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SPEAKERS

Anthony Sanders, Patrick Jaicomo, Paul Sherman

A **Anthony Sanders** 00:24

Hello, and welcome to Short Circuit, your podcast on the federal courts of appeals. I'm your host, Anthony Sanders, director of the Center for Judicial Engagement at the Institute for Justice. We're recording this on Thursday, December 14, 2023. We are now deep into the holiday season, and happy holidays, merry Christmas, et cetera to all of you. And we have a couple of gifts for you today on this episode in the form of a couple of my colleagues and some cases, one from the D.C. Circuit and one from the Fourth Circuit. First though, the biggest gift of all this year from the Center for Judicial Engagement to all of you is our documentary podcast series' third season, Bound by Oath: Property Rights. So you may have already listened to the first episode, which is about the open fields doctrine (if you want to know what that is, listen to the episode) and the Fourth Amendment. That's the amendment that has to do with search and seizure and warrants and how it interacts with property rights and how it protects property rights. That's all in episode one. So more episodes will be coming. We'll be talking about regulatory takings on the next episode. That should be coming out just before Christmas. And then we'll have an episode a month thereafter in the new year. They will all be about how the Constitution protects or is supposed to protect our property rights. Now, today, we have, as I said, the Fourth Circuit and the D.C. Circuit. And to bring these cases to you, we have two gentlemen who are learned in the law. One of them is Paul Sherman, and the other is Patrick Jaicomo, both longtime IJ attorneys. Welcome back to both of you.

P **Paul Sherman** 02:16

Thank you for having us, Anthony.

P **Patrick Jaicomo** 02:18

Ho ho ho.

A Anthony Sanders 02:19

Of course. Well, we'll get to a rather poor Santa Claus impersonation, although he does have a sweater that kind of rings a bell today. You're going to have to grow your beard a little longer there, Patrick, and maybe get older. So Paul has this case involving an individual that most of you have heard of, former President Trump. Now, there's all kinds of, as there has been for God knows how long, litigation involving the former president, especially right now. It's hard to keep track of it. We are not a Trump litigation podcast. There are other podcasts that do that if you want to go listen to them, but this one is particularly interesting, as it has some unusual legal issues to do with the First Amendment. So in the grand scheme of Trump litigation, it's kind of like a leaf on the edge of a branch as part of the whole tree of litigation, to steal a metaphor from Dickens. But to us, it is very interesting. So Paul, what's going on with this little bit of Donald Trump's life in the D.C. Circuit and who he can malign and who he can't on social media?

P Paul Sherman 03:37

Yeah. So yeah, this is, as you can imagine, a sleepy little case that would have flown under the radar had we not brought it to your attention: *United States of America v. Donald J. Trump*. And if you're having trouble keeping track of the litigation against the former president, this is the litigation initiated by special counsel, Jack Smith, regarding Donald Trump's alleged efforts to unlawfully overturn the 2020 election. As part of that litigation, the district court entered a gag order restricting the ability of the parties to make public statements regarding, or as the gag order actually put it, targeting the parties' counsel and their staffs, court personnel, and any reasonably foreseeable witness or the substance of their testimony. And Donald Trump appealed this to the D.C. Circuit and said that it violated his First Amendment rights. And so we have in this case a really interesting conflict between very important First Amendment rights to talk about the act of government prosecuting a criminal defendant. That criminal defendant is a political candidate, not just any political candidate, but the leading Republican candidate for the presidency. So he certainly has a strong First Amendment interest in talking about this litigation. On the other hand, we have the public's right to have criminal trials conducted fairly and in accordance with law. And so what this case is about is how do we balance those rights? And I think the D.C. Circuit does a really thorough job of explaining that, digging into it, explaining why they are rejecting most of Trump's arguments, and why they uphold most of the gag order, but they do modify it to allow Trump to disparage some people, but not as many people as he would probably prefer. So what ultimately happens in this case is the court, without completely deciding that strict scrutiny applies (and strict scrutiny is the highest level of judicial review), says we're going to apply strict scrutiny here because of the strength of Donald Trump's interest in talking about this prosecution, and then it goes on to apply strict scrutiny. And it does it in a very fact-based way. It looks at, I think, the very compelling evidence that when Donald Trump has spoken publicly about specific people, both in this litigation and in other litigation, it has resulted in serious threats against those people. People have received death threats, people have had to flee their homes. And it's not that Donald Trump is making these threats. But he makes statements like when you come after me, I'm coming after you. And then some of his supporters, by no means a majority, but some of them target judges or election officials or prosecutorial officials. And the court says, look, judges have to be able to do their job, witnesses have to be able to testify without being afraid that they're going to be targeted for threats or even death, and prosecutors need to be able to do their jobs as well. So you cannot make these kinds of targeted statements. There's at least

