

Short Circuit 242

Thu, Oct 20, 2022 2:03PM 47:50

SUMMARY KEYWORDS

law, case, sixth circuit, cert petition, rational basis test, rubber stamp, property, people, home, equity, judge, kentucky, state, court, ij, agencies, called, talking, government, federal courts

SPEAKERS

Andrew Ward, Anthony Sanders, Bob Belden

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 Thursday, October 20, 2022, which means this is the very last episode we will record before we record our Short Circuit Live in New York City on Wednesday, October 26. So if you live in the New York City area, this is your last chance to RSVP for that show, which will be at 7pm in the financial district in Manhattan. So RSVP ASAP. And then you will get to meet my colleague Anya Bidwell and many others from IJ. And our great guests who will be talking about the Second Circuit, and we've had a number of RSVPs recently. That's great. Keep them coming. A lot of law students so be it'd be wonderful to meet some more law students. And right now of New York City area law schools Brooklyn Law School is definitely winning. We have a lot of students from Brooklyn signing up, which is great. But other other law schools in the area you guys you got to do what you can to make it up because we'd love to see some of you too. Got some Columbia folks who some of whom I met a couple of weeks ago at our Short Circuit Live there. Some from our friends at NYU, Fordham we got a couple who have a professor coming and Cardozo, a professor from Cardozo, Alex Reinert is going to be on the panel. But if you guys want to want to get close to Brooklyn, we'd love to see some more law students. And of course, some more lawyers, whether you're a clerk or a practitioner, and are just a member of the general public, you definitely do not need to be a lawyer to come and enjoy Short Circuit Live. So we look forward to seeing some of you then. Now today, we have with us on the podcast, we have one guy who knows a thing or two about New York City. And that's Andrew Ward. Andrew, welcome back to Short Circuit.

Andrew Ward 02:30

Hey, I am very glad to be back. Thank you for having me on again. And I do love New York. It's great place.

Anthony Sanders 02:37

.....

Well, fantastic. And another fellow who comes from a different part of the country than New York City, but is nevertheless a proud American, and that's Bob Belden. Bob, welcome to Short Circuit.

B

Bob Belden 02:51

Yes. And Anthony. Thank you for having me. The the people in New York City make dinner reservations after I have already gone to bed. So it is not for me, but I respect Andrew's choice to go.

A

Anthony Sanders 03:06

Well, it's good that we're recording this early in the morning then while Bob is still going. I'm sure he's been up for a while after his Indiana upbringing. Now, what we're going to be talking about today is actually pretty close to Indiana. And that's a couple cases from the Sixth Circuit. Now, one of them is about property rights. We'll be talking about that one later. But first, a case that is an IJ case that both of these gentlemen are attorneys for. Now, we were maybe going to do this case when it first came out. I think it was scheduling or something that we didn't talk about it on Short Circuit Live, but it is now time to talk about it because it is a cert petition, turned into a cert petition, that is pending at the US Supreme Court. It is an IJ case that some of you may have heard about over the last couple years. It's challenging the state of Kentucky's certificate of need law, and is Tiwari versus Friedlander. So, Andrew, you've been working on this case a long time. A lot of judges have had things to say, which contradict each other. It sounds like there's some other contradicting contradictions all over the country. And the cert petition is hoping to bring some clarity to all of that. So take it away. What's going on with the con law in Kentucky?

A

Andrew Ward 04:35

Yeah, and that's C-O-N, certificate of need, that just so happens to spell con law. So what's going on here is a case about two men that just want to open a business, help their community, and the oldest of old boys networks won't let them. Our clients are two entrepreneurs, Dipendra Tiwari and Kishor Sapkota, who are really living the American dream. They immigrated to the United States from Nepal. They became American citizens. Dipendra opened up his own business as an accountant. And they live in Louisville, Kentucky, where believe it or not, there's actually a pretty large Nepali speaking population. There are tens of thousands of Nepali refugees that were forced out of Bhutan around the year 2000. It's a it's a pretty long and not very well known story. But a lot of those refugees ended up in the United States and several thousand of them, believe it or not, ended up in Louisville, Kentucky and live there today. And Dipendra has an accounting business focusing on that community. And he used to work actually at a home health agency. Those are people that send health care workers into the home: nurses, physical therapists, other aides to help with people with in-home care. He used to work at one of those places. And Kishor is himself a home health aide. And when they met, they really had this lightbulb moment where they thought that they could really help do something for the Nepali speakers in Louisville. It's an older community, a lot of people don't speak English, there's a different set of cultural norms than a lot of people that have been living in Kentucky longer. And they thought, you know, we should open up a home health agency. We

