Short Circuit 286

Tue, Aug 29, 2023 11:26AM 45:31

SUMMARY KEYWORDS

standing, case, abortion, doctors, happening, court, talk, doctrine, andrew, injury, parents, opinion, gender, circuit, claim, challenge, kirby, school, 5th, supreme court

SPEAKERS

Kirby Thomas West, Andrew Ward, Anthony Sanders

A Anthony Sanders 00:25

"Stand in the place where you live. Now, face north. Think about direction. Wonder why you haven't before. Now, stand in the place where you work. Now, face west. Think about the place where you live. Wonder why you haven't before. Your feet are going to be on the ground. Your head is there to move you around. If wishes were trees, the trees would be falling. Listen to reason. Season is calling." Now, when R.E.M. wrote those lyrics - came out in 1988, believe it or not - they probably were not thinking of federal standing doctrine. However, those lyrics - which, of course, sound absolutely nothing like that when put to music - came to mind when I was preparing for the show this week, because we are going to be talking all about Article 3 and standing doctrine in the Constitution here on "Short Circuit," your podcast on the federal courts of appeals. I am your host, Anthony Sanders, director of the Center for Judicial Engagement at the Institute for Justice. Joining me are two, powerhouse, standing expert attorneys - well, who also know some other things - who work with me at the Institute for Justice. You have heard them before, and I am very happy to have them both back. They are Kirby West and Andrew Ward. Welcome to both of you.

A Andrew Ward 01:46

Hey, good to be here.

K Kirby Thomas West 01:48

Yeah, thanks for having us.

A Anthony Sanders 01:49

Great. We are talking about two opinions this week, that the underlying matters are incredibly banal and noncontroversial. One has to do with an abortion drug, and one has to do with schools and transgender policies. You know, two things that we can all agree on, of course. It is

just the standing part that might get some flare-ups and arguments. First, we are going to start in the 5th Circuit, which is what Andrew is going to talk about. Some of you may have heard about this in the news, has to do with a controversial drug that induces abortions and whether the FDA properly approved it and whether a group of doctors properly could challenge it. Then, we are going to move on to a challenge to a school policy about informing, or not informing, parents when children are doing a gender transition of sorts, and Kirby is going to take it away in the 4th Circuit. Let us start in the 5th with Andrew, and if you can tell us about this banal set of facts and a rather complicated issue of standing.

A Andrew Ward 03:07

You know, you joke, Anthony, but this is actually the perfect case for "Short Circuit" because it has no real world impact whatsoever. It is so hot button that the Supreme Court has already said that nothing is going to go into effect. The Supreme Court, it is normally a longshot to say that a case is something the justices are going to want to handle. They are going to take this case, I confidently predict, and we will actually get a result from them probably, you know, sometime in June. It is all just dicta. The whole thing is just opinions for lawyers. So, it is a great thing to talk about on "Short Circuit."

A Anthony Sanders 03:42

My other question was going to be why is the 5th Circuit even doing this? Is not what the 5th Circuit itself is doing like not even right? But, that is kind of a meta question on top of everything.

A Andrew Ward 03:53

I do not know. They are providing guidance. They are giving the Supreme Court the benefit of the Circuit's views. I do not know. There are many questions one could ask about this case. Like, why is regulatory drug approval being raised in Amarillo? I think it is Amarillo (somewhere in the Northern District of Texas), and it is because they know that it is a single-judge district. But, anyway, all these things about currents and the intersection of politics and the courts are neither here nor there for the moment. What actually happened in this case, as you said, it is a group of pro-life doctors challenging the FDA's approval of mifepristone, which is one of the drugs in the two drug cocktail that is frequently used to do medication-induced, as opposed to surgical, abortion. And, basically, the doctors challenge everything about this. They challenge the fact that the FDA approved this drug in 2000. They challenge that, in the mid 2010s, it loosened the use restrictions. They challenge that it loosened them again as a result of COVID. And, basically, what the 5th Circuit, in an opinion by Judge Elrod, ends up saying is that the challenge to the original approval is time barred. The District Court had actually issued a sweeping ruling saying it is all gone. You know, this drug is no good. What happens at this Circuit is that the challenge to the approval as a whole is time barred. The plaintiffs are bringing it too late after the six-year statutory limit for a 2000 action. But, there is standing to challenge. We will talk about the substance first - the 2016 (I believe it was) and 2021 changes. The 2016 changes raise the gestational age from seven weeks to 10, make it so that the pill can be prescribed by medical professionals other than doctors, and some other changes as well. But, those are the two major ones. That first one, by the way - as long as we are talking

