ShortCircuit296

Mon, Nov 13, 2023 3:22PM 48:11

SUMMARY KEYWORDS

jayden, case, qualified immunity, officers, court, moore, child, first amendment, moores, claim, opinion, plaintiff, appeal, short circuit, tori, point, warrant, butler, smith, supreme court

SPEAKERS

Katrin Marquez, Anthony Sanders, Tori Clark

A Anthony Sanders 00:24

Hello, 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 Halloween: Tuesday, October 31, 2023. We have an old friend with us today and also a new voice for our listeners talking about a couple hot recent cases from the federal courts of appeals. So we will get to those guests in cases in a moment. First, just a couple announcements. I know some of our listeners go to the annual bash at the Mayflower Hotel in Washington, DC, the annual lawyers national Federalist Society convention. I will be there on the Thursday, November 9 signing copies of my book. If you would like to get a signed copy, right after lunch, you can look me up in the listings. And if you want to tell me a thing or two about what you think of Short Circuit, that is fine, as well. I always love to hear from listeners. I'll also be at Georgetown the day before that talking about my book, near the end of the day, as part of the Georgetown Center for the Constitution's series on new books on the constitution. So I look forward to seeing some of you at those events. But today, I am going in the virtual studio. I'm going to be with our old friend and IJ attorney, Tori Clark. Tori, welcome back to Short Circuit.

T Tori Clark 01:58

Hey, thanks, Anthony. I've actually transitioned to a new role at IJ. I'm no longer a litigating attorney, but I am doing potential case intake and coordination for our immunities project and for our Fourth Amendment project. So I'm excited to be transitioning to this new role.

A Anthony Sanders 02:17

And we are excited that you are taking over that very important work about the cases that come our way in those areas. And we'll be talking about cases actually in those areas today. But also joining us is Katrin Marquez. So Katrin has joined us as an attorney recently, but she is not a stranger to us. She was a summer clerk, a Dave Kennedy fellow, which we call them now. She was also a litigation fellow. Is that what we call those folks, Katrin, right after law school?

K Katrin Marquez 02:57

That's what we call them now. When I did it, I was a constitutional law fellow. But that is what we call them now.

A Anthony Sanders 03:02

Okay, right. Big difference. Big difference. And now she is working from our Miami office, our Florida office. So tell us a little bit about yourself and what you're working on these days.

K Katrin Marquez 03:18

Sure. So like you said, I've been around the IJ sphere for a while. I really enjoy it. I graduated law school about three years ago. And I couldn't think of anywhere better to work because what can I say? I love fighting for the Constitution, this is the best place to do it.

A Anthony Sanders 03:38

Well, I think that's a ringing endorsement. If anyone out there is looking for a new line of work, we always have openings, especially at our at our headquarters. So check us out on the jobs page. But today, we're going to be talking a couple of cases about the Constitution. First, we're going to start out west. Tory is going to tell us a tale from the 9th Circuit where things got a little hot, you might say for for a property owner.

T Tori Clark 04:11

Yes, indeed very, very hot in multiple senses of the word. So this case is Moore v. Garnand out of the 9th Circuit. And I wanted to talk about this case for a couple of reasons. First, much to my family and friends' chagrin. I love to take every chance I can to talk about how unAmerican qualified immunity is. So thank you for being my outlet for that today.

A Anthony Sanders 04:36

We are always an outlet for raging against qualified immunity.

T Tori Clark 04:40

Awesome, well, I'm in the right place then. And second, the underlying case here is a First Amendment retaliation case with a kind of a qualified immunity overlay, which is timely for us at IJ because the Supreme Court just agreed to hear one of our First Amendment retaliation cases, again with a qualified immunity overlay.That case is Gonzalez v. Trevino. And shoutout to that team: Anya Bidwell, Will Aronin and Patrick Jaicomo, they're probably working on that