could hire younger people in the community who still know Nepali, could interact with the older, sicker population, and everybody could win. And so they spent a ton of time planning that out. You know, they filled out an application, and everything was going great. And that is when they ran headlong into the CON law. And what that certificate of need law says is that if you want to open a new medical business, certain kinds of medical businesses in Kentucky, you have to show that your business is needed. And the way you do that is that it's entirely based on how many existing agencies there already are. So the state takes a look at how many agencies there are. And they say, there's enough, we don't need any more. And that's basically the end of it. They actually just use a mathematical formula that's simple sort of grade school arithmetic, where they look at the statewide usage rates of home health. And then if a county has more people using it, then the rates would predict statewide new agencies get to open. If there's a significant enough gap. And if not, they don't and that's it.

A

Anthony Sanders 07:47

So because we all know that supply and demand is equal everywhere all the time.

A

Andrew Ward 07:52

Yeah, there's there's no such thing. Well, it doesn't examine need at all, like Dipendra and Kishor were trying to meet a need. There are these people who don't speak the same language. They want, it'd be better to give them care in their native language. But the law doesn't look at that. It doesn't look at whether the agencies are doing a good job, or whether they're actually meeting any particular needs. It's just a calculation based on numbers. If there are enough, then no new businesses are allowed. And if there aren't enough, new businesses have a chance. But then they go into an entire trial-like program where the existing agencies have a chance to object to their existence by arguing that No, no, no, we've got all the need like this is covered. Why should anybody else get to do anything that would compete with us like we we've got it. It's basically like you want to open -- this is, you know, an example from the briefs. But you say, you want to open a hamburger restaurant and the government's like, no, no, no, they're already enough Burger Kings. Like that's it, you're done. Well, maybe maybe in a few places. Six counties in Kentucky when we filed the suit out of the 120. Maybe you have a chance, but you are going to have to litigate against McDonald's for like a year. That's effectively what this law does. There was no calculated need in Louisville. And so our clients couldn't open their agency Grace Home Care. And somewhat amazingly, the logic here that the government says is that by keeping new people out of the market, by not letting them address needs that they perceive, this will consolidate business into fewer, older agencies and that will reduce costs, increase quality, and increase access to care. You might have questions like how could banning more care possibly result in more access to care? But nevertheless, that is often how IJ's economic liberty litigation works. We got to get under something called the rational basis test, which we'll be talking about quite a bit, which actually means more like can the government make something up that's not totally laugh out of your chair bad and, if so, that's how the law will be sustained. So my clients sued about this saying, you know, we have a fundamental -- well, fundamental, maybe not, we'll see about that -- but a constitutional right

A

Anthony Sanders 10:11

That is technical term in in this area. So I think it's fundamental.

B

Bob Belden 10:16

I agree.

A

Andrew Ward 10:16

Our clients have important and longstanding right to be able to earn a living. That's something that goes back hundreds and hundreds of years in English common law, American constitutional law, maybe all the way back to 1215 and Magna Carta. And this law is infringing it basically entirely for the benefit of the existing players. Immediately, the Kentucky Hospital Association intervenes to defend the law. They say we have a powerful financial stake in this. We will lose money if this law goes away. So you know, please let us participate in the case, which we think kind of proves our point. And then we have this bizarre situation where it ping pongs back and forth. Every time we get a new judge, it seems like something totally different happens. So our first judge reviewing a motion to dismiss says this law seems terrible. Not only does it sort of not make any sense on its face, there is decades and decades of scholarship studying these laws saying they seem to worsen all the things that they purport to fix, which isn't surprising, because like, nobody would really think that concentrating service into just a few agencies is going to make things cheaper, or more accessible or better. It really seems like this is just a protectionist thing to benefit the established players. Look at them intervening in this case to say, whoa, whoa, this helps us make money. And so he says, Yeah, this looks like it could actually be unconstitutional under the rational basis test, which is like a relatively weak standard of review where the government can kind of say anything plausible, and it's really the plaintiff's job to say no, there is no possible way that this law could be doing something legitimate. That's how ...