about on the show just everything that should not come up at dinner - for like a brief, obstetric digression, for the men in the audience that might not be aware, the way (because of modern obstetric idiosyncrasy) that pregnancy is counted, right? Pregnancy is actually happening at two weeks of pregnancy. Pregnancy is probably going to be found out at four weeks of pregnancy for a median woman. So, when we say seven and 10 weeks, we are talking about three to six weeks, sort of from a woman realizing she is pregnant (a median woman realizing she is pregnant). The court says that both of these actions are inappropriate, are arbitrary and capricious (I think is the Administrative Procedure Act language). Basically, the reasoning is that in the 2016 one, although the FDA studied the various things it wanted to change individually, it did not really study them together. Then, the 2021 one is sort of a result of what happened in 2016 and various data reporting issues. They basically say you do not really know that this is safe enough, so you have to go back and do it again. So, we are back to sort of the original mifepristone regime, as it existed in 2000. Although, again, all of this is on pause until the Supreme Court gets to weigh in. Judge Ho has a pretty interesting concurrence talking about something called the Comstock Act. Which, we can mention, at least on its face, just totally makes it illegal to mail abortifacients in the first place (that seems to be what the plain text says), but the majority does not reach that. But, maybe the bigger takeaway from this opinion, particularly as it applies to standing, but even in general, is abortion affects everything. They even talked about this in Dobbs, the case that overturned Roe vs. Wade, that the idea of abortion has had all these effects on other areas of law that are unrelated. I think that is exactly right. If there is no brighter star in our constitutional constellation than the First Amendment right of conscience (that is a line from West Virginia vs. Barnette), abortion is basically the black hole of our constitutional constellation, relativistically warping everything that goes near it, stretching out, spaghettifying (actual word in physics) all the law that goes near it, stretching it to the breaking point. I think that is basically what happened in the Court's standing analysis. As a basic reminder, under Article 3's case or controversy requirement, not just anyone can sue about anything that he or she does not like or that things might be in violation of the law. You need to be personally affected by it. You know, that is obviously like a car crash, like you hit me with your car. Now, you owe me money because you hurt me, or something like that. But, it does not apply to something like a fairly abstract injury of maybe the government might be intercepting my communications because of international, national security surveillance or something. It has to be concrete. It has to be, you know, tangible rather than abstract. It needs to be actually likely to happen. What the doctors here say is, well, it is basically statistically certain that some women will be going to the emergency room after taking mifepristone, and you know, this affects us because - but then, after that, it gets a little hazy. They say a couple of different things. They say that they might be forced to complete an abortion, like an incomplete abortion where the drug does not take, so to speak, and do that in violation of their conscience rights. They claim that the whole thing is just sort of very upsetting. Even the 5th Circuit's opinion rejects that one. They said that they could be distracted by these injuries from treating other patients. They say that their malpractice rates could go up because these are dangerous procedures.

A Anthony Sanders 10:22

And they say they have before, right? Like, they have actually been in the emergency room a few times with these kinds of women?

