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SPEAKERS

David Asp, Ryan Wilson, Anthony Sanders

A Anthony Sanders 00:24

"There is a place where the sidewalk ends and before the street begins; and there the grass grows soft and white; and there the sun burns crimson bright; and there the moon-bird rests from his flight to cool in the peppermint wind." Well, apparently, the Nashville, Tennessee, city council are huge fans of that famous poem by Shel Silverstein because they have mandated that property owners all over the city build sidewalks that end. However, the 6th Circuit has said that violates the Constitution. We're going to talk about that this week on "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 August 25, 2023. I am super excited about this episode with two, special guests. This, I believe, is the first "Short Circuit" in historyâ€”we've made almost 300 episodes nowâ€”with an all Minnesota contingent. Both of my guests live and practice in Minnesota, and I live in Minnesota. However, the cases we're going to talk about are not from Minnesota, although there might be a little Minnesota thrown in. I just think it's super special that this star of the North is going to contain all three of us on the show today. I will introduce the special Minnesotans in a moment. First, however, I have a special announcement and that is that we at the Center for Judicial Engagement are hiring. We are hiring a new position. It is a senior fellow, somebody who will work with me and others at the Center for Judicial Engagement to do things like scholarship and writing and all kinds of other stuff that we do at the Center. So, if you're interested, we'll put a link in the show notes to apply. The guidelines are people with a law degree and five-plus years of experience, but there's some other details. You can check that out either at the link or just go to the IJ jobs page, and you can see it there. We're also hiring in, as we often are, other areas. If you are a recent grad or about to be a grad of law school, we are hiring different kinds of fellows in those areasâ€”litigation fellowâ€”and we also have a fellowship for people between clerkships. If you are going to have a gap between clerkships coming up, please check us out. Of course, we also have our law clerk, our Dave Kennedy Fellows; that will be next summer. If you're a current law student, look for those; you can apply for those later this fall. But, today, it's all about the Minnesotans. So the first Minnesotan I'm going to introduce is a partner at a firm here in Minneapolis: Lockridge Grindal Nauen. Did I get that right, Dave?

D David Asp 03:43

Yeah.

A **Anthony Sanders** 03:43

He is a partner there, David Asp. He is a big-time ERISA, and other facets of the law, litigator. He is also getting to be an expert on the North Dakota Constitution. If you want to know about North Dakota constitutional matters, Dave is the guy to talk to (even though he doesn't actually live in North Dakota, although he grew up across the river from it). I also need to disclose that Dave and I did share an apartment for a couple of years in law school, a couple different apartments (one of which wasn't clean very often). I was trying to remember if we had a vacuum. I don't really remember a vacuum.

D **David Asp** 04:26

There is no way we had a vacuum.

A **Anthony Sanders** 04:28

We were also in each other's weddings at different times. So I want to get that on the table. It doesn't mean I won't have hard-hitting questions for his analysis, which is going to be about an ERISA caseâ€”an area of law we don't talk about much on "Short Circuit" but has huge consequences for Americans. The facts of this case are pretty astounding, like what's going on under the subsurface of our health care system and how the ERISA statute interacts with that. Dave is going to explain that in a little bit, but first, I want to welcome him to "Short Circuit."

D **David Asp** 04:32

Well, thanks, Anthony. It's great to be here, and thank you for that introduction about what I have as, kind of, an eclectic, litigation practice in North Dakota. But, you're right. I am in Minnesota, and you're also right that we are friends. We were roommates in law school and lived a lifestyle that I wouldn't recommend to anyone (in a lot of filth in an apartment).

A **Anthony Sanders** 05:32

A lot of cold too (to save money at times).

D **David Asp** 05:37

Yeah.

A **Anthony Sanders** 05:38

I remember reading textbooks with gloves on. I don't think we actually saved a lot of money on

I remember reading textbooks with gloves on. I don't think we actually saved a lot of money on that. Anyway, someone who does not read with gloves onâ€”I think he's much smarter than thatâ€”is another friend of mine, Ryan Wilson. Ryan was a clerk for us at IJ. He was a litigation fellow. He's now in private practice here in Minnesota. He was also a clerk on the Minnesota Supreme Court for Justice Barry Anderson. He's going to talk about some more, kind of, "bread and butter" of "Short Circuit," a takings case â€” the one from Nashville I referred to earlier. But first, welcome, Ryan, back to the show.