A

Anthony Sanders 12:03

By relatively weak, you mean weaker than absolutely anything else.

A

Andrew Ward 12:09

Yeah. I mean, it really is. And this is eventually the subject of our cert petition, different formulations of this test go so far as saying it's really if there is anything that the human imagination can come up with, as long as it's conceivable, you know, we have to sustain a law. We go into discovery, you know, there is a very strong record about how the hospital association lobbies for this law, the state follows the hospital association's recommendations, they have committees to try to open up the service to hospitals, but keep everybody else out. There's a huge academic record, including the federal government's position itself, the federal government has been against these laws since the 1980s, saying they don't lower costs, they don't increase access, they don't improve quality. And there's this close to unanimous and admittedly not 100% unanimous, academic consensus that these laws don't work. There's a woman who used to run Kentucky's CON programs said it's just sort of shenanigans by entrenched incumbents. And in response, the other side, you know, hires a guy who says, Oh, well, I think it works. He does some some analyses that don't meet the expert standards in

federal court and aren't even close. And he says, Well, I don't know, maybe this could arguably do something. And of course, on top of all that is the common sense point that it is not going to increase quality of care to force people to get care in a language they can't understand. It's not going to increase access to ban the kind of care that they want. The state's response to that is like, well, you know, they have an app.

B Bob Belden 13:55

Andrew, it might be helpful to kind of steel man what the what the other side is saying. Can you think of like what the best argument for one of these CON laws is and why it's not persuasive actually?

A Andrew Ward 14:09

Sure. So the very best case for the con law used to exist but doesn't exist anymore. The actual kind of not crazy justification that the federal government actually used to encourage decades ago was that Medicare reimbursed on what was called a cost-plus basis. It would always reimburse, depending on how much a provider charged and so theoretically, like a hospital could do something that wasn't needed, like it could make a bunch of new wings and a bunch of beds that were just going to sit empty, and factor that cost into the services it did provide. And then we'd get reimbursed for that even though there wasn't really a market demand. Congress changed that reimbursement scheme decades ago so that that rationale really doesn't exist anymore. Of the ones that exist today, there really aren't any good ones that apply to home health care anymore. In other cases, there's been discussion of possibly spinning off profitable services, like you need to consolidate profitable and unprofitable services at hospitals because they have to provide care for free under federal law. And so maybe we shouldn't let someone open something new that spins off service. Whatever the merits of that, and it is quite likely wrong, according to the research, there really aren't any good ones left that apply in home health care. We can talk about a little bit what the state said. But then we get to the next judge after discovery. He says none of your evidence matters. This is the rational basis test. The state just has to make something up. And they've said, well, for example, economies of scale, right? Like if there are fewer agencies, we can buy like gloves and pencils in bulk. That will lower costs. So that's rational enough. I mean, nobody seriously thinks in the real world that having fewer of a business, fewer entities with less competition is gonna lower prices. But it's make up-able. So the judge ran with things like that. Then we get to the Sixth Circuit on appeal, and then we get a totally different take on the law. Judge Sutton on the Sixth Circuit, who wrote the opinion, he calls it outrageous at oral argument. He sort of berates the hospitals for saying, Oh, you want to keep these guys out of the market. So that's you. I hope this law doesn't end up killing people by reducing access to services.

A Anthony Sanders 16:47

He also asks, right, where is the Attorney General? Why isn't the Attorney General defending this law, which he somehow didn't do?

A Andrew Ward 16:56

Yeah, the higher ups in the Kentucky government did just leave it to the the Cabinet of Health and Family Services. I couldn't I couldn't tell you why. But they certainly weren't super interested up there in the SG's office or the AG's office in defending the law. But ultimately, Judge Sutton writes this opinion, saying, you know, as bad as this looks it teeters on the edge of rationality. But we can't say that it's so irrational that we can strike it down in federal court. And even then, though, we're still talking about arguments that no one in sort of normal language would call rational, right? Like one thing Judge Sutton said was, well, these guys want a service that provides care in Nepali language to Nepali speakers. Who knows, maybe if they're fewer agencies, they'll all be more profitable. And maybe they'll invest that profit in hiring people who speak more languages. So maybe you could rationally say that by banning a Nepali language agency, it will actually create more Nepali language services, because the more profitable oligopolist will spend their money hiring Nepali language aides. That's the kind of thing we're talking about under the rational basis.