A Andrew Ward 10:28

No, they do not really say that. There was actually a whole colloquy at oral argument about just the passive voice because one of the doctors that the 5th Circuit relies on says, I have personally treated 12 women who required ... and then various procedures that I object to. But, she never actually says. It is written in the passive. She never says that she is the person who performed those procedures. There is all just a general sense of, well, it is possible, I have seen, it could happen. But, I would say that it is a stretch under existing standing doctrine anyway to really know that these doctors - that people will come into their specific hospitals, the members of these organizations - will have to do things that they do not want to do. None of them ever actually say they have had to do (they personally, clearly have had to do) something they do not want to do. They talk about other people, how it could happen to them. Now, at oral argument, their lawyer said she was referred to herself; she is not a lawyer, so she just wrote it that way. I tend to think the declarations are written by the lawyers, but who knows. It is all just a little loosey-goosey. They do not say anything about actual malpractice rates going up. The idea that treating a patient is in and of itself an injury, because then you cannot treat a different patient, just seems to sound like all of being a doctor is an injury. I am not going to sit here and tell you that any of this is wrong. I am a plaintiff's attorney, and I mostly hate standing doctrine. I think, by and large, it is a scam to keep meritorious claims out of court. However, I will say that this standing holding appears to be consistent with broader standing precedent, particularly a Supreme Court case that is discussed in the opinion that says you really cannot make just pure, statistical claims; there needs to be an identifiable, specific person that needs to have some likelihood of harm in the future. Now, the 5th Circuit says that is not really what that case means. But, it kind of seems like it is what it means. It all just seems a little loosey-goosey to me. And, if I may, it is hard to see this happening in a case that is not about abortion. Here at the Institute for Justice, I am getting a case right now where the 4th Circuit is about to hear an oral argument. It is about our client who hit a police officer in 2004, and many years later, he went to work as a substance abuse counselor. It turns out, that is illegal because he has this conviction for assault on a public official. In 2017, Virginia said this person has to be fired from his job, he is legally banned for life; he has to be fired. His employer did fire him. He is now subject to that lifetime ban. Every day of his life, he wants to be working as a substance abuse counselor. He instead works as a trucker. That is how he supports his family because what he wants to do is a crime if he gets hired. The District court in that case ruled that he did not have standing because it is theoretically possible that one day, the governor of Virginia might pardon him, which would remove the injury. So, we do not really know that he is injured. That is a question the 4th Circuit is going to take up in October. I have a hard time thinking that if these doctors who have seen other people affected by things that hurt their consciences in the past, and at some point in the future, some of the women who, yes, are statistically sure to come to the hospital, might come into the hospital where they work, and nobody else will be available. They are the only ones who can possibly be there to complete that abortion. That did not happen. It is why it is there as an emergency. All of this is directly attributable to the changes about seven to 10 weeks or non-doctor prescribers or it coming through the mail, not just the approval. It cannot be due to mifepristone. It needs to be due to the things that they actually challenged that were not time barred. That all of that is likely to happen, it is a hard time seeing that happening in a case. It is not about abortion, so is the level of disregard for the agency. I think that is a little bit unlikely too. But, yeah, abortion - it is a black hole. It changes all the law around it.

K Kirby Thomas West 15:01

I have something that is not necessarily a disagreement, but maybe a broadening of or a different perspective on Andrew's point. This is unique to an abortion case. I think this reminds

me a little bit of Judge Ho talking about in his concurrence, something that brought a lot of attention online, about the aesthetic injury to doctors who appreciate caring for unborn babies and are hurt by the fact of abortion. I also was unclear, Anthony. I think I misinterpreted some of the declarations as well. I thought one of the doctors had a patient come in at nine weeks with a healthy pregnancy and then later be treated for the side effects of the abortion. But, I might have missed that, Andrew - the digression on the passive versus the active voice there.

A Anthony Sanders 15:52

It was a 93 page opinion. Andrew, I think, read it a little more carefully than us perhaps.

K Kirby Thomas West 15:57

Right. That is very true. I defer to Andrew on that factual point.

