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SPEAKERS

Anthony Sanders, Jared McClain, Josh House

A **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 Friday, December 16, 2022. We are quickly approaching the holidays. But before we get there, we have a couple wonderful examples of judicial engagement and also judicial abdication, maybe one of the worst examples of judicial abdication that I have ever seen. Joining me for this happy news and sad news are a couple of my colleagues. They are Josh House and Jared McClain. Welcome, gentlemen.

J **Josh House** 01:10

Thanks Anthony.

J **Jared McClain** 01:10

Thanks for having us, Anthony.

A **Anthony Sanders** 01:12

Well, let's start with the unhappy news down in Louisiana. So, Josh, this is a case that's up your alley, because you have litigated certificate of need laws with the Institute for Justice. And that essentially, is what this case is about. And apparently, they're totally cool under the Constitution.

J **Josh House** 01:36

Apparently, Anthony, and yeah, this this case is just a perfect example of judicial

Apparently, Anthony, and yeah, this this case is just a perfect example of judicial disengagement, disengagement with the facts and creating a legal standard that's really perhaps impossible to meet. So the case is Newell-Davis versus Phillips out of the Fifth Circuit. And the case involves the plaintiff, Ms. Newell-Davis, she is a longtime social worker, has a lot of experience with different types of social work. And she wanted to start a business that offered respite services to families with special needs children. And those are services that teach children basic life skills, to help them stay off the streets or to basically just survive when their parents might be away. And again, the focus would be on on special needs children, so perhaps a service that's not widely available. And these sorts of services, along with other social work services have to be licensed in Louisiana with the Louisiana Department of Health. So these sorts of services have to be licensed, as you mentioned, Anthony under a sort of certificate of need scheme. And with these schemes, you essentially have to prove that there is a need for the service before you can open the service. And I know we've talked about those before, like with the Kentucky certificate of need case that was on Short Circuit a while back. And the basic idea is that these come out of a time when the idea was you needed to prevent overinvestment in healthcare. And so the government would come in and essentially ration the availability of these services by forcing new services and entrepreneurs to prove that the community would need them. The Louisiana Department of Health regulation at issue here requires not only that the applicant show that there's a need but actually that there would be serious healthcare access consequences without their service opening. Now, Ms. Newell-Davis, the plaintiff in this case, she argued that there is a need for her service because it is provided to special needs children, that there is this need for respite services. And ultimately, after she applied to the Louisiana Department of Health, she was denied. And it is undisputed in this case that the reason that she was denied was because there was no business necessary. So that's where we are when the case is filed. Miss Newell-Davis then files this case saying, Look, this whole scheme is a way to keep out competition. It is not actually about making healthcare more accessible. It's not furthering any legitimate government interest. And that brings us to the standard that the court applied. So Ms. Newell-Davis lost at summary judgment, it goes up on appeal and the Fifth Circuit applies this rational basis standard, which we've talked a lot about on this podcast. And this rational basis standard asked whether the regulation reasonably furthers a legitimate government interest. And so Ms. Newell-Davis says it does not further any government interest and the court disagrees. And the court really applies the most, I would say extreme version of rational basis, saying not only does does she have to prove that the government's asserted interest in this case either were untrue or illegitimate, but actually also that she has to show that she has to what's called negate the interests that the court is going to think of during this litigation. And the court says, it has thought of an interest that Ms. Newell-Davis did not negate, which was that it lowers the administrative burden on the government to not have to license new businesses. In other words, it is easier for the government to just turn away new businesses and to focus regulating on the ones that are already licensed, rather than have to go through licensing entirely new businesses altogether. And the court says that this government interest is furthered by keeping out new people, and therefore that the regulation is constitutional.

A Anthony Sanders 06:03

That's pretty interesting. The government just doesn't have to do as much so therefore, the government can just keep you out of your occupation.