A

Anthony Sanders 18:12

I wouldn't really call that teetering on the edge. I think it probably fell a long time ago. But that's what judges often say, under the standard.

A

Andrew Ward 18:21

But that's what the Sixth Circuit said. And ultimately, we decided to petition for cert. We think that there's you know, this is really part of IJs core mission, saying that economic liberty, the right to provide a living for yourself or your family, to start a business is something that the federal courts need to meaningfully protect. And that's what we're asking the Supreme Court to take on. Clarify the standard of review isn't this hyper deferential rational basis test and whether it's a meaningful rational basis test or maybe something else as someone amici have argued, it really needs to be meaningful. Because what we have now is a test where crazy things happen all the time. You know, you have circuit splits over different aspects of this test, about whether something like pure economic protectionism is or is not legitimate at all. You have splits where you just get these completely crazy results, some court saying if you want to sell caskets, not do anything related to funeral directing, but if you want to sell caskets, you can't be forced to become a funeral director. Whereas other courts will say if you want to sell caskets online, you still have to embalm 25 corpses for practice. You've got cases where people who commit like vastly worse sex offenses against children can be treated less harshly based on imagining pure hypotheticals that this is going to help children. There are a ton of crazy results. You have the Department of Justice, arguing that space aliens could be -- invisible space aliens, unknowable space aliens -- could be the rational basis for a law. You actually it's gotten so bad that the courts actually split about their metaphors. You don't normally see a circuit split on metaphors. But there are two. There's a circuit split over the rational whether or not the rational basis test is toothless. We have quotes saying that it is and quotes saying that it isn't. We also have a split over -- I'm forgetting the second metaphor

B

Bob Belden 20:25

The second one is the rubber stamp.

A

Andrew Ward 20:26

Yeah, there's also a circuit split over whether this test is a rubber stamp or whether it isn't. And so it's really just a complete mess. And that mess matters, because there is this long standing right to be able to earn an honest living. It was taken away from my clients solely for the benefit of existing players. The agency that objected to them coming into the market was a billion dollar hospital chain that that couldn't possibly go out of business because these guys wanted to help people who are refugees from Bhutan.

A

Anthony Sanders 20:59

So I have a couple things to to ask. First, do either if you have a rubber stamp in your office?

B

Bob Belden 21:07

Not yet.

A

Anthony Sanders 21:07

I think rubber stamps are probably you know, like the dodo bird these days. Well, except maybe at the front desk when you actually get physical mail. But I think when I started private practice in like 2005, they gave you a rubber stamp. I can't even remember what I used it for, but you would, you know, move the date. And anyway, um, so that that was a rubber stamp. I don't know about the rational basis test, though. Seems like a rubber stamp to me most of the time.

A

Andrew Ward 21:34

Justice Scalia used to say that he wanted a stamp that said stupid, but constitutional. But you know, what we really shouldn't have is a stamp that says insane, but constitutional. And that's the way the rational basis test functions too often today, and that's what we're trying to change.

B

Bob Belden 21:49

So I think I think if the if the cert petition is granted, a good idea for kind of a case trophy here would be a rubber stamp with the text that says not a rubber stamp. And that will be that will be how we signify the victory.

A

Anthony Sanders 22:04

The rubber stamps. That's a good band name too.

A

Andrew Ward 22:07

You know, it is what we're asking the Court to take up. There is plenty of language saying this test is not a rubber stamp. There are plenty of cases in Supreme Court history, where they treat it as not a rubber stamp saying, you know, that argument is dumb, it makes no sense. We're not going to believe it just because you could make something up. Or there's no evidence for that and we're not going to believe it when it's implausible. But then there's a whole host of other cases where they say, you know, the limits of state power, really are the limits of the human imagination. And if that's the case, you know, everything is permitted. There is no, there is no thing that's too far for the government to do. And we'd like to be able to say that no, there are really meaningful limits. And the right to earn a living means something.