R **Ryan Wilson** 06:16

It's great to be here. Great to be back.

A **Anthony Sanders** 06:18

Well, Dave, you're going to take us down south, from Minnesota to Oklahoma. Apparently, they were not fans of how their pharmacies were distributing their drugs, and that ran into this friend of ours named ERISA.

D **David Asp** 06:39

That's right, Anthony. Thanks. I am glad this is the first ERISA case you've had to discuss on "Short Circuit."

A **Anthony Sanders** 06:46

Well, I think maybe at some point the show had an ERISA case before, but it doesn't come up much.

D **David Asp** 06:52

You might have had one slip in previously. Yeah. Well, I am glad that I could leverage our friendship to get on the show and talk about ERISA because I know it's what the listeners want.

A **Anthony Sanders** 07:04

They're clamoring for it.

D **David Asp** 07:05

They get the First Amendment, enough of your forfeiture takings cases, constitutional litigation, and they're really saying, what's going on with the ERISA preemption? The case I'm talking about today is an interesting 10th Circuit case. I think I can make the case that this will be very interesting for your listeners because they care about the circuit court of appeals and what

might be coming at the Supreme Court, or maybe laying the groundwork for what might be coming at the Supreme Court. The case I'm talking about is the Pharmaceutical Care Management Association v. Mulready. Mulready is the insurance commissioner of Oklahoma, and the case is about Oklahoma's Patient's Right to Pharmacy Choice Act. That's an act that regulates pharmacy benefit managers. A pharmacy benefit manager is the intermediary between the pharmacies and your prescription drug plans. They're called PBMs. What they will do is they will create pharmacy networks; they will contract with pharmacists to create those networks. They will negotiate prices for drugs, and then, they will give those options to plans. Plans will contract with the PBMs to provide those services. The court order explains, and it's sort of true throughout the cases in this area, that the concern about PBMs is that, one, they can decide how much to pay the pharmacies for the drugs and their network agreements. And then, two, most of the largest PBMs also have affiliations with health plans or with pharmacies of their own, so the concern is that those largeâ€”like CVS Caremark, for exampleâ€”retail pharmacies, their Caremark incentives are to benefit CVS and at the detriment of smaller, independent, or rural pharmacies. So, at this point, almost every state has enacted a PBM regulation. Usually, the regulations are focused on protecting your brick-and-mortar pharmacies or independent pharmacies and retail pharmacy locations, especially if there were also concerns about lack of transparency. The PBMs don't necessarily share with the pharmacies how much they're paying for the drugs, and in some cases, there have been reports of the PBM paying the pharmacy (reimbursing them) for a drug in an amount less than what the pharmacy itself actually pays.

A Anthony Sanders 09:43

I should ask, at this point, for people familiar with our our economic liberty work at IJ, it sounds probably to a lot of listeners like just good, old-fashioned, naked protectionism. Put ERISA aside even. Between the brick-and-mortar stores and the other businesses, is there also maybe some kind ofâ€”I know it doesn't come up in this contextâ€”like an antitrust argument for why this isn't just pure, naked protectionism? Maybe it's misguided policy, but there's some reason there. It's not just, we're trying to protect one business at the expense of the other.

D David Asp 10:22

Yeah, I mean, there certainly have been antitrust cases relating to PBM conduct, usually in the context of a particular drug or with respect to the relationship with a pharmacy. I think that is the growing area of litigation. What the states have been trying to do is to respond to constituent concerns that they can't see the pharmacist of their choice. So, really, the issue often comes down to: I live in a small community; I'd like to be able to go to my longtime, local pharmacist, but that pharmacist has a problem with the PBM. They get reimbursed for drugs at an amount less than what they actually pay for it, so they're losing money by agreeing with the PBM. So, a lot of that is part of the problem. Then, there's the problem of networks, where a PBM might say, well, we're going to prefer our own mail-order pharmacy over that local retail pharmacy in a rural area. So, they give incentives for plan participants to use that pharmacy at the expense of the local independent. That's what the state legislators have been trying to get at. That's been going on for a long time, and like I said, most states have that restriction. What's changed in recent years has been that, in the past, the PCMA here (which is the plaintiff in this case) and the association for PBMs, has sued on these laws under ERISA's preemption provision, arguing that they're preempted by federal law and can't be enforced by the state.

