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SPEAKERS

Anya Bidwell, Anthony Sanders, Easha Anand

A Anthony Sanders 00:00

Hey everybody, quick note to start the show- near the end, we start discussing 'where are they now', about a few cases we've had on the show before, and where they're at in the pipeline. And I say how a few cases have been relisted by the Supreme Court and won't be coming up again, probably until the next conference, which isn't for a few weeks, and then Anya breaks in and says, "don't jinx it." Well, little did we know, but the opposite of a jinx was about to happen, because about an hour after we stopped recording this episode, the Supreme Court granted cert in one of them, Martin vs. United States, a case from the 11th Circuit. So just keep that in mind when you're listening. We, of course, didn't know that was about to happen. Now enjoy the episode. Although it cannot be of the greatest antiquity, seeing that tea was not introduced into Britain until the middle of the seventeenth century, and for many years thereafter was too rare and costly to be used by the great bulk of the population, the practice of reading the tea-leaves doubtless descends from the somewhat similar form of divination known to the Greeks as 'kottabos,' by which fortune and love were discovered by the particular splash made by wine thrown out of a cup into a metal basin.A few of the wives still practice this method by throwing out the tea leaves into the saucer, but the reading of the symbols as they originally formed in the cup is undoubtedly the better method. Well, the Third Circuit recently seemed to indicate that officers of the law should be expected to read tea leaves if they're going to follow the Constitution and basically practice the standards that were in that reading, which is from a book called 'Tea Cup Reading and Fortune Telling by Tea Leaves by A Highland Seer published in the early 20th century. We're going to discuss today how maybe that's not the right way to interpret the Constitution and even the doctrine of qualified immunity as it stands today. And we're going to do that with a long time friend of the show here 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 Monday, January 27 2025 and as I said, we have a long time friend of the show coming back on Short Circuit to discuss tea leaves in the Third Circuit, qualified immunity, and a few other things. But after that, we will get into another case out of the First Circuit that involves sovereign immunity civil forfeiture. And we're also going to have a story about biker gangs that I just heard about that's not actually in the case, but that will come. Who I will introduce first is my friend and colleague, Anya Bidwell. So Anya, welcome back.

A Anya Bidwell 03:01

Hey, hey, great to be here, especially with-

A Anthony Sanders 03:05

-with who I'm about to introduce. So, we had a debate about this- we don't know if she's been on three times or four times more times. If she's been on four times, I think it's the record for a non IJ person on Short Circuit. If it's three times, then it's still great. And the our guest is Easha Anand. Now Easha and her colleague at the Stanford supreme court litigation clinic, where she is an assistant professor of law, her colleague Jeff Fisher, they were both on the show about a year and a half ago at the beginning of OT 23 Supreme Court term. Anya went on site on Stanford and asked them about how their clinic works. Now, at that time, Easha had never argued before the Supreme Court, and now we're back a few months later, and she's done it four times. So before we get into doing the cases of the day, I want to thank Easha for coming on and also ask what's it like going from zero to four in not a lot of time? Do you have any tips for oral advocates out there? And, how's it been going?

E Easha Anand 04:19

So first of all, thank you both for having me. And if this is not my fourth time, if I'm not the record holder, that means you have to invite me on one more time, so I can be the record holder. Always a pleasure to be here. I'm a huge Short Circuit fan, both the newsletter and the podcast, and just always grateful for the work that IJ does, and I love collaborating with you guys. So yes, I have been at the court four times since we last recorded.We'll check the archives and put it in the show notes. And it's a dubious distinction, I have to tell you, because twice I went up to the Supreme Court because my client had petitioned and I'd represented them at the cert stage, and the Supreme Court granted. Twice my client had won below, and I went up to the Supreme Court despite filing a brief in opposition, vehemently telling the Supreme Court that they should not grant cert. So it's a little bit funny to celebrate my time at podium because half the time I was up there because I failed at the cert stage. But that said, it's always an honor to kind of appear before the court. I clerked there and had so much reverence for all the advocates who were standing up there, and it's really cool to kind of be among their ranks.