strong enough evidence that this actually results in real world harm. But it does scale it back somewhat from what the district court initially held. Notably, the court holds that Trump can make statements about special counsel, Jack Smith, and you can be certain that he will continue to do so.

P Patrick Jaicomo 07:50

Do you mean deranged prosecutor Jack Smith?

P Paul Sherman 07:53

Yes, deranged prosecutor Jack Smith, as Trump has called him and may continue to lawfully call him. The court does draw a distinction between statements about witnesses and statements about government officials. So one of the things that the court says is you can't make any statements about witnesses, pertaining to their testimony. But with regard to other government officials, like the prosecutors, you may make statements about them, as long as they are not intended to materially interfere with their government function. And with regard to witnesses themselves, Donald Trump can still talk about the witnesses if he is talking about them for purposes other than their role in the litigation. So one of the things that the court points out is some of the witnesses against him are former, basically, employees of Donald Trump in the executive branch who have written books about Donald Trump, and Donald Trump has an interest in challenging the characterization of himself in those books, and he can talk about that. But he can't talk about the substance of their testimony. Ultimately, I think what we see here is a court really grappling with these two very important government interests, the interests of Donald Trump in speaking, and the interest of the government and the public in having trials run fairly and trying to strike a very careful balance, which is something that we like to see in First Amendment cases. I think that often, you know, certainly in some of our cases, we think we don't get courts that are sufficiently engaged. And on the other hand, you know, there is often a perception that strict scrutiny means that the government always loses, that there is never a government interest sufficiently compelling to uphold a restriction on speech, and I think the court does a good job walking through the case law and explaining that when you are an actual party to litigation, your First Amendment rights are circumscribed somewhat. We still have to, you know, measure that line carefully, but you don't have complete freedom to speak if it's going to prejudice our ability to, you know, have our criminal justice system function. So kind of an update on this case: In an unrelated part of this case, the special counsel, Jack Smith, has sought certiorari from the Supreme Court before judgment of the D.C. Circuit on some immunity issues that Donald Trump has raised. I have not seen anything from Trump's lawyers related to the gag order, but it's possible that that will somehow get folded in with the appeal on that immunity stuff. Trump has to respond to that petition for certiorari by December 20. It's an extremely expedited schedule. So we will see what happens there. All in all though, a really interesting case. You know, the last thing that I'll say about it is I think one of the notable things about the decision is that it really recognizes the role of the district court in weighing the factual analysis about things like Donald Trump's intent when he makes specific comments. And so, to that extent, Trump may feel like the shackles are off and, now, he can say whatever he wants because no one can read his mind and know what's in his heart of hearts and what he intends when he speaks. I think there's a subtle nod from the court of appeals that like actually, district court judges are pretty good at making those kinds of credibility determinations. We saw this from the New York court in his ongoing

litigation there where he's been fined $15,000 for violating restrictions on his speech making comments about court personnel there because the court simply didn't believe that, you know, he was not referring to the court personnel, as he claimed. And we could see similar things here. You know, Donald Trump is nothing if not voluble, so I think if he doesn't watch himself, he could very well end up facing some sanctions in this case.

P Patrick Jaicomo 12:34

I think, before we really get into kind of the questions and the additional issues here, that the important thing for the audience is to do your best to abstract away from the fact that this is a Donald Trump story. Because this is, like Paul said, a very important First Amendment story and also an important fair court story. And so, you know, imagine that instead of Donald Trump criticizing deranged prosecutor Jack Smith and the like, you know, the Institute for Justice is making statements about our ongoing cases or another sort of plaintiff-side civil rights firm is doing that. And so the issues at stake here should not be colored, to the best of our ability, with the brush about whether you support or oppose Donald Trump. And I think that the big concern here should be that we don't let the law get sucked down that particular rabbit hole because these are actually very important issues that exist independent of Donald Trump. And I think there's some aspects, frankly, of this case that are very Trump-centric and that kind of makes it a little bit difficult to pull those out of the analysis.