A

Anthony Sanders 22:51

And the other thing I was going to say is that if you guys out there, listeners, are interested in ideas, economic liberty work, which I know many of you have probably followed for a long time. This is an excellent summary of that. The cert petition in this case that we'll put a link up to, in addition to the Sixth Circuit opinion, if you want to give it a read, it talks about all these different rational basis cases and what they do. The roots of the right to earn a living, and it cites a number of sources that if you want some deeper background in that you can go and read. And so I commend it to everyone's attention. Also this case there are -- I counted eight amicus briefs in support for the Court taking the case, which not a bad number.

A

Andrew Ward 23:44

Not at all. I'd actually say the with with all of course, appreciation and respect for for our colleagues that filed amicus briefs, the most important person urging the court to take a look at this, I would say is Judge Sutton writing for the Sixth Circuit himself. You know, he wrote this opinion saying, we lose, but it came out on Valentine's Day. And it actually was a bit of a, maybe a love letter is too strong, but a like letter to, to some of the things that IJ has really argued for. You know, he says that we lose because the test is deferential. But, you know, maybe you guys have a point. You know, this is not a law that he would vote for. It teeters on the edge of rationality. And maybe these guys have a point that the standard of review really should be higher. And he and he has this great section where he talks about, you know, it's really hard to chop up rights into these different levels of review. And maybe we really should say that this is about liberty as opposed to property. It's bizarre that these guys might have more of a chance if they were under a different standard of review if they lived in a different state, and that there are all sorts of things that the government does that affect things that are deeply important. He references IJ's probably most famous case Kelo versus New London when a woman lost her home for it to basically go to economic development for Pfizer. And Judge Sutton says that, you know, these things really matter. And maybe this is something the Supreme Court needs to take a look at. We can't do that, because we're one of the lower courts, but the Supreme Court can. And that's what we're asking them to do basically. You know, the Sixth Circuit said, this is something you maybe want to take a look at. And for all, not just because of that, but for all the reasons we've discussed about all the problems with this test it it really is.

B**Bob Belden 25:34**

Anthony, what did you I know you're a fan of state constitutions, like many at IJ. What did you think of sort of the closing remarks in Judge Sutton's opinion, talking about constitutional causes of action at the state level?

A**Anthony Sanders 25:48**

Well, I appreciate as I always do when Judge Sutton writes about state constitutions that he said that there's this alternative, which is going to your your state constitution. And of course, listeners may know that I've written a lot about state constitutions and how we should look to state constitutions to protect our liberties. But that doesn't mean that the US Constitution should be ignored. Just because we have this other option, right, we have this other option for various reasons, one of which is the US Constitution just doesn't cover everything that we at the state level, would like to have covered or that citizens when they put their constitutions together would would like to have covered. But it doesn't mean we should just ignore the 14th Amendment, which is the basis for your guys's lawsuit. So I don't think that should enter into how we interpret the US Constitution, its own constitution. And maybe the Kentucky Constitution would give, you know, a chance here. But this law has been on the books for a while, and I haven't seen the Kentucky courts doing anything for people like your clients. And so I think that's, you know, it's a little bit of passing the buck there. You as a federal judge are supposed to be enforcing this Constitution. And we hope that the US Supreme Court is going to put a little bit more emphasis in that job description that our Article III friends all have. Well, something else that our Article III friends all have is enforcing property rights in addition to the right to earn a living. And the Sixth Circuit also tackled that recently. This case just came out last week, and it's litigated by our friends at the Pacific Legal Foundation. It's Hall vs. Meisner, and it's about this growing recognition of this problem called equity theft. So, Bob, it sounds like a maybe a bit of a like a crime, mystery, equity theft. So what what's going on here? This case that comes it looks like it comes out of Detroit.