A Anthony Sanders 05:33

So is it easier on the fourth time than the first time, or is it terrifying every time?

E Easha Anand 05:39

Absolutely not easier. I still don't sleep the night before, still can't eat breakfast, still don't sleep for two weeks after, as I think of all the things I should have said but didn't. So no, at least it doesn't get easier on time number four. Maybe it has gotten easier for my colleague Jeff, who

you referenced, because its his time number 50.

A Anthony Sanders 05:57

We will take the pressure off by having you discuss a case that you have nothing to do with from the from the Third Circuit.

A Anya Bidwell 06:08

Though I have a breakfast advice coming from Chief Justice Roberts. I remember being super nervous, and one of the marshals was like, "don't worry about it. This is all good, and you should totally eat." He's like "the Chief Justice Roberts always had a cup of coffee and a half a donut, or a full donut and a half a cup of coffee."

E Easha Anand 06:29

Fascinating. So for the last argument, I had this really bad like lingering cough. It wasn't COVID, but I just was still coughing constantly, and I was so scared I was gonna get there and be hacking up a lung in front of the justices. And so, when I get to the courthouse, like, the marshals look through my stuff and I have cough drops in there because I'm so anxious this is gonna happen. And so even before I get into the courtroom, you know food and drink are not allowed in the courtroom, but I engage in this whole debate with the marshall about how cough drops should be an exception and they finally let me bring them in. So I felt like I won that kind of like statutory interpretation medal before even walking into the courtroom on the actual case I was arguing. But I did win that legal argument.

A Anthony Sanders 07:16

Well, at least you didn't almost cut your finger off like our colleague Bill Mauer, did before a case a few years ago. And he almost passed out from losing blood in the waiting room before the Supreme Court nurses office, which they have. They bandaged him up, and then he went out, and then did a terrific job.

E Easha Anand 07:35

I clerked at the court for a year and didn't know they had nurses.

A Anthony Sanders 07:38

Wow, maybe it was just somebody called him a nurse, but he got fixed up and and he was okay after that. So quick announcement before we get to each the case is going to talk about. Most of you probably have heard this by now, but some maybe not. It is Short Circuits, 10th anniversary. We started February 13, 2015, at least the newsletter, and the podcast was a couple weeks later. We are having a party and show in Washington DC on Thursday, April 3, in

the evening, which you're all invited to. How are you going to get there? I get it, but if you're in the area, we'd love to see you. Tickets are free, but they may sell out. So "click" the link in the show notes to go. There's gonna be a lot of folks there. You'd get to see people such as retired judges Diane Wood of the Seventh Circuit, Kent Jordan of the Third Circuit, and Adam Liptak of The New York Times; Eugene Volokh speaking at Stanford's Hoover Institution; and Raffi Melkonian, a dean of appellate Twitter (or whatever it calls itself these days), along with our old friend Clark Neily and many IJers. So if you want to see all that- plus a party- please come. But first, we're going to have our party that Easha is going to introduce us to: a Third Circuit case about qualified immunity, which is not very fun as far as we're concerned.