Those lawsuits were succeeding before 2020, I would say. In the 8th Circuit, there were a number of lawsuits in (I believe) Iowa, Arkansas, and North Dakota that found the lawsâ€”the PBM regulationsâ€”to be preempted. But then, in 2020, the Supreme Court took up one of the cases in the Arkansas law, in a case called Rutledge v. PCMA. In Rutledge, the court found that Arkansas' law was not preempted and focused on whether the state law relates to the ERISA plan and has a connection to it. So let me take a step back here and talk about the actual language of the preemption clause because this caseâ€”like Oklahoma's case in Rutledgeâ€”is going to turn on the language of ERISA, which says that ERISA shall supersede any state law "insofar as they may now or hereafter relate to any employee benefit plan." It supersedes any law that relates to an employee benefit plan. That's extremely broad. To help identify what might relate to an ERISA plan, the Supreme Court's test is that it relates to an ERISA plan if it has a connection with or a reference to such a plan.

A Anthony Sanders 13:04

Wow, that's super helpful.

D David Asp 13:06

Yes, it's super helpful. So all you have to do is say, does it have a connection with an ERISA plan? And, if it does, it's preempted. You can imagine how this has been difficult to apply and how it has resulted in a lot of litigation over the years. But, in Rutledge, the court looked at this standard, looked at the state regulation of PBMs, and tried to give a little bit more specificity, saying that if it has a connection with an ERISA plan, we're primarily concerned with laws that require providers to structure plans in a certain way, to structure plan benefits in a certain way. So we know it's preempted if it requires payments of benefits in a certain way or if it requires certain rules that require someone to be a beneficiary under the plan. We know it's preempted, it has a connection, if it specifically directs benefits in some way. But ERISA is not preempted if it just increased the cost to the plan or alters the incentive. Before thatâ€”laws were preemptedâ€”the argument was the law is preempted because this creates more expenses for the plan, right? We're just regulating the PBM here, not the plan. But the PBM's conduct is going to increase the costs for the plan or maybe change the incentives for the benefits to the plan, and that's not sufficient for ERISA preemption to apply. You have to actually affect the benefit structure. After the court's decision in Rutledgeâ€”for exampleâ€”the 8th Circuit reconsidered the North Dakota law, which did create specific incentives around benefit design and said, well, that's not preempted because it has a de minimis. It's not central to plan administration, and so it doesn't have a connection with the plan. That's getting a little more clarity. Now, coming on the Oklahoma law, the question now is how close to influencing, hindering, changing benefits can you get before you're actually requiring payment of benefits or creating rules, before you're crossing the line into actually mandating a certain benefit design? And the Oklahoma law did basically four things. It required PBMs to assure that its members had access to brick-and-mortar pharmacies. So, depending on where you live, a certain number of brick-and-mortar retail pharmacies had to be available to you; you can't rely just on mail-order. It also precluded the PBM from creating incentives to use mail-order, instead of the brick-and-mortar. And it said that any willing pharmacy that was in the network had to be able to participate in a preferred network, so the PBM couldn't have a preferred network for just its affiliated pharmacies, beyond if the other pharmacies were willing to agree to those same terms. And then, finally, it said the PBM can't terminate a pharmacy from its network or otherwise take adverse action against it

just because one of the pharmacists is on probation with the state pharmacy board. And the 10th Circuit considered those laws and said, these are preempted by ERISA because they actually affect plan benefit design. By saying that you have to have a certain number of brick-and-mortar pharmacies, you're basically precluding the plan benefit design that's just mail-order. And so, because you're precluding that type of benefit design, that has a "hindrance" on the benefits themselves. That analysis is really, I think, at odds with the circuit's analysis on the North Dakota law in a case called PCMA v. Wehbi, which had different types of restrictions (in some ways, some not so frequently). But that case talked more about, look, you're creating incentives on the benefits; you might increase the costs to the plan. But that's not mandating a particular type of benefit. And the language in the Supreme Court decisionâ€”the language in Rutledgeâ€”that they're focusing on talks about the structure of plan benefits, like requiring payment of benefits or creating rules for beneficiary status. And these laws don't do that. So I think the question here is really, how close to incentives can you get before you're actually mandating a certain type of plan design? And that's the central issue in this case.