P Paul Sherman 13:43

Yeah, I think that's exactly right. I mean, you know, to share sort of a personal anecdote, IJ, in all of our cases, speaks to the media about the cases. We publish op-eds about the cases while the cases are going on. And it's an extremely important part of the civic education role that we play in trying to, you know, inform the public about these important constitutional issues. And I actually had a case where an opposing litigant in the case filed a bar complaint against me saying that I had violated ethical rules because I had made public statements about the case. And that complaint was ultimately dismissed because of Supreme Court precedent holding that you can't gag people from speaking about these issues, unless it materially interferes with the function of the courts.

A Anthony Sanders 14:40

And that was a First Amendment case, if I remember correctly.

P Paul Sherman 14:43

Yes, that was also a First Amendment case.

P Patrick Jaicomo 14:46

Yeah. And of course, prosecutors, both deranged and not, commonly hold press conferences to announce, for instance, indictments and prosecutions.

A Anthony Sanders 14:46

Ironically. And when they arrest the suspect, they tell the reporters so they can put it on live TV as they do the perp walk. One question I had for you, Paul, and so I did not read this case as carefully. You said that it applied strict scrutiny, though it seemed like it was kind of like a different twist on strict scrutiny. So it wasn't quite as hard a test, at least on one of the parts of the analysis as it could have, or what am I missing there?

P Paul Sherman 15:31

You know, I don't know if I agree with that.

A Anthony Sanders 15:34

Okay.

P Paul Sherman 15:35

You know, Trump argued that the standard should actually be clear and present danger, which is actually not a standard that is used under First Amendment law.

A Anthony Sanders 15:49

Right. It hasn't been since like 1919.

P Paul Sherman 15:51

Yeah, it was kind of an ancient articulation of ... And actually, I believe the clear and present danger language comes from, was it *Abrams*? The draft protesting case where it was like, oh, you know, you can ban people from protesting the draft because that presents a clear and present danger.

P Patrick Jaicomo 16:11

Yeah, it's fire in a crowded theater.

A Anthony Sanders 16:11

I think it was even from *Schenck*, which is the one before *Abrams*.

P Paul Sherman 16:15

Yeah. So the Trump campaign basically said there should be no weighing of, you know, the government's interest here at all. You can only do this, essentially, if it has already materially interfered with the litigation and even said that, essentially, the only thing the government can do is enforce existing laws against things like intimidating witnesses. And the court does reject that. And I think, correctly so. I mean, Trump's team doesn't even challenge these witness restrictions, right? They were smart enough not to go to that bit. No, that's right. I mean, so Trump is an accused criminal defendant. And as part of his supervised release, the reason why he's not sitting in a jail cell is because he's agreed to certain restrictions on his conduct. And one of those is that he will not talk to witnesses in the case. And he does not challenge that; he recognizes the court's authority to impose that limitation on him. And one of the things that the court here says is it would be very odd indeed if Trump would be prohibited from speaking to say Mark Meadows, but could go on Truth Social and say, you know, Mark Meadows better not be a coward and a liar who makes up lots of horrible stuff about Trump so that he can get a sweetheart deal from prosecutors. Right, which he basically did do early in this case? Correct. I mean, this is (I'm paraphrasing here), but I'm not far off from what he actually said. And, you know, again, I think the court did a good job. And the district court did a good job of looking at like what has Trump's actual conduct been in this litigation and in other litigation, and what has the effect of that speech actually been in the real world?