A Andrew Ward 16:01

I do not know if you should though. I mean, it is pretty complicated.

K Kirby Thomas West 16:06

The aesthetic argument obviously harkens to some of the environmental cases. So, we have, for example, the Court - the Supreme Court - has said that the desire to use or observe an animal species, even for purely aesthetic purposes, is undeniably a cognizable injury for the purpose of standing. So, what Judge Ho talks about is if it is the case that your desire to see an animal species (and you do not know for sure when you go to these protected areas if you are going to see that animal species), but your desire to see it and the fact that you will go to those spaces, you have an injury because it is less likely that you are going to get to see them if whatever environmental harm comes to pass. Judge Ho says, similarly, these doctors, they love babies; they love unborn babies. And, they delight in caring for patients who are pregnant because of their aesthetic value of these unborn babies. I think this rings false to people often because they just do not really believe that the aesthetic value is that great, both on either side of these things - the environmental or the abortion cases. I think people kind of roll their eyes like, oh really, you love the snail darter that much? Or, oh really, doctor, you are getting that much joy out of the sonogram image? But, I do not know. I am a little bit less skeptical in both situations. But, I think why people kind of roll their eyes is it seems like what the court is really doing is almost like a Lorax theory of standing like, who will speak for the trees? It is like there is something here that has some kind of interest that cannot assert the interest itself. The snail darter cannot get standing in a federal court. The unborn baby cannot get standing in a federal court. And so, the court is like, there is kind of this thing, so maybe we can give the standing to someone else. They can take the case for this other thing that we cannot give standing to, which is not a thing, and the court should not be able to do that. I think that is why people in these cases feel like, I do not know, that is what you are asserting, Court, really what is happening? Is this really the rationale for finding standing here? But, again, that said, I am affected by this. I am not unconvinced in either case that people truly do not have an injury in these situations.

A Andrew Ward 18:39

I actually am too. This got a ton of flack online like, well, if Jim cannot see the majestic bald eagle in the wild, then surely, doctor pro-life should get to see that smiling baby. And, I actually think it is probably intellectually correct that those are both injuries. But, I think I would still dispute the likelihood of it as to any particular, identifiable person. That you could say that, because of the specific regulatory changes, pro-life doctors get less business because of the existence of abortion. This is clearly true in the aggregate, but that any, particular person in this organization is likely to be harmed by these regulatory changes, it is tough.

K Kirby Thomas West 19:35

I take that point. I think you are right that it is tough, but I think that is equally true in the context of environmental cases. Endangered species are endangered because they are very rare. So, your chance of seeing endangered species is already kind of low. Then, can you show that the decreased likelihood and being able to see an endangered species is because of a specific regulatory policy? I think you have a similar, difficult chain of events. I think it is probably true. The only thing that I know is true is that courts should say either both are fine, or both are not fine. I think one of the big frustrations with standing doctrine is it is just terribly inconsistent, as we will see coming up. I think that is where a lot of my frustration stems, but I do not know. I take Andrew's point on a lot of it, but I am not totally unsympathetic. Just, as a matter of consistency, I do not know. Maybe there is something here.

A Andrew Ward 20:35

Oh, we will see what happens when oral argument at the Supreme Court is in like, March, April probably. Get a decision in June, and we will see in 2024 how to resolve all of this.