A Anthony Sanders 17:34

And the big plans, they're going to argueâ€”or these networks argueâ€”that those kinds of structures can have big consequences for the cost of the drugs in the end, right?

D David Asp 17:48

Right. And then that was the argument of Rutledge too, right? Because the Arkansas law in Rutledge said, look, if a pharmacist is going to lose money by prescribing a drug, if you're only going to reimburse them for the drug in an amount less than what they paid for it, they can refuse to fill it. And so that's, essentially, a decision about the plan, right? Because, otherwise, a plan could say, well, we would like to have those provisions in there because it saves the plan money, ultimatelyâ€”at least arguably it does. And so that all will affect the plan financially, one way or another. And I think that's not enough. The question is, how close to designing benefitsâ€”like networks, for exampleâ€”can you get before you're actually crossing the line into changing the structure of plan benefits? And it's ... let me ... I want to make two, really specific points about the opinion because I think there's, sort of, more interesting pieces that might be subject to further debate in the future. And one of them ... so, I know ... I'm sure you and all of your listeners are now following along, have the opinion in front of them, and have been reading it.

A Anthony Sanders 19:02

Of course.

D David Asp 19:02

If they can pull over and maybe start looking at page 12 of the opinion, it cites the definition for "any willing provider," which again, is the one that says if you have a provider in that network, and they want to be preferred, you have to let them be preferred if they'll agree to the same terms as everyone else. And the court says no; what this provision actually says is that any

pharmacy gets to be in your network if they'll agree to the terms. And when I read that, I thought, I just am not sure that's what the statute actually says. And the analysis for this discussion is in footnote nine of the opinion, but let me just read you the language and see what you think. It says that a PBM can't deny the provider "the opportunity to participate in any pharmacy network at preferred participation status if the provider is willing to accept terms and conditions." So it says, "any pharmacy network at preferred participation status." I think that means you can't deny them the opportunity to be a preferred pharmacy in the network. It doesn't mean, as the court says, that you have to allow every pharmacy into the network.

A Anthony Sanders 20:17

Where? Because it says they have to accept the terms.

D David Asp 20:20

We'll have to accept the terms with any network at preferred participation status. So I think the district court read it the same way that I'm looking at it. The 10th Circuit disagreed and (in the footnote) explained why it disagreed. But I think a really interesting part of this opinion is that the court's fundamental view of what the law does is based on the interpretation of Oklahoma law because it would have a more significant impact on plan design if any pharmacy would have to be allowed in the network, as opposed to ...

A Anthony Sanders 20:54

Would that mean that it might notâ€”well, we could talk now about its futureâ€”be a good vehicle at the Supreme Court on this, you know, wide issue in the conflict with the 8th Circuit, if maybe there's just an argument it misread state law? And, if so, this isn't a great case.

D David Asp 21:13

Yeah, that may be. And it may be that Oklahoma can go back and and revise the law. I don't know if that would really solve the court's broader concern about what is doing the plan benefits. But the other issue that is really, I think, at odds with the 8th Circuit's decisionâ€”where there seems to be a clear, circuit splitâ€”is another provision of Oklahoma's law which says that a PBM can't deny, limit, or terminate a pharmacist from its network just because the pharmacist is on probation with the state board of pharmacy. So it just says if you're on probation, that can't be the only reason that you're terminated. It doesn't say that the PBM couldn't have its own quality assurance requirements or its own review. It just says that can't be the only reason. And the court says that's preempted because it goes too far in, the court says, that it forces the plan to capitulate to all pharmacies, even if they're on probation. Now, the Wehbi case in the 8th Circuit involves a North Dakota law that actually said that PBMs couldn't require certain accreditation and certification requirements for pharmacists. So they said you can't require it to go beyond state law, and that wasn't preempted. So you have the 8th Circuit saying that (even greater requirements, really) you can't have a requirement beyond state law; it's not preempted. The 10th Circuit is saying it is. To me, it seems like they're in conflict. And the other thing that's the, sort of, fundamental question