briefing as we speak and doing a great job. But this is a really active and interesting area of constitutional law to watch right now. Because the Supreme Court seems to be taking an interest in it, which is awesome. And as we'll talk about, the stakes are really, really high, when the when the government thinks that it can punish you for exercising your First Amendment rights. So that's my first caveat. My second caveat, I want to say something really briefly before we start about qualified immunity, and regular listeners of Short Circuit might be rolling their eyes, because they've probably heard this a lot. But just as a brief refresher, when you want to hold a government official accountable for violating the Constitution, it's not enough to prove that they violated the Constitution. Oddly enough, you also have to prove that the violation was clearly established, which courts have interpreted in practice, to mean that you have to point to a case with nearly identical facts to succeed most of the time. And not only is this a really high barrier for litigants to overcome, it's nowhere in the Constitution, it's nowhere in our federal civil rights statutes. It's a judge-made doctrine that really gained its legs in the latter half of the 20th Century. So it is a high barrier, and a policy judgment that judges have made primarily in the last few decades.

A Anthony Sanders 06:40

So judicial activism, you might even call it.

T Tori Clark 06:43

You might possibly call it that, yeah. So, turning to this case: In Moore v. Garnand, the Tucson Police Department was investigating a building fire, determined it was arson, and then decided that they wanted to talk to Mr. Moore, who was the person who was responsible for taking care of the building. And so officers went to Mr. Moore's office, where Mr. Moore and his attorney were waiting. And when officers started questioning Mr. Moore, his attorney advised him to remain silent and not answer questions. So, on the advice of his attorney, Mr. Moore said, "Okay, I'm not going to talk to officers anymore." And according to the plaintiffs, at that point, officers became more aggressive. They ended up snatching his phone out of his hand, they arrested him, took him to a police station, fingerprinted him before letting him go. And then a few days later, officers obtained a search warrant for Mr. Moore's home that he shared with his wife. And officers told Mrs. Moore "You know, we wouldn't be here if your husband had just talked to us." And if that wasn't enough, these officers also caused the Tucson PD to open another investigation into financial crimes of Mr. Moore and his wife, which that investigation was eventually closed for lack of evidence of wrongdoing. And so after all this rigamarole, the Moores filed a federal civil rights lawsuit, and also submitted some public records requests relating to what they had been through. After the Moores filed this first federal lawsuit, the officers reopened the arson investigation into Mr. Moore, and also tried to induce the IRS to open an investigation into the Moores' finances. I guess because Tucson had not succeeded in pinning them down on anything the first time. So after that reopening, the Moores replaced their previous federal civil rights lawsuit with this one. And they have they had some Fourth Amendment claims, and they had some First Amendment claims. But this opinion specifically deals with the First Amendment claims. And what the Moores argue is that the arrest and the various investigations, among other things, and the search of the home, were all basically officers' attempts to take revenge on the Moores because Mr. Moore first refused to talk to officers and then the Moores filed their lawsuit and public records request trying to hold officers accountable. So the district court here actually denied qualified immunity. And we can talk a

little bit about the jurisdictional piece later if you're interested. The court left open the possibility that it could revisit the qualified immunity issue in the future but said "Right now I'm denying the motion." But the Court of Appeals, the 9thCircuit, reversed and held, first that there's no clearly established First Amendment right to remain silent in police questioning. And second that there's no clearly established right to be free from retaliatory investigation. So the Moores first claim was that, again, Mr. Moore's arrest, the search of the house where they said "We wouldn't be here if Mr. Moore had just talked to us," and the various opening and reopening of investigations, were retaliation for Mr. Moore's decision not to speak to officers at the advice of his attorney. And so I want to pause here to talk about his First Amendment versus the Fifth Amendment right to remain silent, because that's a pretty confusing piece of this opinion that the court doesn't really get into.

A Anthony Sanders 10:54

That's the one we all know and love, right? The Fifth Amendment right to remain silent.