P Patrick Jaicomo 18:26

I agree. I think the most compelling aspect of this is how the court explains, well, even the Trump camp here does not quibble with the fact that you can be put on conditions, you know, pretrial. And so, here, what the court says is you're essentially trying to launder your agreement to not have contact with witnesses by saying things in such a way that everyone, including the witnesses, understands you're speaking to them. And so that, I think, is compelling. The two points that I kind of wanted to quibble with in the opinion itself are, you know ... The opinion explains all of these sort of Supreme Court cases about when speech can be restricted vis-a-vis, you know, court proceedings, and of course, you've got the one line that talks about attorneys, and the court sort of rests its analysis there on you being an officer of the court, which, of course, has no application whatsoever to Donald Trump, who is not an attorney or an officer of the court. And so, you know, the court in this decision acknowledges that. To my mind, it doesn't really explain how exactly those dots are connected. It sort of mixes and matches that case law with the case law about parties to the case, which are resting heavily on the fact that you get special information as a participant in the litigation. And here, at least as I read this opinion, none of the stuff that Donald Trump was talking about really had much to do with secret information he would have gleaned through the process that wouldn't otherwise be public. And so I thought that discussion was important for the sake of explaining how the law works, but I just didn't see its application to this case. Because really what the court is concerned about here is the fact that this is Donald Trump, who basically has retained a bully pulpit, had one (frankly) before he was the president, and continues to have one today. And that sort of puts him in a league of his own in many ways, as opposed to, you know, your normal criminal defendant who might post on Facebook where 114 people see the post.

P Paul Sherman 20:23

Yeah, I think that's fair. I mean, Donald Trump is unique in many ways, and one of them is that

probably, I mean, maybe unlike any criminal defendant in American history, he has an ability to reach a massive audience that is extremely passionate about his innocence in this case and, you know, can react violently to that in a way that a typical criminal defendant would not. And, you know, on the other hand, Donald Trump also has stronger First Amendment interests than most criminal defendants do because he is a leading candidate for the president of the United States.

P Patrick Jaicomo 21:08

So I actually thought the court did a good job of addressing that by explaining, and this is true in many other First Amendment contexts, just because you do something, whether it's criticize the government or petition the government that's protected by the First Amendment, that doesn't give you additional rights that you would not have otherwise had. And so I think the analysis about Donald Trump being a candidate plays into this same thing where it's not you don't get to run for president or any other elected office and then essentially get additional rights that normal people don't have under the First Amendment. I do think the other piece that I was going to bring up, and I think that kind of dovetails with what you said, Paul, about people's reaction to Donald Trump, is the way the court addresses ... Donald Trump's attorneys here, I think, argued, based on the opinion's discussion of it, heavily about the heckler's veto. And, you know, to a lot of listeners, this sort of concept has mostly been used, in my opinion, incorrectly in recent years as a veto of hecklers shouting down speakers and that being wrong and that's wrong, but not for the same reasons. The heckler's veto is about the government taking action against you because of the reaction of people listening and saying, hey, we don't want you to shout something offensive and then have this mob beat you up. So we're going to stop you from shouting the offensive thing. And here, you know, the analysis the court addresses has to do with, you know, Donald Trump said this, and then people received emails and phone calls, really disgusting emails and phone calls. And I thought that the court's treatment of the heckler's veto here was actually very, very thin. And their analysis was, well, the heckler's veto is essentially meant to protect you from you saying offensive things to a group of people who then react. And here, you're saying things that you want the people to support you, and they will react. And so this isn't the heckler's veto. And that just did not strike me as a logical distinction to draw.

P Paul Sherman 22:53

Yeah, I mean, I think it was correct as far as it went in terms of explaining like, well, what you're saying isn't really historically what we have understood as a heckler's veto. It's kind of like a supporter's veto, in a sense. You know, the court goes on to distinguish what's happening here from actual criminal incitement, which is when speech is calculated to produce imminent lawless action. That's like when you whip up a mob in a frenzy, as opposed to just sort of putting speech out to the public at large. And, you know, some people may respond to it. And, you know, I agree. I think there's not a lot of case law on that. And that's why I think the court had to base its ruling kind of in well, what has happened in the past, and what is happening in other litigation now?

P Patrick Jaicomo 23:55

Yeah.

P Paul Sherman 23:56

So you know, I think, as you mentioned, this case is in many ways unprecedented. And so the court has to try to navigate this doctrine, but also be sensitive to the real world impact and not just kind of try to decide this from first principles.

P Patrick Jaicomo 24:14

Yeah. And I think too, this is what sort of circles us back to where we started when I said, you know, the audience should look at this and think not just about Donald Trump, but about, you know, plaintiffs' attorneys in civil rights cases, for instance. Because, you know, the analysis is good as far as it goes, but I think all of the concerns and all the harms that the court identified would have been identically present if this were, for instance, a prosecution of Rudy Giuliani and Donald Trump or tweeting similar things as a completely unrelated party or maybe a potential witness or something because the court wouldn't have the sort of power over Donald Trump that it has because he's a party here. And I think that his status as a party is really immaterial to the harm that he could cause here or in a case that he's not a party to.