B**Bob Belden 28:01**

Yeah, it is a little bit of a mystery why counties and cities think they can do this, but I don't think the theft part is very mysterious, once you get through the facts here. So yeah, this is Hall versus Meisner, and what's going on here is that Michigan passed a statute called the General Property Tax Act, which allows a local government to initiate foreclosure proceedings on people who have tax liens. And so the the best way to sort of understand this is probably by reference to the plaintiffs in this actual case. The lead plaintiff, as I understand it, had a tax lien of about \$22,000. And it's kind of interesting, the way that the court describes it, the tax lien is not just the unpaid taxes, it is taxes, interest, like additional fees and assessments. So you're talking 22,000, which could actually be like a much smaller number. I'm not sure what the unpaid taxes were, but it allowed the statute allowed the county to take Tawanda Hall's home from her with nothing more than a petition to a local court. And the only way she could avoid foreclosure was to come up with all of the money to pay her unpaid taxes and all the fees. So there's not really -- doesn't seem like there's really an opportunity to litigate like, oh, do I actually owe these taxes? Is the proper process being followed? You just have to show up with a Brinks truck full of \$22,000 and hope that they give you your house back. So the plaintiffs in this case brought, among other claims, a Fifth Amendment takings challenge to this Michigan statute

saying the way that this statute operates when you take Tawanda Hall's home and sell it, and don't give her any of the proceeds, which is what this statute allows, you have taken sort of the difference in the value of her home and the tax lien. The delta there is what her sort of remaining equity in her home is. And she should be entitled to have that back. But this Michigan statute allows the county to say, well, you know, we're just going to keep that. And so what happened here was, the county took Tawanda's home, initiated foreclosure proceedings, got title, absolute title to the home, and then transferred it to the city where Tawanda lived. And that's sort of important because the county says, if we had sold the property, then sure, yeah, Michigan law says Tawanda can have the delta. We would have had to give her the proceeds of the foreclosure sale above her tax lien. But because we transferred her property to the city, for the -- I'll call it the face value -- for the amount of the tax lien, we we didn't conduct a judicial foreclosure sale, there were no proceeds. All we got was our tax, the outstanding tax obligation. So there's nothing left to give her.

A

Anthony Sanders 31:37

We did such a bad job at making money off the house that we have nothing for her.

B

Bob Belden 31:40

Right. But don't worry, the county might not be as into profit as the city but the city had it figured out. The city handed it over to a private, for-profit entity, which then turned around and conducted such a sale and got \$308,000 for this woman's home. So the so the delta, I'm not a math guy, listeners will check the numbers here. But it sounds like the city and this for profit entity wound up with \$285,000 leftover, which otherwise should have gone to Tawanda. And if the county sold it, it would have gone to Tawanda.

A

Andrew Ward 32:24

They're arguably more egregious examples of this sorts of thing in other cases, too. I mean, there are cases where someone has had a tax delinquency of, you know, a few dollars, and the house is getting sold. And I mean, you know, that's unfair enough, and it's why we have things like homestead protection, but they didn't just keep the few dollars, they kept the entire value of the house over like a few bucks in tax delinquency. And that's bananas is I think the technical legal term for it.

B

Bob Belden 32:53

Just like a fundamental right, bananas is also a term of art in our profession. So the the Sixth Circuit, Judge Kethledge is writing for the panel here, sort of runs through these facts and looks at the claims that the plaintiffs are bringing. And the real question here in this Fifth Amendment takings claim is at a 30,000 foot level, the property interests that is protected by the Fifth Amendment is usually a creature of state law. And this Michigan statute is nothing if not a product of state law. And so it kind of gets to the question of: if there is an existing property right at common law or under state law, what can the state do to change or abrogate that property right? And so to establish that there is a property right at common law or state law,

the panel starts in the 12th century where all good opinions start and runs through kind of the harshness of courts of law at the time and how if you were on some noblemen's land, and you had your thatched hut, and you fell behind on a payment, and the court of law showed up that day, and you were you were out doing something and you missed the session, the noblemen could just take your house, and that was it. And over time, courts of equity stepped in and said, Oh, well, you know, that's not exactly fair. We need to recognize some kind of remainder interest. And the panel runs through a few hundred years of English history on this in particular. And you have all the heavy hitters. I think you've got references to Coke and Hale.

A

Anthony Sanders 34:57

Coke. [pronounced Cook] I have to correct I'm sorry.

A

Andrew Ward 35:02

It's one of those trick pronunciations.

B

Bob Belden 35:05

Anthony gave me an out here by mentioning that I'm from Indiana. And so that's Coke to me.

A

Anthony Sanders 35:12

That's how Lord Coke was known in Indiana.