J Josh House 06:14

I mean that's right. The problem with this sort of rationale is that it's hard to imagine any regulation that doesn't meet that test or any licensing program. I mean, the whole point of licensing is to keep some people from performing whatever it is that's been licensed, and allowing others to do it. Now, the question ought to be whether that licensing scheme is related reasonably, as the standard says, to some legitimate end. So for instance, a health and safety regulation in the context of a respite service might make sense, maybe she has to show that she has qualifications to offer respite services. There's all sorts of ways in which this could relate to the actual license being provided by the government. But instead the end that the government says is like this has nothing to do with actually protecting health and safety. Indeed, the court says it doesn't really have anything to do with whether there's a need in the community. Really what justifies this regulation is that the government doesn't want to have to keep tabs on further businesses. And so it's just not allowing more people to be licensed.

J Jared McClain 07:24

You know how the government could accomplish that is by not issuing the licenses in the first place. Then it wouldn't have to keep tabs on anyone.

J Josh House 07:33

Yeah, I mean, and it's, you know, it, we know that this can't be the actual law in this area, because there have been licensing restrictions that have been struck down within the Fifth Circuit itself. The opinion here cursorily mentions the St. Joseph Abbey decision, which we at IJ litigated and involved the licensing of casket building, essentially. And there, you could make the exact same argument that the Fifth Circuit panel is making here, which is that, well, fewer casket makers means fewer people to regulate. But the court rejected that. Because that's obviously not enough to sustain a burden like this on someone's right to earn an honest living. And again, here, it's it just seems like any licensing scheme would meet this standard of fewer people to have to license and to keep tabs on.

J Jared McClain 08:34

Yeah, when you look at the outcome in this case, you might think like, oh, well, like respite care, there's kids involved, maybe there's some government interest in protecting children at some general level. But then you actually read the opinion. And it's it's hard to imagine any licensing of anything that would not survive this level of rational basis review. The court says that it's not its job to consider the wisdom, the fairness, or the logic of legislative choices. And that it's the plaintiffs job to negate any conceivable basis that the court might come up with, during oral argument or when it's writing its opinion after oral argument. And if you can't just affirmatively negate anything that the court might dream up, it's going to uphold the regulation here. And it's impossible to bring an economic liberty claim under this standard. And like Josh mentioned, St. Joseph's Abbey exists or at least in name only, it still exists ...

A Anthony Sanders 09:42

Still good law.

J Jared McClain 09:43

... in the Fifth Circuit. Yeah, it gets a few passing parentheticals in the court's opinion, but in the thrust of this opinion is just the government can do whatever it wants. And rational basis review at this level, it's sort of detached from both the purpose of government and the purpose of what judges are supposed to be doing, right? Because like, what is the government's interest here in stopping someone from earning a living? And if the only interest that they can come up with is it's cheaper and easier for us to not have to look over your paperwork and have to issue you a license, then they could just keep anyone for they could require licenses for all industries, and deny them to whoever they want at completely arbitrary levels just because of bureaucratic ease. And that should never be the rational basis for denying someone a license.

A Anthony Sanders 10:45

Yeah, it seems like there's there's two levels of interests here is what the court saying. So there's the the actual license that the the government has, which has some kind of asserted interests protecting public health and safety, whatever. And then in implementing that scheme, the government is saying, well, we need that license. And then it's hard if you have too many people that you have to go out and check on if they're obeying that scheme, and therefore you shouldn't have their license taken away, or whatever you have to do for licensees. So we're just not going to have those other licensees, which to me, just almost seems illogical. And yet, court just buys that. I mean, you could you're right, you could have had that in the casket cases, the various casket cases that have been litigated. So in St. Joseph Abbey, the monks of St. Joseph Abbey, which were to our clients. They made these caskets, they sold them so that the government could have said, well, we need to make sure that the casket itself is safe, which was a reason rejected by the Fifth Circuit in that case as not being legitimate or not being connected. And so because it takes us a lot of time and effort to go out and check on those licensees, which I don't think they actually did, then you can't even get a license in the first place. But I mean, when you look at it that way, there's still the underlying license. Like who cares however, many you have the check on if whether it's one or a zillion, if the underlying reason for not allowing the license itself is irrational, then it doesn't matter if you have to check on other licensees. So there's a lot of levels going on there that don't make sense.