A Anthony Sanders 24:59

Yeah, although the motivation is definitely in the background there because he's sure offended and not ancillary. The takeaway I had, and you both already touched on this, is that you're right, Patrick, that there's kind of different facts than there would be with anyone else on both sides, the interest on both sides. So there's the interest of the power that this man has to draw supporters to his cause that very few other people have. But then there's also this interest ... And, you know, his speech is about an issue of public concern. But even though that's on either side, my takeaway is that when this is applied to other people, so not the Donald Trumps of the world, the fact that most people don't have that ability to go on social media and have mobs start calling up court clerks means it seems like it's going to be a pretty speech-protective precedent for future defendants. And I can think there must be all kinds of criminal defendants who have had orders placed upon them that are completely overbroad and overprotective and that they have legitimate things to say, maybe not, you know, to, as you said, 114 friends on Facebook, but legitimate things to say. This seems like it's going to be helpful there. Do you guys disagree?

P Paul Sherman 26:30

So, I mean, you know, Patrick works much more closely with the world of criminal justice and qualified immunity, so he may have more educated thoughts than I do on how this is going to apply to sort of the regular criminal defendant. But I think it's definitely the case that, you know, certainly the median criminal defendant does not have the kind of resources Donald Trump does to push back against a gag order like this. The fact that there is now a decision from the D.C. Circuit saying that it will apply strict scrutiny to these kinds of restrictions definitely will make it easier for other criminal defendants in the future to challenge similar restrictions.

P Patrick Jaicomo 27:13

Yeah, I think that's generally true. I think you'll see, similarly, in those sorts of cases, the government will cite some sort of like obtuse comment on a Facebook post or maybe even a threatening phone call to the court and say, well, you know, since Patrick posted this on Facebook, someone called the court, and that's enough to overcome strict scrutiny in these situations. I don't think that's a winning argument, but I think it's one that will be made by the government. We'll see how it plays out.

A Anthony Sanders 27:38

And I think often, I mean, I know even less than either of you probably do about this area, but from what I have read, that kind of order or that kind of threat is often used in say plea bargaining negotiations to try to get people to co-opt to something that maybe they didn't actually commit. And this is another arrow in the public defender's quiver in cases like that. And so that's a good thing.

P Patrick Jaicomo 28:07

Yeah. But let me say one last thing because it's going to connect the concept of qualified immunity in this case to the next one, which it's worth noting that as the court sets up this case for Donald Trump, it's explaining, hey, this is an interlocutory appeal. This is not a final judgment. This is an order that's, you know, partial. The whole case is still going on, and so it outlines like these very high standards for deciding this in this posture. And of course, it says this one meets it, which it easily does through the collateral order doctrine, but I just want to highlight that collateral order doctrine has been used by the Supreme Court to provide blanket interlocutory reviews of every denial of qualified and other immunities. And so if you look at a case like this where the court has to go through this sort of jumping through hoops and says, well, this is very urgent. This needs to be addressed right now, and we cannot wait until the end of the case because of the rights at stake. Just keep in mind that, contrary to the importance and rarity of that (which is also highlighted by the court) in the context of qualified immunity, every defendant can immediately and repeatedly appeal, instead of waiting until the end of the case.

P Paul Sherman 29:14

And not to drag this out further, but that incidentally is at the heart of this petition for certiorari before decision in this very case regarding Donald Trump's immunity from prosecution for his actions when he was president. And he also claims that because he was acquitted at impeachment, that it would be double jeopardy to charge him with these things. And yeah, you can tell from the chuckling that that's not a super persuasive argument. But anyway, as a result, he appealed. He was able to immediately appeal to the D.C. Circuit that has the potential to derail the trial, which is scheduled for March. And that's why the special prosecutor is asking the Supreme Court to weigh in on this immediately.

A Anthony Sanders 30:05

Well, Paul, that was not dragging it out. That was an extra gift for our listeners. But let's get to one of our big gifts, which is Patrick's tale of *Short v. Hartman*, which is a tragic tale about what happened to a woman in the Fourth Circuit. But it's also a story of how a circuit can kind of correct itself without too much funny business, as I like to think about it. So Patrick, what happened to Miss Short?