E Easha Anand 09:02

Well, thanks for that introduction. The case I want to talk about today is Rivera Guadalupe v. City of Harrisburg. Jorge Rivera Guadalupe was arrested and charged with nine offenses. These ranged from very serious charges, like attempted homicide, to less serious ones, like firearm possession, and everything in between. He waited in jail for 18 months, at which point the government dropped five of the charges. The jury acquitted him of the remaining four. But he argues that the problem is he was detained for 18 months, and at least the most serious of those charges had zero foundation. Here's the fact pattern: One evening, someone came to the hallway of Mr. Rivera Guadalupe's rooming house, argued with his friend, shot the friend in the stomach, and ran away. Mr. Rivera Guadalupe retrieved his gun and tried to chase the shooter down. A detective arrived to investigate and interviewed several people, including Mr. Rivera Guadalupe's neighbor. All of them said the person who shot the friend was a Black man. Mr. Rivera Guadalupe, however, is Puerto Rican, short, and walks with a limp—two details that none of the eyewitnesses mentioned. Yet all that information about Mr. Rivera Guadalupe was omitted from the warrant the detective obtained. After he was acquitted, Mr. Rivera Guadalupe filed suit, raising what's called a Fourth Amendment malicious prosecution claim. He argued that the detective essentially misrepresented the truth to get him arrested and charged, which resulted in his 18-month detention, even though the detective knew he was not the shooter. A Third Circuit panel agreed that he had a claim- but ruled that qualified immunity applied. To follow this opinion, we need to understand two doctrinal backdrops. The first is "What is a Fourth Amendment malicious prosecution claim?" It's clear what a malicious prosecution claim is-it refers to a common law tort that charges officers with initiating a criminal prosecution with malice and without probable cause. Essentially, it means setting the machinery of the criminal justice system in motion without justification. But why is this a Fourth Amendment problem, rather than a due process issue? Some Supreme Court justices- Gorsuch, Alito, and Thomas- actually argue that there is no such thing as a Fourth Amendment malicious prosecution claim. I think they're wrong. Whatever ambiguity existed in prior Supreme Court decisions, Thompson v. Clark settles the question: a Fourth Amendment malicious prosecution claim does exist. While Thompson doesn't dive into the theory behind it, I'd recommend Williams v. Aguirre, an Eleventh Circuit opinion by Chief Judge William Pryor, which lays out the theoretical foundation. What he explains, correctly in my view, is that the Fourth Amendment contains a procedural component. Many justices, including Scalia, have endorsed this idea. At the time of the founding, part of what rendered a seizure reasonable- under the Fourth Amendment's prohibition on "unreasonable seizures"-was some form of neutral judicial intervention. That meant a warrant for arrest, a preliminary hearing, or another judicial authorization of detention. The malicious prosecution tort, then, maps onto an allegation that the judicial process used to justify a seizure was corrupted.Until recently, there was a circuit split on an important issue: Malicious prosecution requires a lack of probable cause. But what happens if a defendant is charged with multiple offenses? Some courts said that as long as one of the charges was

supported by probable cause, then there was no malicious prosecution claim—even if the other charges were completely baseless. You can imagine extreme hypotheticals. Say someone is charged with both drug possession and murder. If there's probable cause for the drug charge, then under this rule, it wouldn't matter if the cops lied to procure the murder charge. The logic behind this approach is that, when officers arrest someone in the field, the Supreme Court has said it doesn't matter what specific charge they had in mind—it only matters whether some criminal offense was supported by probable cause. But the other side of the split rejected that approach. Instead, they applied a charge-by-charge analysis: If even one charge lacked probable cause, a malicious prosecution claim could proceed. Last term, the Supreme Court resolved this split in Cheverini v. City of Napoleon, a Stanford case. The Court adopted the charge-specific rule. The case involved Yasha Cheverini, a master jeweler in Napoleon, Ohio. He bought a ring, which turned out to be stolen, and was arrested. He faced three charges: two that the Sixth Circuit found probable cause for- receiving stolen property and a licensing violation- and one that the court didn't assess: felony money laundering. That charge was significantly more serious than the others and required proof that Mr. Cheverini knew the ring was stolen at the time of purchase. The only evidence supporting that charge was a detective's claim that Mr. Cheverini confessed. But here's the problem: The officer didn't include that confession in his original police report. Weeks later, without documentation, he secretly went back and altered the report to include the alleged confession-without changing the date or noting that the report had been modified. Assuming, at this stage, that there was no probable cause for the felony money laundering charge, this was devastating for Mr. Cheverini. His business depended on trust- wholesalers had to entrust him with thousands of dollars' worth of diamonds. The felony charge ruined his reputation and led to days in jail. Yet the Sixth Circuit ruled that because the two lesser charges had probable cause, he had no malicious prosecution claim-even though the felony charge, the most damaging one, was baseless. The Supreme Court unanimously rejected that reasoning. The justices who recognize Fourth Amendment malicious prosecution claims signed on to the opinion, affirming that courts must apply a charge-specific analysis. That means if even one charge lacks probable cause, a Fourth Amendment malicious prosecution claim can proceed. This reasoning makes sense given the kind of theoretical foundations we talked about. When an officer goes to a magistrate to get an arrest warrant, the specific charges matter. A judge might approve an arrest warrant for murder but reject one for marijuana possession. The panel in Rivera Guadalupe followed this precedent, ruling that the any-crime rule no longer applies- going forward, the charge-specific rule governs Fourth Amendment malicious prosecution claims. So for the other piece of doctrinal backup we need is an understanding of qualified immunity. Regular listeners of this podcast are familiar with qualified immunity and its pitfalls. It's a doctrine that appears nowhere in the text of Section 1983-the Civil Rights statute that allows plaintiffs to seek damages for constitutional violations. It's historically baseless and creates a disconnect between how officers are actually trained and what constitutes "clearly established law." For example, take George Floyd's murder. His family's civil suit never went to trial, let alone resulted in a published appellate decision. So under the qualified immunity framework, it wouldn't contribute to "clearly established law." Yet every police officer in the country knows about that case-far more than they know the latest circuit court ruling in their jurisdiction. Setting that aside, the core justification for qualified immunity is that officers shouldn't be liable for conduct they could not have known was unconstitutional. But in Rivera Guadalupe, there's no question about whether the detective's actual conduct- omitting key exculpatory facts from the warrant application-was improper. Every officer knows you're not supposed to lie.