J Josh House 12:42

Exactly, Anthony. What you're getting at is what the court has termed in some of its decisions is a license holding itself up by its own bootstraps. In other words, there has to be a good reason to have the license in the first place. It can't be that the licensing scheme justifies having a licensing scheme, which seems to be what the court is having here. So in this context, the state has made the decision to license respite services. That is the decision that has to be justified first, before you get to what the consequences of having a license are for the government. And it seems like instead, the consequences of having a license, which results in fewer people practicing that activity or healthcare service, justifies having a license in the first place. And so you have like licenses justified by the fact that there are licenses, and that's I think the Supreme Court has rejected that. Obviously, other courts have have at least implicitly rejected that because we know licenses get struck down. So it you know, this is just a really

disengaged, completely checked out opinion. And I want to say another example of just how checked out this opinion is, is that they also the plaintiffs also brought state law due process and equal protection claims, and the state law due process claims were dismissed, supposedly, for having been waived. And I looked at the briefing, Anthony, and there are pages of argument about the state law due process claims. And so it just boggles my mind how just completely checked out the Fifth Circuit was in this decision, not only in its reasoning, but in saying that claims that were clearly argued below were somehow waived at the trial court level.

A Anthony Sanders 14:22

Well, this case was brought by our friends at the Pacific Legal Foundation led by Anastasia Boden, and so we don't know if this case is going further. But if any case might be ripe for en banc review, it could be it could be this one to sort out what the heck the Fifth Circuit is saying about economic liberty. So we wish them well in that and we wish this case to not have any more lasting effects. But of course, that's a touchy business when it comes to the rational basis test. Now a case that had a little bit more of judicial engagement and looking at facts and standards and whether the government has actually lived up to them is in the Sixth Circuit. And that's what Jared is going to tell us about now.

J Jared McClain 15:13

Yeah, this is a case about qualified immunity, which unfortunately, often, like rational basis does not get the benefit of judicial engagement. Often in these opinions you see curt reasoning that sort of just sweeps away the plaintiffs claims. But as you mentioned, Anthony, this one, there was some judicial engagement here. It starts with police following a car with its brake lights out. They see it turn right without putting its signal on. They activate their lights and sirens, but the car just keeps going. And the police, they were in one of like the prisoner transport vans and not a squad car. They don't actually pursue and there's no chase, which good for them. Because there was also another qualified immunity case this week where police should have known that they were putting people's lives in danger, like starting a high speed chase over a misdemeanor. And the court said that they shouldn't be doing that. So like, this was how things should have worked. And after the Altima drives away, they look up its license plate and determine that the picture that they get in their database must have been the driver. They say it was the same older white guy with short hair who was behind the wheel. And they submit a police report where they say that they were able to see what the driver looked like and the attributes that they assigned to him were the ones that matched the picture that they saw on basically like the DMV database. And they recommend that this go to a grand jury and he get indicted for the failure to stop. The grand jury indicts based on this police report positively identifying the driver. And a couple of weeks later, on Thanksgiving, police show up and arrest the owner of the car at his house and hold him in jail for six days. The problem, according to the driver's eventual 1983 complaint, is that he wasn't the one driving the car that night. That it was his roommate, who's 30 years younger than him, much shorter, and has different color hair. So if you take the plaintiff's claims here, the owner of the car, if you take his claims to be true, it's really hard to confuse him and his roommate based on their physical descriptions. And then he takes it one step further, and he surreptitiously records his roommate admitting that he was the one driving that night. And then he hires an expert to recreate the

scene and demonstrate that there was no way for the police to see into the driver's seat on that dark night when they were following him. Because the car made a right hand turn and the view of the driver was obscured by the car.

A Anthony Sanders 17:58

This guy is pretty impressive. Pretty organized in getting his defense together.

