abroad to ask for aid. So it does seem kind of weird to say, "Well, there's no historical basis for this right to international travel," when we might not have a constitution without international travel.

A

Anthony Sanders 40:37

And you can still do that. And then make your assessment about whether there's a justification here when the guy owes \$421,000 from a foreign source. But that's a different story. Well, Tori, thank you for coming on and talking about these different cases. And we'd love to have you on again some time. We'll, as I said, be on the road in some of the next few weeks. And so please listen to us, as we make those journeys. But in the meantime, I'm going to ask that everyone get engaged.