(which is kind of interesting in these cases), comes out of Justice Thomas' concurring opinion in Rutledge, whereâ€”it will not surprise you to hearâ€”he took the position that the court's ERISA preemption jurisprudence kind of has missed the point here all along. And when the statute says that ERISA supersedes state law that relates to a plan, supersede means that ERISA has to first talk about the issue. If ERISA regulates it, the state can't regulate it. It's sort of a conflict preemption, and it's not the way that the courts have analyzed it, where they look toâ€”well, even if Congress didn't regulate this area in ERISAâ€”does it have a connection with an ERISA benefit plan? And, interestingly, in the Rutledge concurrence, Justice Thomas talked about every state law where they have found ERISA to preempt the state law has involved a matter that's explicitly addressed by ERISA since 1995. Soâ€”in, at least, the last 30 years, almostâ€”that's been the case. So that might be another reason why the Supreme Court might be interested in this case again. I mean, it just had an ERISA preemption case in 2020, so I'm not ... You may have a better sense than me about what they'd be interested in taking. Certainly, your listeners are clamoring for more ERISA content.

A **Anthony Sanders** 24:17

Of course.

D **David Asp** 24:17

And so they would want the court to take it. But, and I would think it'd be interesting, I'm not sure if that ultimately will be where it ends up.

R **Ryan Wilson** 24:26

Is there a potential this case could be mooted? ERISA (I'm no expert), I've understood, has been amended from time to time. And is it possibleâ€”this is pretty popular among the states, it looks likeâ€”any legislative change could allow states to enact this kind of legislation?

D **David Asp** 24:43

Certainly. I think PBM legislation at the federal level could do it. I mean, if the Congress were to pass regulations similar, then they're clearly speaking on the subject. And that's sort of what the 10th Circuit says at the end. They say, you know, we understand that you have concerns about independent pharmacists and these practices, but that's for Congress, not for Oklahoma, to decide. So I think, certainly, if federal legislation passed, I imagine that would influence it. But, until then, states will have ... most states ... We mentioned we're all Minnesotans; Minnesota has a PBM regulation. Almost every state does, so it'll be ... This is an issue that's going to keep on coming up in the future.

A **Anthony Sanders** 25:28

Yeah. So thanks, Dave, for that exploration of ERISA preemption. But a lot of people probably, you know, when they first heard that we were going to talk about an ERISA case on the show, maybe rolled their eyes and moved to the next podcast. But it is ... I like that we're talking

maybe rolled their eyes and moved to the next podcast. But it is ... I like that we're talking about it because it is a massively impactful statute that a lot of people don't have much of a clue about. But the Employee Retirement Income Security Act of 1974 has had a massive shaping of our health care system for good or for bad in a lot of waysâ€”also, you know, your retirement dollars. And if you are ... If you participate in a health care plan through your employer, which is pretty close to a majority of Americans, it has an impact on you. And this case said that these PBMsâ€”which I know almost nothing aboutâ€”270 million Americans (so like 80% of us) participate through these and get our, when we need prescriptions, drugs through these. So this is a seismic part of our legal system that goes to the Supreme Court a lot on preemption issues, and I used to litigate it a little bit in private practice. And it's as clear as mudâ€”this whole preemption thing. The Supreme Court hasâ€”to some extent, I thinkâ€”done the best it can, or maybe not quite the best (as Canada's Justice Thomas would say) on trying to figure this broad language from Congress out. But it is in no way an issue that has been solved by the court, and the court will keep addressing it, as will the courts of appeals. So we'll see where this goes. We're also going to see where takings law goes. And so takings law has been interesting the last few years as the court has had to put a little more teeth in the takings clause of the Fifth Amendment. We had a doubt separately from takings law, but broadly on property rights. We had a show about a year ago where we talked about the city of Nashville, Tennessee, and its regulation of property rights. We talked about a really interesting article that our friend, Radley Balko, wrote about fines and fees that the city puts on property owners. And we also talked about a case of ours with our colleague, Paul Avelar, that we've had there for a while now about home-based businesses. And Ryan is going to now bring us a caseâ€”that I had somehow missedâ€”that came out in May about sidewalks in the city and how they're just not doing things by the Constitution. And yet, I think this is a case that probably would have gone the other way a few years ago before some of the Supreme Court's recent takings cases. So Ryan, take us ... Take it away, and I want you to please tell us where the sidewalk ends.