A Anthony Sanders 20:48

Well, I think that is a really interesting question because I could see two, completely different things happening when this case gets to the Court on standing. One is, it could be a chance for some of the newer justices and some of the ones who have been there a while who do not agree with some of those environmental decisions to just sweep everything clean and throw these doctors overboard, but also throw a lot of other folks and other ideological points of view, like a lot of environmental groups, overboard. Or, we could have this black hole of abortion, as you say, Andrew, and we would just get a lot more standing, but in ways that a lot of people do not like, of various persuasions. I think you both have a good point that, especially as civil rights attorneys, if we were writing on a blank slate, there probably would be some standing here. But, given how a lot of cases end up, including cases I have litigated and where there is not standing, and there is a lot shorter chain of events like Andrew was talking about, I cannot see how these people have standing. I mean, under their theory, you could have standing to sue car companies. I mean, any ER doctor has treated people who were in a car accident. So, if you had some nuisance lawsuit that you cannot have cars because people started having an

accident, of course, on the merits you would lose, but on standing, how could you not have standing? And, say you hate cars, and when people come in, it reminds you of those damn cars and so, you get pissed off. How do you not have standing under this theory?

A Andrew Ward 22:30

We are totally going to have, like when SBA happened in Texas, these sort of private bounties for abortion. Gavin Newsom said they are going to do it for guns. Surely, there is some group of ant-gun ER doctors who will also have standing. This happens like when states ban gender-affirming care, other states respond. Well, actually, I think it happened the other way first, but you know, these doctrines are transubstantive. So, as soon as you empower one side, you impair the other side too.

K Kirby Thomas West 23:03

I agree. I think it definitely opens the door to all of those cases, which, I think, we will see. One of the other things I think that kind of warps standing doctrine is, so we will get to this in the next case, but a discussion of is it right for a court to decide something? Or is this more proper for a legislative body or for the electorate to decide? When you are dealing with things within administrative agencies, like this case, it is kind of hard to affect those things through the ballot box. The representatives that you elect have very little impact on what is happening within the FDA. I think that insulation of agencies from the actual impact of decisions by the electorate (and you know you cannot impact them), leads to a pressure into the courts to open up standing doctrine so that these issues can be resolved somewhere. And, maybe it should have been resolved in the electoral process, but we need to deal with it in the court instead. So, I think that there are these background forces that are spaghettifying, as Andrew said, our standing doctrine; that is not only abortion.

A Andrew Ward 24:17

Now, that black hole line - by the way - comes from our colleague, Jeff Rowes, lest I claim the credit myself. It is not mine.

A Anthony Sanders 24:27

Well, let us travel away from the black hole and towards a very different place, the 4th Circuit (most of us would agree), where Kirby is going to bring us to this other, totally, noncontroversial subject.

K Kirby Thomas West 24:42

Yeah, keeping it really light today. So, in the 4th Circuit, we have John and Jane Doe Parents vs. the Montgomery County Board of Education. So, what is happening in Montgomery County is that the school district has enacted a policy where children who are gender dysphoric or questioning their gender can develop with school officials a gender support plan. That plan

includes things like changing their name that they are called within the school, changing their pronouns, what locker rooms they are going to use, what bathrooms they are going to use. And, as part of this plan, the student rates how supportive they feel their family is going to be of the proposed changes in their gender or proposed changes in how they are accessing various services within the school. If the student says that the family is not going to be very supportive, the school can then choose to keep the family or the parents out of the gender support plan entirely. What that looks like is not just that they do not mention to the parents that the student has changed their name and their pronouns and what facilities they are using, but also some active subterfuge. They advise that teachers should continue using the old name and pronouns on any forms that go home, even though, in the classroom, they should be using the updated names and pronouns. They even go so far to say that in a situation where they feel parents are unsupportive, if the family specifically asks, the school can essentially lie and say no, there is no gender support plan. There are, in the record here, 300 students for which Montgomery County has chosen not to involve the parents in the gender support plan. This was challenged by these John and Jane Doe Parents. What they said is we have a fundamental right to control the upbringing and education of our children, which is a well-established right under the 14th Amendment. And, they said, we have a right to know what is going on, and this policy violates that. But, their claims were rejected because of a lack of standing. So, what the 4th Circuit said is, listen, we have no reason to think that your children are developing a gender support plan. You never alleged that they had developed gender support plans. You never alleged that your children even were gender non-conforming or questioning their gender in any way, or they were particularly likely to develop a gender support plan. So, because we do not know that you specifically have been injured, even though Judge Quattlebaum says he thinks the policy is perhaps repugnant, these parents do not have standing to actually challenge that policy. And then, in dissent, Judge Niemeyer takes a broader look at what the actual claims alleged are. So, what Judge Quattlebaum and the majority here say is that the claim alleged was specifically the parents' right to know what was happening here. Judge Niemeyer says no, the claim actually is the parents are alleging that the school district has usurped their role as parents, and they have a fundamental right as parents to be in charge of these sensitive conversations about sexual identity and gender identity. And, that just by creating this plan and the existence of this opportunity for children to develop this and go down this path without their parents knowing, that the school district has usurped that role; that, in itself, is an injury that the parents have suffered. So, wildly different view of standing than we discussed in the last case, and I think it is particularly interesting here where the whole problem with the policy is that you do not know if your kid is in the policy. That is something that was alleged in the complaint - that parents said we do not know. For all we know, our children might be in a gender support plan; there would be no way for us to know for sure whether or not they were. And still, the Court says sorry, no standing, unless you can say that your kids are actually being subject to this policy in some way.