A

Andrew Ward 35:15

En banc. [pronounced en bank]

B

Bob Belden 35:17

Yes, that you're not wrong about that. It's it is [in bank]. But so after, after surveying the English history and sort of coming to the conclusion that there is an equitable interest in this real property above and beyond whatever your your lien is to somebody else, the person who's like trying to take your property to satisfy the lien. After acknowledging the English history on that, the panel goes into the American history and talks about our sort of uniquely American innovation of foreclosure by sale, which does what it can to kind of align the interests of the two parties here, the creditor and the debtor. If the creditor forecloses on the debtor's property, typically, the creditor then has to go out and say, like, I'm going to try to get as much money for this property as I can. And that allows, that allows the creditor to have their lien satisfied. And it it does what it can to protect the debtors underlying equity in the real property. And again, in this section, I mean, you have, you have Story, you have Marshall, you have Cooley, it's a it's a very thorough survey of the American history in this area. And after running through that American history, the panel goes into what the Michigan statute does here, and how it

conflicts with that eight centuries of property protection for owners of real property. And at bottom the best way to sum up what is happening in the application section of this opinion is that Michigan law recognizes an equity interest for a real property owner and in every single context, except for this one, where the county or local government forecloses on a real property owner, and does it to satisfy a tax lien. And so the panel looks at a private foreclosure of like, if a bank takes your house, they can't do this, they have to try to sell it, and they have to give you the proceeds that are leftover. And the court runs through like marital examples, when you're dividing up assets in a divorce or mineral and timber leases. It's just uniform. You retain an equity interest, except for when you have fallen behind on your taxes and Oakland County decides that they want your real property to satisfy it.

A

Andrew Ward 38:00

You retain it, except when the government is going to make the money. That's so weird that coincidence.

B

Bob Belden 38:07

Exactly.

A

Andrew Ward 38:08

You know the analysis the Sixth Circuit does in the case that Bob is describing is really what we're hoping the Supreme Court does in the Kentucky CON case. I mean, there is centuries and centuries of history saying that there really is a meaningful common law and constitutional right to be able to earn an honest living. And if that's true, and it means something, there's just no way that some bureaucrat doing like fifth grade level arithmetic can conclude a business isn't needed because of usage rates statewide. And if the Supreme Court is looking at this, through that framework we we really ought to be winning. And that's that seems to, if anything, be what the Supreme Court seems to be more interested in doing. There were several cases last term and I'm definitely not expressing any opinions about whether they came out the right way or not. But the Court really took this more historical focus about examining what common law said, what early constitutional cases said. It's what the Sixth Circuit was happy to do in this case. And we think in a case like ours, it would it would show that we win -- in the Kentucky CON one.

B

Bob Belden 39:21

I was gonna say one other one other linkage to the to the Kentucky CON case that we've already talked about. Anthony brought up that Judge Sutton asked why the Kentucky AG was not there defending the law to explain what was going on. And it turns out that in Hall versus Meisner, the Michigan AG did show up. But you get the sense from this opinion that the Michigan AG and the Kentucky AG are probably sitting somewhere wishing that they had done what the other did. Because on on page 14 of this panel opinion, the last full paragraph, Judge Kethledge notes that the Michigan AG showed up and warned about, quote, serious fiscal consequences endquote, of ruling in favor of the plaintiffs here who, to be to be clear, wanted

to get back the value in their home that had been taken from them, like the value leftover after the taxes were satisfied. The serious fiscal consequences to the state of Michigan in the AGs opinion, required ruling in favor of the defendants here and Judge Kethledge, I would be remiss if I didn't quote this line directly for the listeners in that same paragraph. Judge Kethledge writes: in some legal precincts that sort of behavior is called theft. He cites back to a dissenting opinion from a Sixth Circuit case in 2017, that I have not had a chance to review yet. But I'm hopeful that I'm hopeful that it's it's a colorful one.