A Anthony Sanders 19:20

They don't need the real tea leaves to know that's true

E Easha Anand 19:23

Exactly. There's no need to read tea leaves to know. I mean, for decades, if not centuries, it has been clearly established: don't lie to the magistrate. The panel nonetheless has qualified immunity. Why? Because, although it was clearly established- you should not do what this detective did, that is lie on a warrant application- it was not clearly established that you could be sued for damages when you lied on a warrant application, but there was nonetheless probable cause for some charge that you didn't lie about. That, to me, is an expansion of qualified immunity, even beyond its already, to me, untenable roots. If an officer knew that what he was doing was unconstitutional, it shouldn't matter that he may not have known the vehicle for holding him accountable. So Chief Judge Pryor in the 11th Circuit talks about this in Williams. He says, "any doctrinal tensions concern only the relationship between the Fourth Amendment violation and the malicious prosecution, the vehicle that we have held controls liability for these violations, we have never wavered about the prohibition of misstatements and warrant applications." And I think thats sort of qualified immunity, not only where there's a lack of clearly established law about the officers actual conduct. But qualified immunity when there's something unsettled about the way you get from constitutional violation to liability, about the any crime rule, about the heck bar, about the way you figure out damages, I think that sort of qualified immunity is really dangerous and untenable, even if you buy all the since debunked historical and policy justifications about qualified immunity writ large. Let me pause there. Those are the two big things about this opinion that I wanted to flag, and I'm so eager to hear from both of you about this case.

A Anya Bidwell 21:12

What you were saying about qualified immunity really resonates. And to our listeners, I recommend you guys read a concurrence by Judge Thapar in case called O'Connor vs. Eubanks, where he also discusses this. And there you have an issue involving a taking, and Thapar says it's clear, and everybody knows the government must pay for what it takes- that's the constitutional rule. And then you should be going into all these various things that come into the liability. But you shouldn't be in the second problem of qualified immunity, looking beyond that constitutional right and whether it was violated. It really, really creates a whole bunch of problems when judges start kind of breaking that wall. And Thapar does a good job explaining, that for the first prong, you actually look at whether a cause of action exists, and then the second prong, you look at whether a constitutional right was clearly established. And you kind of stay disciplined about this. But the Court just doesn't look at it that way, and every time that the question came up before the Supreme Court at the petition stage, the court denied certiorari. But this is something that is definitely important, and we should watch that space. I am worried that qualified immunity is becoming this kind of a mechanism for judges to make their opinions less drastic for police officers. Like you hear that even like this recent case, Barnes v. Felix, that came up before the Supreme Court last week, the justices are like, "okay, even if we rule that there is a Fourth Amendment violation, there's still qualified immunity to protect the officer, right?" Tanzin v. Tanvir, the same question came up, you know. Even in Gonzalez this also came up, even if we say that the retaliation claim can proceed, they can still be protected by qualified immunity. So I feel like, because judges treat qualified immunity as this kind of a stop gap mechanism if everything else goes wrong, they can turn to qualified immunity. They kind of purposefully keep the second prong of qualified immunity mushy, and