R **Ryan Wilson** 28:55

Well, we will get to that at the end. But I think you'll find, unfortunately, it's an unsatisfactory answer in this case. So here we have Knight v. the Metropolitan Government of Nashville and Davidson County (which I'll just refer to as Nashville) coming out of the 6th Circuit by way of the Middle District of Tennessee in Nashville. So apparently, Nashville has been a growing city; population has been increasing, and their sidewalks have not caught up with them. The court talks about how they have a fairly high pedestrian death index, almost double the national average. They've tried to fix that problem by building more sidewalks, so they set aside some money, increased their capital budget. But, unfortunately, it will take them 20 years to cover, at that rate, the number of critical miles needed. So they passâ€”Nashville passesâ€”an ordinance and says, we can solve this problem quicker. We're going to make new building owners and people applying for a permit either build a sidewalk on their property, build a sidewalk somewhere else, or give us some money, and we'll decide what to do with it. So, as you can imagine, a couple of landowners applied for permitsâ€”James Knight and Jason Mayesâ€”and I want to note, for a second, the court does something I really enjoy in this opinion. They put pictures. I always enjoy ... You know, they say a picture's worth a thousand words. It definitely saved some time trying to describe ...

A **Anthony Sanders** 30:20

Yeah, those pictures really helped crystallize the issue, I think.

R Ryan Wilson 30:26

Yeah. And so, you can see, one of the homeowners wanted to expand, or to tear down a smaller building and put a larger home on it, and could not come to an agreement with how the sidewalk should be built, so never ended up getting a permit. One of the other landownersâ€”Mayesâ€”by comparison, he had an empty lot. He built his property, paid the in-lieu fees, and then wanted a refund to say, this is unconstitutional; I don't think I should be paying this. And they denied his refund, so it goes to the Middle District of Tennessee. The Middle District of Tennessee looks at the law and weighs these two, competing tests. So the two tests that are out there are Penn Central, really a balancing test (very ... relatively favorable for the government), versus the Nollan/Dolan (we'll just call it the Nollan standard), which has several, other factors that tend to weigh much more toward landowners, property rights, finding a taking, and what the court characterizes as an unconstitutional condition. So, for example, in order to get a permit, you have to let the government take your property and have that be an uncompensated taking. So, I should say, the government also argued in the Middle District for a rational basis test. As you know, Anthony, the government loves a good rational basis test.

A Anthony Sanders 32:00

Yeah. Why not throw that in there?

R Ryan Wilson 32:02

And the District Court didn't bite and said we've seen nothing in any Supreme Court precedent or 6th Circuit precedent that would allow us to apply the rational basis test here. They then go throughâ€”the Middle District goes throughâ€”the stated law and applies Penn Central. And so what you had in the lower courts is the government basically abandoning any argument under Nollan/Dolan and the property owners not arguing at all for Penn Central. So this is going to be decided purely on a matter of law (which test applies). And it goes up to the 6th Circuit, and the 6th Circuit does a great job walking through when Penn Central applies, what it should apply to, and this Nollan/Dolan testâ€”which it finds really is on point here, that it's tailored. This is a condition to a permit that's requiring you to give up some property or pay some fees, which the Supreme Court has also found applies under the Nollan/Dolan standard. It's a huge test. And it comes to the conclusion that the test that should apply in the 6th Circuit is the Nollan/Dolan test. So one of the arguments has to do with does it matter if it's an administrative ad hoc determinationâ€”or takingâ€”or if it's part of some broader, widely applicable, legislative scheme? And there, there's a split among circuits. The 10th Circuit goes one way, the 9th Circuit recently reversed itself, and there is a big split among states. So, for example, in the 9th Circuit, the 9th Circuit says it doesn't matter if it's administrative or legislative or as ... The state of California still makes that distinction. So you have a real mess nationwide as to states versus federal courts, who and what tests are applying here, and does it matter if it's legislative or administrative? And the court takes a step back, and it looks at the history of the Fifth Amendment, traces it back toâ€”just an originalist argumentâ€”England. It says it really doesn't matter who's doing the takingâ€”doesn't matter if it's local bureaucrats, a local administrator, or legislature; it's what's being taken. It ultimately comes to the conclusion that it doesn't matter; the Nollan/Dolan test applies here because it's an unconstitutional condition.