A

Anthony Sanders 41:10

If your state's budget is dependent on theft, essentially not taxes, not broad-based taxes, but taking people's homes and not giving them the equity out of them, then you have larger problems than just, you know, not being able to pay your budget. There's something else going on there, which is beyond what we're talking about today. The opinion's overview of the history of equity and law and equity I commend to everyone's attention. And this is an often or almost always untold story for people who go to law school, which is the division of law and equity. And like, what that means and what that informs us today that you can get a little bit of a preview of by reading this case. One thing I think that's really interesting to think about. And also, it's interesting for, say, libertarians out there to think about, you know, who maybe think about like, natural law principles of what is property and liberty and right to contract and how courts should enforce that is the property right at issue in this case that equity has created over the centuries, it's kind of a barrier on what you might say, the freedom of contract. Because if you have a contract, so that person with the thatched huts and the lord -- maybe there's like an imbalance there in the first place because he's the lord after all -- but they contract that, yeah, if you miss a payment, I get to take your house, no matter how much you've already paid me, and I get to keep everything and Okay, let's put that in the contract. But then the courts of equity have actually said, No, we're not going to enforce that contract, we're going to draw up these other procedures to protect that person. And then that gets embedded into the law of the realm and then later the laws of the United States, unless you happen to be the government. So it's, it's one, I think, example of how the common law, we often think about the common law is, you know, much more libertarian than say, the way that laws are structured in other countries or the way that we pass laws today in the States. But there's more to it than that. The common law can be complicated.

A

Andrew Ward 43:35

Although this one really, that is that is very interesting that you have this sort of like unconscionability principle that it's quite, it's arguably paternalistic, but not here, though, right. Like, this isn't a contract. Nobody's saying taxation is theft, like the theft is the theft on top of the taxation when they don't give you the money back.

A

Anthony Sanders 43:58

What I'm saying is the the the kind of deep definition of property, of what a property is, has this complicated, I wouldn't even call it paternalistic. I think it's just like where the courts went in centuries past, but it has this kind of complicated background. And that kind of goes to like a bigger issue, which is why I think this case is so fascinating is the federal courts often say that

the US Constitution does not define property, it just protects property from being taken or unreasonably regulated. And that property itself is a definition of state law. And here we have kind of an extreme example of this state saying, okay, but we're going to define the property to mean...

A

Andrew Ward 44:45

Yeah but it has its limits.

A

Anthony Sanders 44:46

...you don't get all this property. And so like when is it okay for a say, a state to change property law over time and when is it a constitutional violation? I think the best example of this is this long historical process is a way that it can change. But it can't change, like all of a sudden through a statute coming in and just rearranging stuff.

A

Andrew Ward 45:11

And certainly not in litigation. One of the things that I most recognized in this case was a government defense of playing with definitions. We see that in IJ cases all the time. Basically, you know, we say you did this egregious unconstitutional thing, and they say, No, we didn't. And the reason we didn't is that we said we're not doing it. I'm dealing with this in a case right now in Texas. It's a free speech case. It is illegal for our client to like, tell people advice about their pets, like if you say, like, Hey, should I feed my dog this? And he says, Yes. Like that's a crime under a literal interpretation of Texas law. And we say that's a free speech problem. Like, obviously, you can give people advice. And Texas's response is no, no, no, it's a crime. Like we said it was a crime. And obviously, the First Amendment doesn't protect things that are crimes. So what are we even doing here? And this happens all the time in IJ cases. They just ipse dixit say, we assert that we are not doing the thing that you accused us of.

A

Anthony Sanders 46:13

That's a great example. You can't you can't redefine property that way. You can't redefine speech into conduct that that way, either. We, I should note, talked about a similar case at the Sixth Circuit that an opinion that Judge Sutton wrote actually, last year where we had Ohio attorney Emily White on to talk about a case she did that was one of these equity theft cases from an from an Ohio example. And that's Short Circuit, it was number 175. We'll put a link up in the show notes to that episode. So this is a continuing process at the Sixth Circuit. I know the Michigan Supreme Court has also been addressing this issue. And so we'll look forward to it developing in the future. But one thing I'm really glad we developed today was to talk about your guys's case at the Supreme Court. So best of luck. Do we know when the cert petition might get to get a hearing?

A

Andrew Ward 47:14

Mid-November is the first chance the justices will have to consider it

mid-november is the first chance the justices will have to consider it.

A Anthony Sanders 47:21

Okay, so all eyes on that. And thank you guys, both for coming on Short Circuit.

A Andrew Ward 47:26

Yeah, thanks for having me.

B Bob Belden 47:28

Thank you.

A Anthony Sanders 47:28

All right. Well, we'll see some of you next week at Short Circuit Live in New York City, but to everyone in the meantime, I'd ask that you get engaged.