P Patrick Jaicomo 30:37

So in a lot of ways, this is a very simple case. But in a lot of other ways, this is very complicated. And I'll say right at the outset, I think, first and foremost, this opinion is two things. One, it is an example of judicial engagement. And two, it is cert bait. And I would be very surprised if one of the big name cert attorneys here in D.C. doesn't try to pick this case up and file. I'll get into that and as far as why in a bit. And so the facts of this case are, like Anthony said, very tragic, but quite simple. The plaintiff is the widower of a woman who committed suicide in jail, and the circumstances leading to that are very upsetting. And so ultimately, this woman was arrested. She had tried to commit suicide recently, and through her arrest and booking process, she noted in multiple ways that she had recently attempted suicide. Many of the officers at the jail were aware of this, as well as the medical staff. In addition to the actual recent suicide attempt, which again, was documented, she was going through severe alcohol and drug withdrawal, which is another indicator of someone's likelihood of committing suicide. And she had marked on several of these intake forms about her mental health in a way that would have indicated to any person, including a layperson, that she was a risk of committing suicide. At the same time, there were stated policies at this jail that clearly explained that when someone is a suicide risk, there are basic precautions that need to be taken. Among them, you don't place someone in an isolated cell, you take away their bedsheets, and you check on them every 10 or 15 minutes. And of course, none of those three things happened in this case. And tragically, Miss Short hung herself in her cell and died two weeks later. And so what this case is really about is whether her husband, on behalf of her estate, can sue several of the officers who he's alleging were responsible for her suicide. And this appeal particularly is about one of those officers and whether she acted with deliberate indifference, which is the standard that's applied to constitutional violations where the violation is actually that the government should have done something and actually did nothing. And the reason that I say that this case is a good example of judicial engagement is what the Fourth Circuit does here is it says our circuit up until this point has looked at deliberate indifference to medical needs such as this and said we will apply a subjective standard. And that's very important in these cases because a subjective standard requires a plaintiff to show that the official who you're suing actually had knowledge of the medical condition and therefore should have acted to do something to provide drugs or medical intervention, or in this case, followed policies to ensure that someone doesn't commit suicide in an isolated cell. And what the Fourth Circuit does here is it squares its old case law saying that you do have to show that with Supreme Court precedent more recently looking at the 14th amendment and says, actually, we interpret the United States Supreme Court as having applied an objective standard when you're dealing with the 14th Amendment as opposed to the Eighth. And I'll pause there to say, the Eighth Amendment applies to prevent cruel and unusual punishment to people who've been convicted of crimes and are in prison. But we're talking about a suicide in a jail of someone who

had not been convicted of any crime, which is governed then instead by the 14th Amendment's due process requirement, which prevents anyone from being punished at all without due process of law.

A Anthony Sanders 34:25

Sorry to interrupt here, Patrick. I think that's a fascinating distinction that people will, of course, miss. But if she had been convicted and sent to jail, would there be some kind of due process claim she could bring then, or is it completely gone, and then you only have the Eighth Amendment at that point?

P Patrick Jaicomo 34:42

At that point, you fall into the Eighth Amendment posture, but you still can bring a claim, and that's sort of the core of the analysis here. At different points, the Supreme Court has said, well, look at the text of the Eighth Amendment. It prohibits cruel and unusual punishment, and that means obviously you can be punished. The punishment just can't be cruel and unusual, and that incorporates the subjective requirement of the person who's doing it knowing that it's bad, whereas the 14th Amendment just says you can't be deprived of life, liberty, and property without due process of law, which has been interpreted to mean you can't be punished at all. And so there, the objective standard makes more sense. It's not that you had to have intended to punish someone, but that you were so reckless in your decision-making that they were effectively punished by being denied medical treatment, and in this case, being denied the policy of checking on them to make sure they don't commit suicide in jail. And so this is the Fourth Circuit going out of its way and saying, hey, we know we have earlier case law that says the standard is subjective, but we think that case law is inconsistent with the Supreme Court, and we are now going to change it as a panel, as opposed to an ombud court because of that. And as anyone who's litigated in the circuit courts knows, usually that's a very, very heavy lift. In fact, you know, I had a case recently where we made this argument, in my opinion, with much more compelling evidence of the Supreme Court's intentions than here, and the Sixth Circuit Court of Appeals sort of dismissed it out of hand because it wasn't exactly the same legal issue. And here, you have the Fourth Circuit looking at excessive force under the 14th Amendment and saying that's enough for us to get to this deliberate indifference standard and say that it should only include objective intent. And you know, it's worth noting too that you've seen the courts sort of apply objective and subjective in ways that will have serious effects on the availability of prevailing in a case. So if you have to show subjective intent, for an officer, that can be a lot harder because, you know, there might not be evidence of that that's at least easily ascertainable at the motion to dismiss stage, which is kind of where this case comes up, as the judgment on the pleadings is very strange. And so you could tell that the Fourth Circuit's also sort of exasperated by the way this case was handled below in some respects.