A Anthony Sanders 29:24

And, bringing it up, by the way, bringing up the very case that was distinguished in the other case, this Clapper case about whether the government is listening to your communications or not. But, you cannot figure out if the government is actually listening to your communications. So, Andrew, how would you put these two cases together, or is that humanly possible?

A Andrew Ward 29:51

Well, I mean, the real comparison would be, if you really wanted to see if they would come out the same way, the Parents in Montgomery County (where I went to middle and high ... no, my whole life where I went to school growing up). It has been a long time, so I have to double check my facts. What they should do is get some concerned parents together, make sure at least somebody in the plan has a kid that was affected by these things (even if he or she will not be again), but someone with a past injury, and then, just get enough parents. Even if one in 1,000 kids is going to go into one of these plans (which, I do not know, that sounds sociologically plausible), in an organization with 1,000 families, that is a more than 50 percent chance that at least one family (if I did my back-of-the-envelope math right before we started this show), it is more likely than not that at least one family in the organization would then have a child in the plan. So, that is the situation where I think that you would really see if the 4th Circuit would be willing to follow the 5th Circuit, and based on the panel, they totally would not. But, I like this opinion, both actually. Both the majority and the dissent I think are clearly right on standing. They just disagree about how to interpret the complaint, which I do not know. I do not care. I take no position on that. But, these are much more traditional applications of standing. I think just a very standard, "You do not know this is a problem for you, so take it up at a school board meeting."

K Kirby Thomas West 31:36

Yeah, I think one of the interesting things that we did not talk about was that both the majority and dissent talk about the Parents Involved in Community Schools vs. Seattle case from 2007. And there, the Supreme Court said that parents had standing for an equal protection challenge to a race-based school assignment policy, even though they had not even applied for school yet. Because, in the equal protection context, being forced to compete in a race-based system, which they would have as they applied for schools, is an injury. And so, what the dissent says is similar here. These parents are in this system that exists, and that policy has put into place, that is unconstitutional. What the majority says in response to that is, this is just an equal protection case; this is a quirk of equal protection law. That kind of standing analysis just does not apply in other contexts. I think Andrew is right. That comes back, again, to just the differing views of what the claims are here. Because, if you do take this kind of broader view of what the claim is, then I do not know that it is that different than the equal protection thing. I think the Court is right that, so far, that has only been used in equal protection cases. But, also, I think the Court discounts a little bit that the the right to control the upbringing and education of one's children - the Supreme Court has described as perhaps the oldest, fundamental liberty interest recognized by the Court. That is something that we did not get into the merits of at all, but that is something that I think the District Court really erred on is that the District Court did not kick this on standing. The District Court evaluated this on the merits and applied rational basis review and said, if this easily passes rational basis review, this is totally fine. And then, standing came up later on appeal. But, again, I think when you look at how the policy is implemented and that parents are being subjected to it by force - like they do not have an option, it applies to every student - it does kind of seem analogous to me to the equal protection context of being forced into the system.