But, because these arguments were abandoned below, it does not reach the answer about whether, under the Nollan test, you can require somebody to build a sidewalk to nowhere. And so that'll have to be left for you ... a future case as to whether that has the appropriate nexus and the proportionality under the Nollan test.

A **Anthony Sanders** 32:18

And it was interesting that the city, it seems, really didn't try at all to say that requiring the sidewalk would be proportional under the test, which was interesting to me because in Nollan/Dolanâ€”it's called Nollan/Dolan (for listeners' benefit), by the way, because it's two cases from the 90s called Nollan and Dolanâ€”it's better if you're a property owner. It's better than having the Penn Central test where (I think the rule of thumb usually is) you have to lose 90% of your value before you can say something's a taking under the Penn Central test. Under Nollan/Dolan, it's better for the property owner, but it's not a sure thing. And, you know, I could see them arguing, well, if you get a sidewalk, if you build on the property, then of course you're going to have people there. And everyone needs a sidewalk to be safe, even if it's not maybe for people passing by, so it makes sense that you would pay for the sidewalk. They didn't even try that. It was just, you know, we're going to put all our eggs in the Penn Central basket. I guess that could be poor litigating, but I wonder if, when you actually look at the costs and everything, the writing is on the wall that is not going to pass the test.

R **Ryan Wilson** 36:27

Well, before this case, there was aâ€”I'll go with split, butâ€”disagreement among the lower courts in the 6th Circuit as to which test applied, and so this is the second ... There was a case that came up prior where they didn't have the opportunity to resolve this, what they called an interesting question. So I do think there was an appetite to finally decide which test applies here. But, at the same time, again, with the government pushing for the rational basis test, I just think part of it is that there's a certain presumption by the government that the court will want to defer to them. So I think, making no arguments at allâ€”I can't speak for them as to why they abandoned their argument completelyâ€”one could make an argument that new developments: We need you to put in sidewalks even if, right now, they're sidewalks to nowhere because as more people develop, there'll be connections to your neighboring sidewalks and may be able to pass the nexus test for properties. It would be more difficult to require somebody to build a sidewalk 30 miles away from their property, but certainly on your property and also granting an easement, one could make an argument for that.

A **Anthony Sanders** 37:38

Well, that seems to be what really killed maybe their ... And maybe why they didn't argue it is that you could have the sidewalk built, but you could also pay the sidewalk money for this sidewalk built miles from your house. That doesn't seem to have much of a "nexus," and so, really, that's a tax. So if they (the city) could structure it differently, that everyoneâ€”I don't knowâ€”could pay a pretty hefty tax, but could pay a tax or could build a sidewalk; you just don't get a choice, and you have to build a sidewalk. Do you think that would have passed muster here if just everyone has to build a sidewalk?

R Ryan Wilson 38:23

It might have. And as I dug into this, one of the questions a lot of scholarship tries to discuss is when does it become a tax versus a taking? And what is that balancing act? Ultimately, what a lot of this is going to come down to, and will the Supreme Court ever resolve this, is how broad does the legislation have to be to apply to everybody? Obviously, in Euclid, it was that the zoning applies universally to everyone, right? So that's one end, and the 6th Circuit talked a little bit about this, but this is a little bit closer to putting the burden of everybody on a particular landowner. We're in between does that cross the line where you can regulate everybody equally versus, for example, people building new homes. And there's a case in front of ... a cert petition in front of the Supreme Court that will be discussed in September on this issue. This case came down between the original petition and the reply, and they were able to get it in there. And so we'll see if the court takes this up this opportunity. Justice Thomas has written several concurrences and dissents to denial of cert, saying this is a question that should get resolvedâ€”this administrative, legislative distinctionâ€”so we'll see if the court takes it up.