J Jared McClain 18:04

Right, on the one hand, we're saying that this is this is a good demonstration of judicial engagement. But on the other hand, this guy gets falsely arrested and he has to put in a lot of work to sort of proving the negatives of his case. And so he's got his expert reports, he's got his roommate on tape, admitting it wasn't him, that the charges against him eventually get dismissed, allowing him to bring his 1983 action. And it sort of turns into a battle of the experts with his with his expert saying, look, it was too dark, there was no way to see the driver and the police maintaining, of course, that they were able to successfully see the driver. And there's dashboard cam that doesn't go either way. It's dark. It's grainy. It does dispute some of the things the police put in the police report such as that, like, this car sped off and almost caused an accident. And you were able to see from the dashboard cam that that's not actually what happened. So that I think probably is in the back of the court's mind in whether a reasonable jury might look at these facts and determined that the police were lying here. The fact that there were already some things in the record, aside from the plaintiff's own accusations that show that the police weren't being fully honest here. And so the trial court denies the officer's motion for summary judgment. And because it's a qualified immunity case, they're allowed to immediately appeal that denial to the Sixth Circuit. And the Sixth Circuit takes a look at this. And they say that the standard that they're applying is whether given the record evidence, including the dashboard footage, the plaintiff's version of events was so demonstrably false, that no jury could agree with him. So basically, if the plaintiff put forward enough evidence that could convince one reasonable jury that the cops were lying here, then that was enough for his claim to survive summary judgment on qualified immunity grounds. And the thrust of his case was that the police have caused his wrongful seizure to happen. They caused him to spend six days in jail over the holidays because they lied on the police report, either knowingly, deliberately or just with reckless disregard for the truth. Maybe they looked at the picture and were like, okay, yeah, good enough for us, like we didn't actually see him. But that was that was probably enough. And the court didn't say that you had to like show that they deliberately and intentionally lied -- just that they showed a reckless disregard for the truth on the police report that created the probable cause. And an interesting aside here is there's case law that says that when police are behind a car, they run the license plate, that creates reasonable suspicion for the police to believe that the owner of the car is driving. So if the owner has any warrants out for their arrest, they can pull that car over on the assumption that the owner of the car is driving. But what the court says in this case was that assumption is not enough to satisfy the probable cause standard. So in law, there's there's reasonable suspicion which can get you like Terry stops or Whren stops of a car, and then there's probable cause what you need to search and arrest someone. And it's often like this gray area of like, what counts is reasonable suspicion, but not probable cause. So it was interesting here that the court clarified, you can't say probably that the owner is driving, but it is enough to give you a reasonable suspicion to pull them over. But since they didn't pull over the car here to confirm who the

driver was, all we had to go off of was the officers' description. And the court says that were it not for the officers' description, there would not have been probable cause in this case. So that's basically like saying, but for the officers putting down the owner of the cars description in the police report, there would not have been a warrant issued for his arrest. So then you go back to the accusation that the owner makes that the police here we're just lying or showing reckless disregard for the truth. And the court goes through the facts. And they go through his expert report and all this evidence he puts forward and how the the dashboard footage doesn't confirm or deny really either way, but it does undermine some of the officers assertions in the police report. And they say that a reasonable jury could have determined that the police made a recklessly false statement that was necessary to the grand jury's finding of probable cause. And so that's sort of like step one, under the qualified immunity analysis, like, was there a constitutional violation here, and the court says there was. And so then we get into whether that constitutional violation was was clearly established. Because in the way the courts apply qualified immunity, you need to show a clearly established violation of the Constitution so that the officers had fair notice that what they were doing was violating someone's constitutional rights, and they can therefore be held accountable. Because like, although we're all presumed to know the law, the officers that enforce the law are not held to that same presumption. And so we have to clearly establish that they knew what they were doing was wrong. And the Sixth Circuit analysis here goes in two parts. First, they say this is one of those special cases where the violation of the Constitution is so obvious that it doesn't demand a whole catalogue of factually similar cases. And it says it's long been the practice of the courts to define the right to be free from seizure without probable cause at a high level of generality. And a reasonable police officer would know that fabricating probable cause, thereby effecting a seizure, would violate the suspects clearly established rights to be free from an unreasonable seizure. And although the court does go on to talk about some cases that support this analysis and say, okay, even if it wasn't obvious, we're going to belt and suspenders this because there is case law out there in the Sixth Circuit that says that if you're going to file a police report with insufficient information to support your probable cause statement and intend for that to lead to an arrest, then you're violating the suspect's right to be free from an unreasonable seizure. And so the court says denial of qualified immunity affirmed. This is going back to the trial court. And there will be a trial at which the jury can decide whether or not they agree with the plaintiff that the officers here were lying. So we can actually have a jury of the driver's peers determine the facts of this case and whether his constitutional rights were violated, which is how the process is supposed to work.