A Andrew Ward 33:57

What I am hearing from Kirby is that the rational basis test is bad, and school choice is good. But, those are maybe issues for for a different IJ.

K Kirby Thomas West 34:06

How did you know?

A Anthony Sanders 34:06

Well, without getting into school choice is good (which, of course, it is true), I thought that kind of glossing over the merits and what the dissent gets more into was actually a really interesting subject that we do not see all that much in litigation. That is this kind of broader idea that you cannot challenge, like we have had a lot of news the last couple of years about school curricula, what a public school is teaching most of the time because it is just the public school providing an education, to the parents. And so, they do not have a fundamental right for you to teach Hamlet, but not a fellow, or whatever the nitty gritty is of the curriculum. But, there are certain things that schools do that go beyond just the three R's, one of which is helping your child transition to a different gender. And so, that is where it merges into this other, this more fundamental right, which we have talked about here on "Short Circuit" and the Center for Judicial Engagement a lot recently, (which is the right identified in Meyer vs. Nebraska 100 years ago) to direct the upbringing of your child. So, when a public school is forcing you, the state forces your child to attend school, and then, they start doing things like gender transitioning assistance, then it gets into this fundamental right. And, not this is just how we teach things, and do not bother us because you know, the state has an interest in educating children. Usually, that does not come up much because you cannot litigate about the every jot and tittle that the curriculum offers. But, it is an interesting, I think, view into that. We will probably, as this kind of litigation happens more, get more cases where there is actually standing, where this is going to be an issue - some of which are already in the courts. They just got children that actually were subject to a policy like this, unlike in this case.

K Kirby Thomas West 36:27

Yeah, I think that one of the crazy things about the District Court opinion is that they equated this to curriculum choices, and they said, oh, this is kind of like what the school is deciding to teach about issues of gender and sexuality. No, transitioning socially is what doctors who are treating kids and therapists who are treating kids would maybe prescribe as a part of treatment for gender dysphoric kids. But, I think, tying the merits to the standing issue a little bit, one of the problems with this view of standing is that the people who, and I think this is true in the government surveillance cases too, can say, if your kid was questioning their gender, you would probably know. You would probably know that maybe your kid is at some increased risk for this, and you would have some kind of indication. Similarly, you might say, maybe you are doing something that you think the government is surveilling because you are doing some crimes or something like that. But, in both cases, the situation where you legitimately have no reason to think that this is happening, but it is actually happening, would be the most problematic cases of all, right? Because, it is like, well, the government, I am doing literally nothing wrong, and the government is surveilling me. Or, my kid is totally acting in accordance with their gender that we thought they had at home, and everything seems fine. But, then at school, there is this huge problem, and I have no idea. I had no way of knowing that this was a possibility. So, in both cases, this kind of standing, the people who have the worst injury of all have no way to redress it.

A Andrew Ward 38:08

Some countries do not have standing. That would be an interesting judicial system.

A Anthony Sanders 38:14

Well, do not have standing that you cannot sue at all? Or you could sue over a hand shake?

A Andrew Ward 38:17

The second one.

K Kirby Thomas West 38:20

I do not like that.

A Anthony Sanders 38:22

Well, some states, of course, have looser standing doctrines. Some of those also do not make a lot of sense at times, but at least they have public policy exceptions and all that kind of thing.

A Andrew Ward 38:40

The pro-life doctors are taxpayers, and the FDA is funded by taxpayers. Give them standing that way.