A Anthony Sanders 37:00

This is like every attorney's nightmare where you go through all of discovery, get to summary judgment, almost to trial, and then the case is decided on basically the complaints. So you did all that for nothing.

P Patrick Jaicomo 37:11

So it's strange. Here, what happened was, basically, shortly after the answer, the defendants moved for judgment on the pleadings. And the court just didn't rule on that. 17 months or so go by, discovery is conducted, they then file a motion for summary judgment, and the court, for some reason that's not mentioned in this opinion, ignores the summary judgment briefing and instead, decides the case on the motion for judgment on the pleadings, and standards are very different. And nevertheless, that's how this case makes it up to the court. Now, the reason earlier that I said I think this cert bait is because in the Fourth Circuit's analysis of its reading of the Supreme Court's decision in *Kingsley v. Hendrickson*, it specifically says, hey, by the way, the 10th Circuit has decided this the opposite way from us and then goes through several pages of analysis about why the 10th Circuit is wrong in its application here. And the court furthermore sketches out all the other circuits on both sides of the debate and explains that most of the other circuits haven't really weighed in substantively, but that there is a split on this issue. And that is what makes this case, I think, cert bait for the people that are always trying to get an additional quill from the Supreme Court. The last thing I'll say, and this has been important for us, in fact, we filed a 28(j) letter in one of our cases because of this thing I'm about to discuss, is the Fourth Circuit says, oh, by the way, at the appellate stage here for the first time, this defendant attempted to assert qualified immunity. And, you know, they go through all the waiver things and say you can't do that. But then they go ahead and say, anyway, in this circuit, we do not allow the assertion of qualified immunity to deliberate indifference claims because qualified immunity is intended to limit claims to those that are clearly established. And the standards by which you go about clearly establishing deliberate indifference inherently will have made it clearly established. And so it doesn't make a lot of sense to then do some sort of separate analysis to say, well, sure, the law was clearly established. But somehow, qualified immunity still applies to this officer's behavior. And that's an important distinction because, in fact, in one of our cases in the Fifth Circuit, the court initially decided the case on the basis that you could, in fact, be deliberately indifferent, violate clearly established law, and there would still be qualified immunity under an additional step to the qualified immunity analysis that has since been retracted. And it's actually quite a complicated issue. But the point is, it is an important issue.

A Anthony Sanders 39:48

And we have talked about that. Could you give the listeners the name of that case again?

P Patrick Jaicomo 39:54

Yeah, that case is called *Taylor v. LeBlanc*.

A Anthony Sanders 39:57

We've talked about that in previous episodes.

P Patrick Jaicomo 39:59

Yes. And that case was about our client, Percy Taylor, being over-detained in a Louisiana prison for about a year and a half past his release date. The one final thing is, and this just shows again that we're talking about judicial engagement, the Fourth Circuit then (after everything it says about objectiveness) says, well, we could just remand this to the district court because it applied the wrong standard. But we're going to go ahead and say that the case should proceed because even under the subjective, the more onerous standard, what the plaintiff has shown here showed that this particular defendant did in fact have the subjective knowledge that this person was, even to a layperson, a suicide risk and should have taken appropriate action.

P Paul Sherman 40:43

Yeah. And so if I were the attorney for this woman's estate, my response to the cert petition would be this is a terrible vehicle for cert because even though they overruled themselves on this matter of whether the objective standard is sufficient, it wasn't outcome determinative because they said, but she also has a claim under the subjective test and maybe after remand, after we get a ruling on the merits, maybe then it'll be a cert vehicle, but we just don't know yet. But you know, so I don't think the Fourth Circuit was playing games here. I think they genuinely did want to clarify the law in their circuit, but that is one of the frustrating things that sometimes we see in appellate litigation. The court will say something very bold, but then say but that doesn't even really matter here all that much because here are these other grounds for ruling for you.