T Tori Clark 10:57

Exactly. Most people are probably going to be familiar with the Fifth Amendment right to remain silent. That's encompassed in the Miranda rights: the officers will repeat whenever they're arresting someone, "You have the right, the right to retain an attorney, you have the right to remain silent," that's probably the most famous one. But here, the Moores don't bring a Fifth Amendment claim. And that's probably because the Fifth Amendment has to do with your protections in a criminal proceeding, and how the government can or can't use your decision to remain silent against you in a criminal prosecution. But here, Mr. Moore isn't complaining that they improperly used his invocation of the right to remain silent in the arson prosecution. He's complaining that the officers took additional steps outside of that prosecution, to basically take revenge on him for not cooperating with them. And so because of the harm that he's complaining about, that falls under the First Amendment and not the Fifth. And I'm using the term right to remain silent, because that's what the court uses. But really what this is under the First Amendment is a right to be free from compelled speech by the government. And when you think about it, most of the time, when you think about a free speech case, you think about a situation where the government is trying to suppress speech, keep you from saying something that you want to say, but the right not to speak is just as important as the right to speak in the First Amendment, because they're both central to ensuring the freedom of expression, freedom of conscience, you know, these really rich first principles that the First Amendment was designed to protect. So this is a really important aspect of the First Amendment that is not talked about as much. But still, the the right to be free from the government compelling you to speak is really crucial to those protections. Nonetheless, in this case, the the 9th Circuit said, "No, there is no clearly established right to remain silent. And specifically, there's no right to remain silent under the First Amendment during police questioning." Now, there is literally a Supreme Court case, Wooley v. Maynard that says, "The First Amendment protects your right to remain silent." But the court reasoned that the Supreme Court statement was made at too high a level of generality, which is a really common analysis in qualified immunity cases. And more than that, they say that was a compelled speech case in Wooley v. Maynard. The plaintiff was forced to have a license plate that said "Live Free or Die," and the plaintiff didn't want to say those exact words. And so the Supreme Court said the government can't compel that speech. So the 9th Circuit kind of draws a

dichotomy between specific compelled speech and more general compelled speech. But more than that, the 9th Circuit goes farther, and says that in order to overcome qualified immunity here, the plaintiffs would have basically had to produce a case that says there is a specific First Amendment right to remain silent in these exact circumstances like police questioning. And then the Court doesn't even actually answer the question whether there is a First Amendment right to remain silent. Under police questioning, they just say, well, there isn't one. So you know, plaintiffs lose, goodbye, which is, again, really common in these qualified immunity cases and very frustrating because it doesn't move the analysis forward for future cases. And briefly, the second claim that the Moores make is that the officers retaliated against them based on the lawsuit and the public records requests by reopening the arson investigation and then trying to get the IRS to investigate the Moores. And here, the Court's analysis, in my opinion is even shakier because the Court acknowledges that there is actually a 9th Circuit case that says retaliatory investigations can violate the First Amendment. And side note, we've actually filed a cert petition at the U.S. Supreme Court on this issue. It's our JTH case, if you want to read more. But here, the Court essentially says, "Well, you know, we know that there's this other case, but that case didn't put the officers on notice here, because the steps that they took in their investigation are different from the steps that the officers took in the previous case." And the court doesn't say, the steps were less intrusive, or worse or better for some reason. They don't really explain why that distinction matters. They just say, "Well, they're different. So, officers would not have would not have known that investigation could have violated the First Amendment." So again, this just goes to show how the lengths to which courts will go to dismiss cases on qualified immunity grounds and avoid both holding officers accountable, which is the immediate harm of these kinds of opinions. But then, also long term courts also avoid even ruling on important constitutional questions.

A Anthony Sanders 16:22

Katrin, do you often invoke your right to remain silent? In a First Amendment context, of course?

K Katrin Marquez 16:28

All the time. Should I do it right now? Probably not the best.

A Anthony Sanders 16:32

That's not a hint.