there's whole bunch of disagreement on various doctrines that go into the second prong, and the court continues to kind of refuse making it clear what that second prong actually stands for. We argue that it is clear, that you are talking about the right and whether the right is clearly established, but there are enough cases out there in the lower courts where they're muddying those waters, and the Supreme Court is doing nothing to say, "No, you should not be muddying those waters." And I do think that fundamentally, that's because they use qualified immunity as that comfort blanket. If everything else fails, we can turn to qualified immunity.

A Anthony Sanders 24:24

I guess, like in this case, it comes down to whether you define the right that is clearly established as the 'actual right,' or ,if it's the right in context, to how it can come up, basically how it can get you in trouble. So the cause of action dates say, "Well, that wasn't clearly established because of this whole multiple charges thing. And so when I went and lied on that warrant, it wasn't clearly established that I'd get away with it or not." I could see why the judges, maybe, weren't really doing their homework or were confused in this case, because it is kind of complicated. But if you think to like another situation, right, like a Bivens claim- so in the Federal officer context. It's perfectly clear that whether you have a Bivens claim, whether you have a cause of action, is different than whether you have qualified immunity. Qualified immunity, which was actually invented in a Bivens case. No one would say that whether or not you have qualified immunity depends on whether or not there's a Bivens claim. And maybe it hasn't come up, because for the last few years, there hardly ever is a Bivens claim, so the court doesn't have to worry about distinguishing those two. But in this kind of case, because of the Supreme Court making it pretty clear and the Third Circuit being pretty clear, despite what the court says in this case. I think the law was pretty clear that there was a constitutional violation here. That's where cause of action kind of gets mixed in with with qualified immunity, if not with the merits.

E Easha Anand 26:17

I think that's right, and so on on the last point you just made, I thought it was pretty clear too. In fact, we put the Third Circuit on the good side of the split when we petitioned for cert in this case, and the district court in this case denied qualified anybody on the grounds that it was pretty clear in the Third Circuit. But even if you thought it wasn't clear, the test is not what is the officers clearly established right to be free from liability, it's what was the plaintiffs, clearly established constitutional right. And you know, these sorts of additional defenses that may be available to an officer, whether it's the heck bar, whether it's the any crime rule, there's a whole slew of things that an officer can can point to to evade liability, even where they violated the Constitution. There doesn't need to be clearly established law on that, because the goal of qualified immunity was never to say, "let's let officers violate the Constitution as long as they're not clear whether they can be sued on it," no, the goal was to say, "Let's protect officers who may not know they are violating the Constitution." And so even if you buy that, that is what qualified immunity is doing, I just think there's no words in a circumstance like this to impose a qualified immunity bar.

A Anthony Sanders 27:32

Well, sometimes you don't need to resort to qualified immunity if you're a court trying to let the

government win, because there's sovereign immunity. Of course, they're very related, but were turning now to a case that is more about the latter, and it's from the First Circuit. And Anya, it goes into something that fans of IJ sometimes know a lot about, which is civil forfeiture. So this is a case where on the criminal side of things, some some people who were not treated well by the system were able to find relief, but not so much on their property through the civil forfeiture side of things.

A Anya Bidwell 28:13

Yes, and I have so many recommendations for the show notes, Anthony.

A Anthony Sanders 28:18

We will put them in there.