A Anthony Sanders 25:23

Josh, have you ever been arrested on Thanksgiving because your roommate was driving your car?

J Josh House 25:30

No, no, that that hasn't happened. Thankfully, I can only imagine what would it be like. I represented someone who was arrested on I believe it was Christmas, once. And, just spending the holiday away from family would be horrible. I mean, when I ...

A Anthony Sanders 25:49

That was the only day they could come get him I'm sure was Christmas Day.

J Josh House 25:52

Yeah, I mean, look at this, this case is really interesting for a lot of different reasons. What's obvious to a normal person is both that arresting someone on a holiday is a special kind of horrible, but also that if you're an officer you shouldn't be lying on your police reports. And you know that the qualified immunity analysis sort of has like two angles, right? Like on the on the one hand, it could be clearly established law that says, hey, look, there's a case on point that says, Don't do this officer and if you guys do it anyway, then you're going to suffer the consequences. But what I like about it is that even though there were clearly established cases, the court goes out of its way here on the Fourth Amendment seizure claim to make a point that also this is obvious. Because it is obvious. I mean, one of the reasons police reports get so, some might argue, overused in as evidence in criminal cases, is that jurors and other people find police officers sort of inherently trustworthy to some extent. And if it's he said, she said when it comes to some sort of dispute over what happened, oftentimes police reports get benefit of the doubt. And so officers know that, and it's just obvious that they should also know that if they lie on those reports, that that's going to have consequences on someone's life. And I love that the court, in addition to addressing the rote legal analysis of here are cases that have to do with this subject, and also approaching those cases with the proper level of generality in order to analogize to them to this situation. I just love that it also goes out of its way to say and it's obvious. It is so obvious.

A Anthony Sanders 27:35

Yeah, I mean, it could it could have just rested on that case, which is hard enough in a qualified immunity case. And it's there actually is a case on point. And that would have been the end of the story. But it begins that part of the opinion with this obviousness analysis. One thing I thought was really interesting, and maybe this isn't on purpose or not. But the the this point about obviousness didn't come up very much, until just a couple of years ago with a case. Maybe it was only a year ago with a case that we've talked about here, on Short Circuit few times, Taylor versus Riojas, where the court on a per curiam decision, it wasn't a fully argued case, it just came up the Supreme Court and they kind of summarily reversed it. But in a short opinion, said what's happening in this case, which was just absolutely terrible facts about someone held in a cell wallowing in their own feces for a certain amount of time, said this is just so obvious a violation of the Constitution that you don't need a case on point. And that kind of like reawoke this idea that sometimes it's just so obvious, you don't need a case on point. But this case doesn't -- it cites some Sixth Circuit cases, a couple older Supreme Court cases. It doesn't say cite Taylor. And so I don't know if that's a sign of the court is realizing there's there's enough out there that it's not just this one recent Supreme Court case that has made that point or what, but it's kind of heartening to see that maybe this is a growing understanding.

J Jared McClain 27:35

Yeah, I believe it was Taylor versus Riojas in the lower courts that at least in one of the lower court decisions, I think, came out the wrong way. Because the courts got so used to applying this the standard where I believe the Riojas was like held naked in his own feces for like six

this the standard where I believe the Riojas was like held naked in his own feces for like six hours. And the precedent only said you can't hold someone in their own feces for 48 hours and think certain number of days out. Yeah. And the officers were like, Oh, well, we knew there was a limit, but we didn't know the limit was there.