K Katrin Marquez 16:34

You know, one of the things that I appreciate about this conversation is exactly what Tori said, which is in these qualified immunity cases, it's so common for the courts to just use the level of generality to get out of actually having to decide the issue. Anyone who's really familiar with qualified immunity jurisprudence knows this comes up all of the time. I find this case particularly interesting, because Wooley is a case I have read, I know something about compelled speech, but this was in a different context than I've read it before. So I really

appreciated Tori's explanation. Something a little bit, actually quite different that I thought was interesting about this case, that really wasn't the focus: what Tori said, but I think is relevant, is the beginning. There's a brief discussion about discovery in the case. And I thought that was really interesting, because in my own review of qualified immunity cases over time, one of the things that I've noticed is at the district court level, not at the appellate court, sometimes you'll have the courts deny the motion to dismiss based on qualified immunity, but they want to split the baby. So they end up really limiting discovery. And that ends up creating a huge problem later on in the litigation, because you get to summary judgment and the Court tells you, "Why you have no evidence here to support your claim." That's, of course, you don't have evidence you didn't give me the discovery I needed. And that issue comes up in this case. And I think it's really important to point that out, because I think most judges try to do their best, but in doing their best, sometimes they end up creating this whole other problem later on in the litigation.

T Tori Clark 18:21

Yeah, and I think that comes up, specifically a lot in cases involving police officers and criminal investigations. Because the court is trying to not impede on a criminal investigation and be be cognizant of the legitimate governmental interest in not having all of their investigatory techniques laid out there for the public to see and things like that. But then in the process, they end up limiting discovery more than they need to and then they come back at a later date and say, "Oh, well qualified immunity because you don't have evidence." Or especially in First Amendment retaliation cases, like our Gonzalez v.Trevino case at the Supreme Court. Discovering evidence is really key to proving the underlying claim. The amount of evidence that you need to establish a First Amendment retaliation claim, in certain context is really, really high. And that's something that we're fighting about in Gonzalez. So, you're totally right, Katrin, that the discovery piece of it sometimes is a make or break issue.

A Anthony Sanders 19:35

And we'll be sure to put in the show notes links to the Gonzalez case and what's going on there, which, which we very briefly previewed on a previous episode and also the JTH opinion that you you mentioned, Tori. Another thing about what happened in the district court in this case that was I find concerning is that one of the worst parts, I think, is thinking as someone who is having to litigate a qualified immunity case from soup to nuts, including in the district court, the most frustrating part of the doctrine from that standpoint is that you can win on qualified immunity if you're a plaintiff, at either motion to dismiss or summary judgment. And then the government official can appeal. Even though you've you're not done with the case yet. You don't go to trial, you don't you don't even go to further discovery. And that's because of the doctrine that the whole point of it is to not waste the government's time with discovery. And so get this on appeal as quick as you can. And here, qualified immunity was denied but without prejudice. And I'm not exactly faulting the district court for how it did that. But that meant that appeal could happen at that time, but the government could have filed again later on and lost again, and that appealed at that time. So it's really a heads, you win, tails, you lose in terms of when the plaintiff has to go up to the the appellate court, instead of just, winning what can be a very onerous process of either motion dismiss or summary judgment, and then being able to get what they actually want to get to, which is the trial where you have a finding of fact of was this actually retaliation? And instead, you can have these multiple appeals even on this initial question.

T Tori Clark 21:37

Yeah, and that is one of the even more formidable aspects of qualified immunity, as if the doctrine itself isn't enough, right? The government can repeatedly appeal this issue, so they get several bites at the apple. And those are interlocutory appeals, which means that they get to put everything in the case on hold, and go litigate this. So if you're a plaintiff, especially if you're a plaintiff who is having to compensate your lawyer, and has limited resources, which many plaintiffs in civil rights lawsuits run into, that's more time on the clock that's ticking away, because you're having to wait for an additional appeal, that's additional appeals that you're having to figure out, or your lawyer's having to figure out, is this worth the money to continue to litigate this? And right, you could lose at any stage of this proceeding. So it really is something, I think I've talked about this on Short Circuit before. But really, the interlocutory appeal aspect of qualified immunity is actually one of the most onerous features.

K Katrin Marquez 22:47

Yeah, it just seems to conflict with a lot of the policy rationale of "Let's not waste time going through all this arduous process" when you just keep going to the appellate court constantly.