A Anya Bidwell 28:23

So this is the First Circuit case, and for more background on the case, actually watch a Netflix documentary called How to Fix A Drug Scandal. Luke Ryan, who is one of the lawyers in this case, is a real hero in life and in that documentary. And so are folks at ACLU Massachusetts, including our friend Matt Siegel, whom we should absolutely have on this show. But let me put that aside for now. So back to this case. Basically for about 10 years or so, two state chemists in Massachusetts tempered with drug evidence and falsified drug results. One chemist did that because she was an ambitious overachiever, and she wanted to deliver for the government and the other one, because she was a drug addict and couldn't help herself. Through a Herculean effort by lawyers like Luke and Matt, the Massachusetts Supreme Judicial Court eventually threw out criminal cases that were tainted.

A Anthony Sanders 30:03

30,000 of them.

E Easha Anand 30:07

That's insane.

A Anthony Sanders 30:07

I wouldn't have thought they'd even have 30,000 cases. I mean, that's just wow

E Easha Anand 30:18

Yeah, I mean, they've done it for a period of 10 years. And in addition to throwing out those

30,000 cases, the court also determined that the 14th Amendment guaranteed that these people, whose cases were thrown out, are owed the repayment of funds that were collected as a consequence of their convictions—things like court costs, restitution, and fines. The court said the 14th Amendment guarantees they get this money back. However, as to the property that was taken from them through civil forfeiture, the court ruled that it did not need to be automatically returned because these individuals' civil forfeiture judgments were not solely a consequence of their invalidated drug convictions. Instead, these individuals would need to file motions for relief from judgment under Massachusetts Rules of Civil Procedure 60(b) to get their property back. As our listeners surely know, Massachusetts gets an F in our "Policing for Profit" study. The barrier to forfeiture is extremely low—you only need to show probable cause that property is connected to a crime. And, as we know, dogs are probable cause on four legs, right? Anytime a dog alerts on cash, you have probable cause that the cash is connected to some crime. And cash, by its nature, generally has drug traces on it. The profit incentive is also horrendous—all forfeiture proceeds go into law enforcement coffers, so law enforcement has an incentive to take property through civil forfeiture. It's ironic that forfeiture funds don't get returned, while other funds that had a higher burden of proof do get returned under the 14th Amendment. In any case, that's where this portion of the case really starts. Two former inmates whose convictions were thrown out filed a lawsuit in federal court asking for an order that would require the automatic return of their forfeited property. Importantly, they also asked for an accounting of all such property—not just money, but a whole range of items—as well as additional procedural protections in case they had to go the Rule 60(b) route to reclaim their property. Naturally, the government opposed this, arguing that the 11th Amendment grants them sovereign immunity and that the Ex parte Young exception does not apply. The First Circuit, in a per curiam decision, agreed with the government on both points. It acknowledged that the Ex parte Young exception allows federal courts to prohibit state officials from enforcing state laws that violate federal law, meaning courts can grant prospective relief to prevent future violations. But here, according to the court, the plaintiffs alleged only a past wrong, not an ongoing one. The plaintiffs argued that the continued withholding of their property was an ongoing violation, but the court rejected that argument, stating that their claim rested on past actions taken during the forfeiture proceedings, not on any current or future actions. That meant there was no ongoing violation, so any remedy would be retrospective rather than prospective, making the Ex parte Young exception inapplicable. As for the plaintiffs' argument that Ex parte Young should at least require procedural protections for their future Rule 60(b) motions, the court rejected that as well. Even though the district court had agreed with the plaintiffs, the First Circuit reversed, ruling that under Ex parte Young, plaintiffs can only seek relief from officials with some connection to the enforcement of the unconstitutional act. Otherwise, the lawsuit would be an improper workaround to the 11th Amendment, effectively making the state itself a party. Since the specific defendants in this case lacked the authority to alter state court procedures, they could not be sued for prospective relief. Ultimately, the case was dismissed, with the First Circuit offering its apologies and regrets.Like come on, at least don't say unfortunately or like, our sympathies. It's like, if you're gonna do this, just do this without this other stuff that doesn't help anybody. So I am hoping that plaintiffs will be successful in the state court. Let's keep an eye on this, because I'm assuming, gonna go back to the state court and file 60 B actions. In the meantime, I do want for us to put the policing for profit in the notes and the documentary in the notes. And everybody, that's homework and we will see you guys next time. Check out both if you haven't already. One thing that's so interesting about this- and you guys are the forfeiture experts, so I'd be curious to get your take- is that this seems fundamentally different from the cases the Supreme Court has identified where they say, "There's no ongoing violation; you're trying to rectify a past wrong." Those cases typically involve benefits or trust payments, where it's simply money in, money out. A similar case is Edelman, where someone was denied their welfare benefits for a long