D David Asp 39:35

This ... So can I ask the question about the distinction? I mean, as you said, it seems like they didn't even try on one of the tests. But the court describes that there's no case in which there's a basis for treating legislative conditions differently from administrative conditions. Is ... Has this caught on separately? As someone who's not familiar with this area, I'm thinking about where is this coming from? Where's Nashville's position they're staking everything on coming from here?

R Ryan Wilson 40:05

So in Nollan and Dolan (more in Nollan), they talked about how these were administrative, ad hoc decisions. A lot of government entities will look to some of the language of Nollan and say, oh see, this is ... It's clear that the Supreme Court was just focused on the fact that this was administrative in nature; it gave too much discretion to an individual. When you take a step backâ€”this is something that that cert petition that was mentioned, discussesâ€”well, Nollan was really the application of a broader, legislative scheme that required dedication of beach access. And so there's an argument, not just whether this applies to legislative or administrative, but when is something administrative versus legislative? And we see this on, for example, rezoning petitions when you ask the government to rezone your particular property. Normally, zoning and rezoning is seen as legislative, but when it applies to your particular property and factors that are related to your development, well, then does that become more administrative or quasi administrative, quasi legislative? And so the court (I think rightfully so) here in the 6th Circuit says, it doesn't matter because it's ... The property is being taken. It doesn't matter if it's being done by one person or a couple of people on a council or city council versus a planning commission. You know, it's still a taking, and that's the easiest way to resolve this. I think that's probably the likely outcome of this. I don't know, Anthony, if you have any ...

A Anthony Sanders 41:31

Yeah, no, I think that's exactly right. And this is a really good case where ... I was really pleased that you suggested this case for the show because it shows, the whole history—I think—of

that you suggested this case for the show because it shows, the whole historyâ€¦I thinkâ€¦of this Nollan/Dolan test shows, kind of what makes for a good case, good facts in a property case, but then also how courts that are not maybe so excited about property rights will use that case in ways that were unintended. So Nollan and Dolan ... They're both about how someone just wants a permit, and they're asked to do these things that don't have much to do with what they want to do with their property. They're good facts because you can kind of have this, you know, like meddling bureaucrat as part of the story, which makes it a lot better than just some city council passed a law 10 years ago, and you have to live with the consequences like everyone else, right? But the principle is the same. The principle is, as applied to your particular property, this doesn't make sense. It rises to the level of being a taking, just like if the city was actually taking your land away. So this is, you know, it's some species (as we call it) of a regulatory taking. The facts made it more of a winner, but the story, the principle, is the same. Then the precedent is that courts that are often not all that into trying to protect someone's property rightsâ€”maybe the facts in the next case, I mean, the facts here, I think, are pretty good, but maybe the facts in the next case are not as exciting as Nollan and Dolanâ€”are going to say, well, we can distinguish those because they're just about some meddling bureaucrat at city hall. This is about a general scheme where we got to defer to the legislature and, you know, maybe even throw a little rational basis in there, like (you were talking about) they asked for here. That then creates all these other cases that go the other way that really go against the principle, and so it sounds like it's time for the Supreme Court to step in and just reaffirm that the principle that's behind all of this is why we have the takings clause in the first place. The court did a good job, I think, in talking about how the idea of a takingâ€”although there wasn't a constitutional principle like this, I think, under English lawâ€”and the Blackstone that you mentioned go back to Parliament creating, taking land. An act of Parliament, which is considered an act of the Sovereign under English law, applies just as much as someone at your dinky city hall saying, well, you have to fork over some cash to get a permit. And the court spent quite a bit of time talking about that unconstitutional conditions clause and how there's not an all-encompassing clause. But it talks about how, in other areas (like First Amendment, for example, in free speech), it doesn't matter if it's a legislative infringement of free speech or an individual administrator. It's what's being infringed, not who's doing it. I like that. It's what's being infringed; it's not who's infringing. So thank you both for coming on this all Minnesota, not about Minnesota podcast that I'm sure all Minnesotans who listen to "Short Circuit" will be super excited about. So Ryan and Dave, good luck in your ventures, in your cases. I'm sure you'll have more exciting cases to talk about one day on "Short Circuit." And everyone else, please check out our jobs page and the positions that are open here at the Institute for Justice. But, in the meantime, I hope that all of you get engaged.