A Anthony Sanders 22:59

But let's not waste time for the government if they seem to be losing. Well, a different outcome, however, occurred out east in the 11th Circuit, where we have kind of a wild, but not so wild tale about what it's like to be 17. Now, you know, in years past, 17 maybe meant you could live on your own at that time; people used to get married at 17, start to raise a family. But apparently, according to an officer at this school, being 17 means it's child abuse if you spend a little time in a park. So, Katrin, can you enlighten us?

23:43

Sure. This case is Butler v. Smith, like you said, it is out of the 11th Circuit. It's out of Georgia, specifically. And it, guess what, it has to do with qualified immunity, because that's just the theme of the day. So what happened in this case is that there is a family consisting of a single mother of three children. We don't know the ages of all of the children, but the important child here is Jayden, who, like you said, is 17 years old. He is a senior in high school. And he is disappointed because his family moved, and because his family moved, he is no longer zoned for the high school he had gone to for the previous three years. At this point, his mom gives him an option: he could continue going to his high school, in which case, he won't have any transportation home. Or she could transfer him to the school that he's currently zoned in, which would provide bus transportation. He wants to stay at at his school, which presents a couple of challenges. So his options become that he can hang out at the school, and so he can be picked up; he can hang out at a local park and so he can be picked up; or he could walk home and wait there. Jayden is actually quite friendly with the school resource officer at his school, that's a local cop who is assigned to the school. And he talks to this resource officer, Officer Smith, all the time and they're friendly. She knows him well. They sometimes have lunch together. And one day, one of the things she learns about him is this setup that they have, that after school,

he could hang out at the school, hang out at the park or walk home, but he won't have transportation. And she is concerned about this. She thinks it's cruelty to a child. And so she actually calls Butler, who is Jayden's mom, and explains the situation that she thinks this puts him at risk. And that Jayden should not be hanging out after school. First, there's a policy that you can't actually be hanging out on the property of the school. She also thinks he can't get water or food while he's there. He's estimated to spend probably around four hours there at the end of the school day before he actually gets picked up to go home. And so they have this conversation, and Jayden's mom explains that she is a single parent, so she can't go pick him up because she has to work and doesn't get off work until later. She does not have her fiance pick him up, because there seems to be some conflict between Jayden and the fiance, and she wants to prevent any kind of negative situation. Jayden was given the option of what he wants to do and what school he wants to be at. And there's one other option that Jayden wants to take, which is he wants to go to an apartment complex nearby where some of his friends live, and he wants to hang out with them. But Jayden's mom does not allow that because he has gotten in trouble a few times for doing that. So this school resource officer has this conversation with Jayden's mom, she knows all of this, but she's still concerned. And one day after school, Jayden goes to the apartment complex that he has been told he cannot go hang out in. And later on, he calls his mom to pick him up and she says, you know, you're not allowed to be there. I did not allow you to do this. I'm not going to pick you up. So he spends the night with his friends there. The next day, he goes to school again, and he speaks to Officer Smith, tells her what happened. And Officer Smith is quite unhappy about this. Part of the reason Officer Smith is probably unhappy about this is because Jayden actually recorded his phone call with his mom. And in the phone call, Ms. Butler refers to Officer Smith in maybe not the most charitable terms. I think at that point, she's quite frustrated, because she keeps trying to accommodate Jaden's desire to stay in the school but he keeps creating these problems. And Jayden plays this audio recording for Officer Smith. She claims she's not upset about it, but there are notes from another officer suggesting she was, and she decides that she has stood by watching this for too long and she decides to get arrest warrants against Ms. Butler. Two warrants, one for first degree child cruelty and one for second degree child cruelty. First degree child cruelty has a minimum five year sentence. For "willfully depriving a child of necessary sustenance to the extent that the child's health or wellbeing is jeopardized." And then the other warrant is for second degree child cruelty, which has a one year minimum for conduct that "with criminal negligence causes a child under the age of 18 cruel or excessive physical or mental pain." The magistrate judge does issue the warrants. And later that same night after the warrants have been issued, Officer Smith texts Jayden and when he doesn't respond within about 10 minutes, she actually has a police unit go check in on him and tells those officers about the warrants. Predictably, this does not go well for Ms. Butler. She is arrested and charged with first degree and second degree child cruelty. And she has to spend four days in jail. Four months later, these charges are dismissed. But I think we can all agree Butler probably did not have the greatest appreciation for what happened. So she decides to sue for malicious prosecution. And this case ends up before the 11th Circuit, as we said. Malicious prosecution is kind of a difficult claim to bring because there are elements both of common law tort malicious prosecution and Fourth Amendment violations. One thing I appreciate about this opinion from Judge Newsom is that he actually explains what elements you take from each of those so that you understand the analysis. Because sometimes these claims can be very hard to understand.