J Josh House 29:50

It tells you something about the state of qualified immunity law that in this case, the officers with a straight face made this argument and I'm looking at the opinion here it says: the officers said that Caskey should have provided a case in which officers observe an individual fleeing from them in a dangerous manner, who the officers then stopped pursuing in order to avoid harm to themselves. And then the officers believed they positively identified the individual, and then they requested an indictment. And then that that violated the individual's rights. In other words, all of those things have to be present, according to these officers before there's a case on point. And I mean, the court laughs this off and basically says, No, you don't need something that's that specific. It can just be officers who lied in a police report. A case that says you can't lie in a police report is putting officers on notice enough. But the reason the officers can make that argument is because of cases like Riojas and other cases that just say, oh, you know, that that that had to do with, you know, an officer who was walking down the street at this same time a day on that same month of the year, and only then would the officer have been on notice he couldn't do that action. And I love that this this decision says no, that's that's not what we're talking about. We're talking about would an officer know it's wrong to lie? Yes.

J Jared McClain 31:08

Yeah. And and the opinion doesn't get into this, but IJ just filed an amicus brief in a case called Villareal in the Fifth Circuit, and we're about to file another one called Rogers, where we try to really dig into what it means for an officer to have fair notice that what he or she is about to do is unconstitutional. And whether, when officers are making non-split second decisions, like the officers here, they went back to the station, they thought about it, they filed the police report. If what they did was lie on that police report like that's not the type of thing that the Supreme Court ever was or should have been trying to protect through qualified immunity. And like they ..

A Anthony Sanders 32:00

The split second decision of lying on my report.

J Jared McClain 32:04

Right. And like in these two cases in the Fifth Circuit that we're working on, there's this delay between the officers deciding they're going to violate someone's constitutional rights, and then following through with it. And when we have that delay, there's not only notice of what the law is, but there's an opportunity to seek legal advice and sort of find out what the parameters are. And that should factor into the clearly established analysis and whether or not they were on fair notice. In this case in the Fifth Circuit, Rogers, the police actually went and asked the district attorney, if they could do what they were going to do. And the district attorney said, No, and

they put it in their police report anyway. And then they tried to hide behind the fact that it then went through the process, and they're like, Oh, well, we're a couple steps removed. And that's what the officers here did. Taking the plaintiff's allegations as true, they lied on the police report, and then they tried to say, oh, but then someone had to take it to the grand jury. And then the grand jury had to make the decision. And then some other officers went to his house and actually completed the arrest. So like, we're actually like five steps removed from the seizure here. And you can't hold us responsible for it. And what this decision from the Sixth Circuit says, and hopefully the decisions that are going to come out from the Fifth Circuit will say, is that you are responsible for the consequences of your actions. And if you are, as a police officer, making decisions at the station that you know are likely to result in an unconstitutional seizure of somebody's body and have them put into jail without probable cause, then you are going to be held responsible for those consequences, even if there were intermediate steps where other people had to carry the ball for you.

A Anthony Sanders 33:56

And those those cases that you bring up, Jared, that you're working on the briefs in, I know we've talked about some on the on the show in the past, and we'll definitely be watching the outcome and how argument goes in them. That I looked up Taylor versus Riojas. And what I thought I remembered it's true. It was six full days of wallowing in feces in your own cell somehow is obviously unconstitutional, says the Supreme Court so I hope everyone remembers that. And they also remember not if you're a police officer not to lie on your report. You are now on notice and so qualified immunity will not attach. But I will attach to both of my guests a very Merry Christmas and Happy New Year and thank you for coming on Short Circuit. And so the rest of you we're going to have one more episode next week before we call it quits for the holidays for a bit. Although there is a surprise, a holiday surprise next episode. So you want to tune in for that. And in the meantime, I hope everyone will get engaged.