time, went to court, sued, and then said, "Now pay me my welfare benefits." The court ruled that this was indistinguishable from a damages action-whether the claim was framed as "I want you to turn over the money you've been withholding from me" or "I want damages for all the time you withheld this money from me," the result would be the same. From the perspective of state sovereign immunity, those claims are indistinguishable. But to me, this case is fundamentally different because presumably at least some of this property is actual, tangible property-someone's car, someone's house, or whatever else was confiscated. Unless the only thing confiscated was money, or any tangible property has since been sold and converted into money, this situation seems very different. A damages action would say, "Give me the money for all the time you kept my car from me," whereas this sort of equitable action says, "Give me back my car," which seems distinct and outside the reasoning of cases like Edelman. I'm curious what you guys think about that-both about my underlying assumption that there's something other than money at stake here and whether I'm right in thinking this feels really different.

A Anthony Sanders 38:03

This case was very unsatisfactory to me, given my background before I was at IJ as a trust law lawyer specializing in employee benefits, mostly in ERISA. The trick of being an ERISA attorney is that you're always trying to make things more equitable than legal because you can often get equitable relief under ERISA but not legal relief. That's also true in trust law generally. Now that I understand the distinction in Ex parte Young isn't strictly legal versus equitable but rather prospective relief versus damages, it reminds me of a common challenge in ERISA cases-making a claim look like a case in equity rather than just a damages action. Often, that distinction turns on exactly what you're suing about. If you're suing over land, that's an old-fashioned case in equity, and I'm sure some land was forfeited in these drug cases-that's par for the course in most states. Of course, there are also vehicles, jewelry, and other assets involved, but the case doesn't specify what kind of property is at stake. Maybe under Ex parte Young, the explanation is that this would be considered an action in replevin, which is a legal action rather than an action in trust. In trust law, the trick is often to establish a constructive trust- so if you take my $10,000 and it gets co-mingled with other cash, it's still constructively a trust. But in this case, there's absolutely no identification of the specific property for the named plaintiff, let alone for the class members. It feels like the court is just washing its hands of the issue and moving on, treating it all as an action for damages, when in many ways, I'm sure it's not.

A Anya Bidwell 40:29

It really reads like a law school brief, for a competition. And it doesnt really deal with any of the intricacies. It's pretty blunt in terms of "we're just saying it's just like this case, so it is just like this case." Rather than what Easha is talking about, where you actually have to engage with: is that actually similar to taking someone's car?

A Anthony Sanders 40:55

I think that holding someone's land seems like an ongoing violation, especially maybe if you still have some kind of right to it. I guess the other argument is really it's all looking in the past. So whether it's legal or equitable, it just doesn't matter. It's not about the future in any real

sense, and therefore it's just ex parte young doesn't, doesn't give you a cause of action.

A Anya Bidwell 41:27

Yep, and go ahead Easha.

E Easha Anand 41:29

I was gonna say so I was just looking at the briefs, and they do say, cars, cell phones, etc, continue to be unlawfully withheld. So, I think we're right to say that there's something other than money at stake, and it sounds like that's still in the state's possession. I guess it seems to me, again, kind of meaningfully different to say rectify the past wrong, which you could do by returning the property, but you could also do by just giving money, versus you are currently committing a wrong every day you're holding on to my cell phone and not giving it back to me. Please give me back my cell phone.

A Anya Bidwell 42:04

Or, car, right? We have represented a construction worker who didn't have a car for two years. I can't even begin telling you what kind of a wreck it was on his business. That's an ongoing violation.