A Anthony Sanders 31:01

I think it's a very classic Judge Newsom opinion: he tries to really explain everything, which is

appreciated.

K Katrin Marquez 31:09

Yeah, I would recommend it to others. I won't go into the details of all of the elements, because there's quite a few. But what's important here is that the 11th Circuit denied Officer Smith qualified immunity. Which, for all the reasons that Tori was speaking about earlier, is actually a really big win, because I think it would have been really, really easy for them to say, "There is no exactly on-point case here" and say, therefore, there is no constitutional violation. Because to be frank, how many cases do you know of where an officer gets mad that she gets called the name, and then tries to have a mom arrested for leaving her almost adult child to hang out for four hours? Probably not that many. And if you're defining it at that level of generality, she would have lost. But the panel does the right thing: they don't decide to ask that exact question and said they think the right level of generality is to ask whether the type of shortcoming in the warrant application was clearly established. And here they say that it was, because in her warrant application affidavits, she actually omits a lot of important information that would have helped to the court understand that Jayden wasn't really experiencing cruelty. So they identify five specific omissions that they think are really important. One was that Jayden had chosen to stay at his old school and knew about the issues getting home. He was well-aware from the very beginning that he would have to hang out at the school or at the park or have to walk there. And Officer Smith knew about this because she had spoken with Ms. Butler and with Jayden. She knew about the different options he had about going home, and why some of them were better than others, and why he would have preferred to stay close by rather than walk home. Officer Smith also knew about an issue regarding the key to the apartment. So like I said, one of the options Jayden has was he could walk home to the apartment. He however, did not have a key to the apartment, because he had previously skipped school to hang out in the apartment with friends. And Butler was concerned about this. So she took his key away and said he would have waited for a family member to open the door for him. Officer Smith was aware of this, she admitted it from the affidavits and that's one of the things the court said "This is relevant information." Another thing that Officer Smith knew was that this apartment complex where Jayden kept going to visit his friends, she was aware that Butler had forbid him from continuing to go there because he kept getting in trouble every time he was there. And she also had made a point in the affidavit that he wasn't getting food for the four hours he was there, he didn't have water, he didn't have a snack. And that that might be an issue for someone that in the affidavit said heart condition. It turns out he didn't actually have a heart condition, but she had a reasonable belief that he did because he had worn a heart monitor at one point. So we're gonna let that one slide. There was a reason for it. But she made this accusation that he was being deprived of food. But she also knew that he had been trying to lose weight because he's on the wrestling team and he needed to lose weight for the team. So the court found that these five omissions made it so that there was no arguable probable cause in the case. And so they denied qualified immunity, which, as with what Tori said earlier, is a big win and one that isn't guaranteed even when the facts are as ridiculous have as they are in this case. So the panel in this case was Judges Jordan, Newsom and Ed Carnes. Interestingly, here, there's actually a concurrence from Judge Carnes, where he says that he joins the opinion, because the opinion does not say that in when deciding what was important to determining whether there was arguable probable cause the court didn't say it's okay to exclude inculpatory evidence. So he says, "Yeah, even if you messed up with a warrant, if you know that there's inculpatory evidence that was omitted, you need to include that too if you include omitted exculpatory evidence in the analysis."

A Anthony Sanders 36:03

One of the few instances of the word inculpatory, I must say. I don't use very much. Which I'm guessing is just the opposite of exculpatory.