P Patrick Jaicomo 41:49

Yeah, it was a jarring experience to read because there's so much that leads up to their holding about objective there.

P Paul Sherman 41:55

I was on the receiving end of this once in a case in the Second Circuit where the Second Circuit ruled that pure intrastate economic protectionism was a legitimate government interest. And so, therefore, our client, a teeth whitening entrepreneur, lost on those grounds. But also, there were other legitimate government interests here and obviously made the cert petition a lot less grantable. And ultimately, it was denied. And it's frustrating to be on the receiving end of that, but, you know, here, at least this woman's widower is going to be able to go forward with the case. And, you know, ultimately, I mean, it seems like a good ruling.

A Anthony Sanders 42:49

Paul, in that case you were just alluding to, my take is that Judge Calabresi just had a lot to say, and he had the microphone, and he was going to say it. And sometimes, that happens in an appellate opinion. Here, I think it was maybe more of just there's so much that needs to get figured out in this circuit, and we're here, and we're briefed, and let's do it. And, you know, it's a little bit less of maybe the loquaciousness of the judges.

P Paul Sherman 43:19

Yeah, I think the court here is pretty explicit that, you know, the reason they feel compelled to do this is because this is an issue that's going to arise again and again and again. And they just want to put a marker down now because they had avoided the issue in a couple previous cases where they didn't think it was squarely presented. And they thought, you know, we should resolve it now. Certainly, in my situation, Judge Calabresi made very clear at oral argument that he had some strong opinions on the arguments that I was making. And he wanted those to appear in the the Federal Reporter.

P Patrick Jaicomo 43:55

I'm glad you said that, Paul, because that was another point I did want to make, which is the court explains that, you know, this issue is sort of passed by the plate. And the court has never swung at it before and cites a couple earlier cases. And in one of the cases, the reason why the court didn't address this is because of qualified immunity. And so that, again, just shows you how qualified immunity can effectively, you know, prevent the furtherance of development in the law. And I also think, to Anthony's point, yes, all of that's true. And I suspect from reading the opinion that also the court was motivated to go ahead and push this past the first post because of the way that the litigation had proceeded in the district court already, and they didn't want to have another two or three years before this case comes now back up on the question of whether applying the tests, you know, would be dispositive. So all of that is to say, I don't see this at all as an opinion by the court that's meant to sort of muddy the waters to prevent cert, although, Paul, I think your advice is good. And frankly, this case has amicus briefs from the ACLU, MacArthur, and Rights Behind Bars, so I suspect if cert is filed, this similar advice will be provided by the amici in the case.

A Anthony Sanders 45:06

One question I have about the litigation here is it seems very rare in these types of cases to see that the government officials' attorneys didn't raise qualified immunity below. Is that just because it was maybe at the pleading stage, and sometimes, they don't think it's worth it at that point? Or was this kind of shades of malpractice that you didn't pick it up?

P Patrick Jaicomo 45:31

Well, I'm not going to weigh in on the professional responsibility aspects of it, but I will say from my rather extensive experience, you'd be very surprised at when government defendants do and don't raise qualified immunity. And I don't think in many cases that is meant to be strategic. I just think that sometimes when you have certain types of counsel, they're just not particularly savvy in these areas. And they thought they had a winner on other grounds. And that was just good enough for them. But it's really hard to say. And, you know, the data suggests, which again, doesn't make a ton of sense to me that qualified immunity is rarely resolved at the motion to dismiss stage. It is far more common to see it resolved at summary judgment. Now, some of that, of course, will be substantive because, you know, if you're relatively sophisticated, you can plead around a lot of the qualified immunity issues if there is sufficient case law to do so. But still. It's an interesting mystery that I have not figured out yet.

A Anthony Sanders 46:40

Well, I want to unqualifiedly say thank you to both of you for this lovely discussion. We'll have more before the holidays commence and even through the holidays. We're banking an episode or two so you don't miss any Short Circuit action. Please stay tuned also for Bound by Oath. We have an Unpublished Opinions even coming your way soon. But in the meantime, I would ask that all of you get engaged.