A Anthony Sanders 42:20

One other weird thing about the case was, so they couldn't get this procedural relief, because they sued the wrong people, and so the real party in interest is state. Which, of course, you can't sue under ex parte young, because they're judges. So there's no claim in federal court at all.

A Anya Bidwell 42:41

Right, which usually is the natural conclusion in all of these cases. But they kind of leave it unstated that fundamentally, wherever you turn, you run into an obstacle that prevents you from recovering,

A Anthony Sanders 42:56

And maybe that's why they didn't go into the details, because at the end of the day you're going to lose anyway. Well, I hope these folks do get some relief in state court. And it sounds like they may. It's just going to be a different ballgame. And then, because of what happened before, they it's they can't do class actions. So it's just going to be one by one. And of course, that's only going to be people who really have a lot that they lost- their $1,000 car that they need to get to work isn't going to be worth it.

A Anya Bidwell 43:27

Yeah, and western Massachusetts is a really interesting place. One of the things I want us to put on the show notes is the Springfield Police Department, Narcotics Bureau, DOJ report from a couple of years ago. And if folks are interested, they should totally read that report and see the kind of stuff that's happening there.

E Easha Anand 43:47

Well, can I just say one word about my vague familiarity with western Massachusetts, which is not to paint with a broad brush at all, but the only time I spent at Western Massachusetts was a prior to law school, I was an investigator. I worked on capital defense cases, and one of my clients belonged to a biker gang known as Freedom Riders, and a bunch of my witnesses were in Western Massachusetts. I spent a lot of time in Western Massachusetts for that.

A Anthony Sanders 44:20

What's it like hanging out with bikers in western Massachusetts?

E Easha Anand 44:24

You know, I learned a tremendous amount. Now, when I see someone, I can read their jacket and tell you what their top rocker and their bottom rocker and their patch mean. Yeah, it was, it was deeply educational.

A Anthony Sanders 44:39

All right well, you learn everything here on Short Circuit, I suppose. I'd like to thank our Supreme Court advocate, our friend Easha Anand, for coming on and Anya, once again. We're going to close very quickly with a 'Where are they now' episode. I teased an episode or two ago that there hasn't been a lot going in the Supreme Court with cases that we've already talked about; but we just had an orders list come down today, so it's the end of the road, but at least we have closure. It's about a case we talked about and Short Circuit 336 which was last August, Hopkins vs. Watson. It was an en banc Fifth Circuit opinion about the Mississippi Constitution's denial of voting rights for felons that goes way back to post reconstruction times and had this really seedy, racist backstory to it. It was an Eighth Amendment challenge. Anyways, that went to the Supreme Court and there was briefing, so it wasn't just summarily dismissed. But finally, the order came down just this morning and cert was denied. Also an update- we talked with our friend who has not been on three or four times, but he has been on twice, Joe Dietrich, he has a en banc case at the Seventh Circuit Gilbank vs. Wood County. Listeners may remember, this was on Short Circuit, 351, this is about a woman who lost her child for about a year in the child protection agencies in Wisconsin, through some horrible facts. She got her child back and then sued, and the Rooker-Feldman doctrine is what was used to throw the case out. Well, Joe's case is now fully briefed at the court, and it's going to be up at the conference on February 21. Which I think is the next conference, where IJ has a couple cases that are also waiting.

A Anya Bidwell 46:48

We're not jinxing anything.

A Anthony Sanders 46:49

No, no jinxing, but they've been realistic three times. So, maybe pay attention when the orders list comes out from that.

A Anya Bidwell 47:00

And remember, Easha, Dubin was relisted many, many, many times.

E Easha Anand 47:05

That's true. There are lots of good things that come out of multiple realists, including the Andrew's opinion that just came down after getting realistic for 10 straight months.

A Anya Bidwell 47:16

I always tell people, it's like Kremlinology trying to figure out how the Supreme Court works.

A Anthony Sanders 47:21

A realist is like a box of chocolates. We'll see. But for now, thank you both for coming on, and please be sure to follow Short Circuit on YouTube, Apple Podcast, Spotify, and all other podcast networks. And in the meantime, I ask you all to get engaged you.