K Katrin Marquez 36:15

I would assume so. I think his point is, if they already got a warrant against you, with evidence that maybe you didn't do it, but there's other evidence that you did do it, let's include it in there, just in case because we want to make sure that we can show you're very guilty. I don't quite understand what his point is there. But he thought it was important to add. Apparently he's not alone in thinking this. He does say that the 2nd and 5th Circuits have said inculpatory evidence should be considered. But it was an interesting aside to the larger discussion, I think.

T Tori Clark 36:53

Yeah, this case is is really interesting for so many reasons. And I hope that we get to the the parenting aspect of this because I would I would love to talk about that too, and rant about that, in addition to qualified immunity. But two things that stood out to me doctrinally looking at this case: the first is that it's kind of a big deal that this case is a malicious prosecution case. And that the 11th Circuit goes into such depths to talk about exactly what is involved in this claim. Because the court cites Thompson v. Clark, which is the Supreme Court opinion from last year, I believe. And in that case, prior to that case, there was a circuit split over whether there even was a constitutional claim for malicious prosecution. But in Thompson v. Clark, the Supreme Court, almost assumes that the claim exists and doesn't really go into a lot of analysis about the circuit split or anything along those lines. There's actually a, I believe, a dissent from Justices Alito, Thomas and Gorsuch that protests on that exact basis and say, hey, you know, the courts never actually decided that malicious prosecution is something you can bring a constitutional claim for. And so, for instance, the 5thCircuit at that point didn't think a claim like that existed at all. I think that consensus now after Thompson, even in the 5th Circuit, is that the claim does exist. But again, I think it's it's a big deal that the 11th Circuit not only accepts that, yes, this is a claim and does this really thorough analysis of how it works, but then decides that the plaintiffs claim is actionable in this kind of new-ish space. So I thought that was really interesting. The second thing that I thought was interesting that Katrin also talked about, is that, unlike the 9th Circuit case we just talked about, the 11th Circuit doesn't actually require identical facts. They say that it's enough to look at this rule that intentionally or recklessly omitting material information from a warrant violates the Fourth Amendment, which from a common sense standpoint, makes sense, right? That is a a clear rule that the officer could have applied in this particular case and knowing that what she was doing was wrong. But the Court could have easily said, for instance, this is a school context, and the considerations for security in a school are different from considerations in a regular criminal investigation. So that means that the previous cases aren't good enough to put the resource officer on notice. But they don't do that. And they look at a common sense reading of the case law and say, yep, that's enough to clearly establish this right, which I think is great.

A Anthony Sanders 39:56

Yeah, I think one thing in the background is just the common sense parenting and that's how Judge Newsom opens it. "Parenting is hard. Raising children requires patience, sacrifice and tenderness. It also requires tough choices. And sometimes it requires tough love." And kind of what's in the background here, I think is this is a very reasonable way to treat a troubled 17-year-old, especially in the mother's circumstances. And it's kind of too bad, I think that the case, I mean, it's because of how these types of cases work the case, the actual legal analysis revolves around what was given to the magistrate judge and what was in the warrant and whether the warrant there was probable cause or not. Whereas, even just the choice to go before the magistrate judge, I think if we had had our druthers, right, it wouldn't turn on whether there's arguable probable cause about what's presented to the magistrate judge. You should look at the whole universe of what's going on here and say that this is a completely reasonable way, for a 17-year-old, we're not talking about a 9-year-old here, we're talking about a 17-year-old, who has made his own choices. I mean, even if the 17-year-old didn't have a choice as what school to go to this, this is not child abuse. This is not anything close to a year minimum prison or five years minimum in prison. One thing that's not talked about, is this kid's life gonna be better off if his mom is put in jail for a year, or put in jail for five years, where he's going to be 18 and emancipated soon, anyway, where like any of the all this would be beside the point? They could have made hay about that. But instead, you know, I get it, they go this kind of more narrow road. This was all just completely ludicrous what this this woman did. And luckily, they found a way to get there. But you know, in the background is that this is not a standard that parents can be held to.