A Anthony Sanders 38:47

Taxpayer standing is always fun, and that comes up in some IJ cases. But, one thing we did not talk about earlier - and as always, I know this is just maybe something to end on - is always something I think the federal courts do not quite know what to do with, is where Congress or the legislature grants standing in a way that maybe is not quite kosher under Article 3. Because, of course, you need standing under Article 3, case or controversy, of the United States Constitution. But, you also need a right to get into court, which is something we talk about all the time when it comes to suits for damages against government officials, and our Project on Immunity and Accountability has dealt with that a lot. A lot of states have this odd doctrine that you need - I mean, it is just odd because if you compare it with federal doctrine - standing under the state constitution to get into state court, or the legislature can give standing. And, if the legislature gives standing, like say a taxpayer suit about bonds being issued illegally by your city or your school district or something like that, then you have standing, even if maybe it would not under the Constitution. That is not true in federal law, but sometimes, it kind of seems like it is because a lot of these environmental lawsuits are under

federal environmental law. You can tell (Congress), at least when it passed, it seemed to want this kind of wild suit by an environmental group that just did not like that trees were being cut down, and maybe the Forest Service was playing footsie with the forest companies. And so, that is a way that we are going to enforce the law, instead of just having the federal government deal with it, even if maybe that would not be okay under Article 3. So, it seems like it moves the needle because Congress was doing this, whereas actually, under the doctrine, that is not supposed to be the case. You could argue maybe some of that is going on with cases like where the FDA is involved.

A Andrew Ward 41:05

That sounds right, and not just very likely, the mifepristone case. But, there is already a case on the Court's docket for next term, about testers under the fair housing clause, that is a standing case. I think there is quite a bit of division on the underlying issues involved in these cases. We can all agree that standing is amorphous and weird.

K Kirby Thomas West 41:27

Yes, totally agree. Perhaps way too big a question for the very tail end of our session, but, Anthony, as our kind of resident IJ historian, I am curious of what the original understanding of cases and controversies is. I have never really known that because it does not matter so much in the way that the laws are applied by the courts and the way that we evaluate if standing exists or not. But, if you can say succinctly, what do you think is meant by cases or controversies in Article 3?

A Anthony Sanders 42:03

That is a great question, which smarter people than me have written about. And, unfortunately, off the top of my head right now, I do not remember the exact answer. But, people have gone different ways on this. Of course, a lot of cases or controversy, the actual words, I think, is a little bit more mysterious than what, say, the English courts did at the time the Constitution was founded, which is usually how that is interpreted. So, could you bring a case in either the King's Bench or the Court of Chancery or some court of the old system or in the states at the time the Constitution was founded? I have always thought that case or controversy textually seems broader than just a regular lawsuit because it is case or controversy. And, I think some people have argued that it is really a term of art; it just means a lawsuit. But, memory fails me on what that is. So, what we should do, Kirby, is have an episode soon where we talk about those things. Maybe we even kick it over to our new podcast, "Unpopular, or Not Unpopular." It is very popular, unpublished opinions. We could talk about it there. But, essentially, a lot of the rules about having a dog in the fight, and not just suing about anything you might be worried about and having it be material to you, that was a thing under the English legal system. But, the exact bounds of it are murky, especially when it comes to the Court of Chancery where we have injunctions and injunctive relief. That gets into a lot of the controversy that has been about universal injunctions and nationwide injunctions and all that stuff. Different people will argue about that.

K Kirby Thomas West 44:16

So, perhaps standing is a mess, and thus, it has always been.

A Anthony Sanders 44:20

Good point. We did not used to have as much government, so there used to be less cases because, usually, this comes up when it has to do with the government, not just me suing my neighbor over putting a fence up or running his truck into my garage or what have you. But, I think part of the reason that it was murky is it did not used to be quite as big a thing. But, that is something libertarians always like to say to excuse away the past, so we will not get too into that. Well, thank you both for standing with me and having this standing discussion. Maybe we will put a standing date to talk about standing more at a future time where we will stand together. But, for now, I would ask that everyone out there stand with me. And, in the meantime, that you get engaged.