K Katrin Marquez 42:13

I agree. And I think the judges recognize that. It's not as evident from the opinion itself. But if you listen to the oral argument, there's a lot of discussion of "this is a 17-year-old." He is hanging out at school, how is hanging out outside of the school and maybe at a nearby park an ideal situation. And it's interesting, because the attorney for Officer Smith starts talking about well, it's a dangerous area, you don't know what's happening. And at one point, Judge Jordan, I guess he's a little bit perplexed. He's like, "I don't understand how anyone would see these charges applying to this situation." And he actually has a quote that I wrote down because I thought it was excellent. He says a law like this is not is "not meant to target a parent doing the best they can but can't do the best that society hopes for." And I thought that was such an excellent point. Because he's saying, yes, it's not ideal that the child has to spend, actually maybe fewer than four hours, there was some factual debate over that as well, hanging out. It's not ideal, but that's not child abuse. And the idea that you're bringing this charge is utter insanity.

T Tori Clark 43:30

Yeah, and, you know, the Supreme Court in a different context has recognized the constitutional magnitude of the importance of making parenting decisions for over a century now. This is a really well-established part of constitutional law, and what the Constitution protects is a parent's right to make a decision that someone else might disagree with about how to parent their child. And for me, I'm sort of a parent, my first one is on the way, and will be here fairly soon. But anyone who, has has experienced, expecting a child or having a child, I think, has had similar experiences, where everyone has an opinion about what you should or shouldn't do, the random lady that you end up next to in the supermarket thinks that you

shouldn't have this sleeping arrangement or that feeding decision or anything like that. And it's just a pervasive part of society. And that was really what I was thinking about, as I was reading this opinion is just, you know, maybe it's not a perfect solution. But this is so within this mom's rights to make a parenting decision and we have to give people latitude and the Constitution gives people latitude to make these kinds of parenting decisions for their own children.

A Anthony Sanders 44:55

Yeah, and that's a good point. So one thing that doesn't come up at all because it doesn't really to, but could have thrown in there is what, of course, we talked about in our school choice work, which is the fundamental right of parents to make decisions for their upbringing of their children. Which is this decision was completely within that fundamental right. You know, one other thing that the court does address, but I think it's just kind of looney tunes that it's in there also, is that she was held for four days in jail, and you're supposed to have 48 hours maximum, but unless there's some special circumstances, Justice Scalia thought it'd be 24 hours maximum, when when that case came out a number of years ago, and yet somehow it's like, I think, from what I know about state courts in Georgia, this is kind of par for the course. In fact, there's a lot of worse stories out there, as our friend Andrew Fleischman has told us in the past. But four days in prison, and it's not even like a big part of the opinion.

K Katrin Marquez 45:57

Four days in prison for giving your child the option of staying in the school that they know and love. That is insane.

A Anthony Sanders 46:07

This is a story I may have told on Short Circuit before. So I apologize for any longtime listeners. But whenever I think like, "is this okay for your child to do?" I think of the story that my my wife's now departed, but beloved grandfather told me that he grew up in the Depression. They lived on a farm in rural Wisconsin. And this is what he told me: his mother would give him and his little brother who was two years younger than him, and he was five and a half, and his little brother was three and a half, they would give them this huge carton of eggs, and a bag with like a grocery list. And they would walk a mile to a little grocery store, they would hand the carton of eggs to the grocery person. And that was like their payment for groceries, the Depression, right? Not a lot of money, but they had eggs. So they gave the eggs, the woman would open the bag, get a list, fill up like a bag of the groceries, and then give it to them and they would carry the groceries back home a mile each way. I don't think that was child abuse. I think that was perfectly fine. I think it'd be fine for people to do today, although I wouldn't recommend it because Resource Officers would probably pick them up pretty fast. And if that's not child abuse, then Jayden waiting in the park certainly is not child abuse. So anyone out there wondering what you what kids should be doing: this is okay. And please mind your own business. So thank you, Tori and Katrin for not minding your own business and joining us today on Short Circuit. Hope everyone enjoyed those stories. We will have another episode next week. Again, look for me coming up if you're going to be at the Federalist Society convention on November 9. But in the meantime, I'd ask that everyone get engaged.