ShortCircuit283

Mon, Dec 11, 2023 9:58AM 57:18

SUMMARY KEYWORDS

text message, case, harm, government, child, eleventh circuit, godaddy, talk, substantive due process, people, opinions, injury, court, en, due process clause, anthony, action, class, unwanted, facts

SPEAKERS

Anthony Sanders, Bob Belden, Christian Lansinger

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 Wednesday, August 2, 2023. We have a couple great guests, including a first timer, to talk about a couple very interesting recent court of appeals opinions. We'll get to them in a moment. But first, I want to talk to you about an exciting new development at the Center for Judicial Engagement and at Short Circuit. So this is a new podcast. So Short Circuit, our bread and butter, what you all love is talking about the federal courts of appeals, and we do that most weeks. We also sometimes have specials where we talk to book authors, or we have our annual Supreme Court preview, we dig into discrete areas of the law. Now we have a new podcast starting though. Now this is going to be under the Short Circuit umbrella, but the new podcast will be called Unpublished Opinions. And as the title denotes, it will be a rather less structured podcast. We're hopefully going to start it next week, so you will see it on your Short Circuit feed. It will not be a new feed, it will also be on the Short Circuit website if you get our content there. And we're gonna talk about legal stuff in a slightly different way. It won't be based on what the necessarily one case won't be necessarily a deep dive in the area, it's going to be a few of us talking about legal stuff, and giving our opinions about it - unpublished opinions - but you, dear listener, will be able to hear us through the Short Circuit feed. Now, it's not going to be all that scheduled. So we're going to do it next week. We don't know when we're doing the next one. They may come from time to time, it definitely will not be an every week kind of thing. But also, it will not supplant Short Circuit. So we're still going to be doing Short Circuit just like we have for a long time. We're going to be putting them out every week talking about the federal courts of appeals, occasional specials, but also, you will see Unpublished Opinions pop up. And if you don't want that, if you're like, "I just want federal courts of appeals content", you can just skip that by. You can see it on your feed and just skip it by, that's fine. But if you want to check us out, just click a little button, and you can hear some unpublished opinions. So I look forward to you joining us on that in your feed sometime soon. But in the feed today are two hungry lawyers ready to digest some law. So joining us for the first time in a while, but a regular voice on Short Circuit, is Bob Belden of the Institute for Justice. Bob, welcome back.

B Bob Belden 03:23

Thanks for having me. Anthony. Always hungry.

A Anthony Sanders 03:25

Okay okay. Well, I hope we're serving up a good feast today. And also joining us for this feast is a first timer on the show IJ Attorney, Christian Lansinger. Christian, welcome.

C Christian Lansinger 03:39

Good to be here, Anthony.

A Anthony Sanders 03:40

So Christian, you recently joined us here as a fellow at the Institute for Justice. Now, if I remember correctly, you are a graduate of the Law School of William and Mary.

C Christian Lansinger 03:53

Yes.

A Anthony Sanders 03:54

That is right? So I have wondered, because I've read up on the Glorious Revolution and all that stuff that William and Mary were much a part of. Is there a sense of that at the school? Does it come up from time to time that because of the Glorious Revolution, we have this law school?

C Christian Lansinger 04:15

For sure. Although I think it usually boils down to arguing whether they're the first or second law school with Harvard. They kind of go back and forth about who was truly the first law school to come to be.

A Anthony Sanders 04:27

Oh, so what's the controversy? So I don't know that.

C Christian Lansinger 04:30

Well, from my understanding, although I have the bias of going to William & Mary, is that William & Mary was the true first law school, but that it was closed for an extended period of

time. And at some point, I couldn't tell you when, but at some point, it came back and it's a question of whether that second opening of the William & Mary Law School should be considered a new law school or should it could be considered as continuous from when it first opened. So there's a little bit of a battle I guess. William & Mary law students feel the need and really frankly, would love the need to compete with Harvard Law students.

A Anthony Sanders 05:02

That is a metaphysical quandary, isn't it? How long was it shut for?

C Christian Lansinger 05:08

I'm not sure. I want to say that it opened sometime back up in the late 1800s. So it probably was some time that it was closed. And I know that Williamsburg at a point in time was rather vacant, and that it was restored back to its former glory, possibly as part of a tourist attraction. But that being said, I couldn't tell you how long, but perhaps long enough that it needs to be dethroned.

A Anthony Sanders 05:35

But that I mean, like the College of William & Mary was there the whole time, right? Like the other facets of the university didn't disappear?

C Christian Lansinger 05:43

I believe so. I couldn't tell you. But that being said, law students would like to have that first role because if I understand correctly, the undergrad is a solidified second place. And you know, what William & Mary would do? It does the exact same.

A Anthony Sanders 05:53

See, I went to a school that completely disappeared for a few years, and then rose up again a few years later in a different part of Minnesota. But it still calls itself like from the original date, which I've always thought is a little suspect. So I don't know where I fall on all this. All right, well, enough metaphysical analysis. For today, we're going to talk about something much more real. And that is a text message. So Bob, have you ever received an unsolicited text message? And did you feel harm?

B Bob Belden 06:33

I gotta tell you, Anthony, I think that this case that we're going to talk about, Drazen v. Pinto, is really, in a polarized society, it's something we can all come together about: our universal hatred for spam text messages.

A Anthony Sanders 06:48

Absolutely.

B Bob Belden 06:49

This is, as Anthony points out, the central question here is whether a single unwanted text message is adequate to give rise to Article III standing, and specifically the injury in fact requirement. That you've suffered a concrete, real injury to give you a stake in the lawsuit. And the underlying facts here are pretty simple. For a couple of years, GoDaddy had an automated text message system where they tried to like develop business leads, and they sent a bunch of text messages to people. And that is not allowed under the Telephone Consumer Protection Act, which the FCC interprets to apply to text messages. So GoDaddy had this system set up, they sent a bunch of unwanted text messages, and that's a violation. So a bunch of enterprising plaintiff's lawyers gathered up all the people who receive text messages from from GoDaddy or phone calls from GoDaddy during that time period, and brought a nationwide class action under the statute. And the claims are, they sound pretty lucrative for the class. There were about 1.2 million people.

A Anthony Sanders 08:07

Well lucrative for the lawyers.

B Bob Belden 08:09

Well, we'll get to that So there are about 1.2 million people in the class. And for each of those people there's some litigating between class counsel and GoDaddy. And ultimately, they reach a settlement agreement that is going to have GoDaddy pay like $35 in cash to each class member or, for each class member, or give them $150 coupon, which I mean I guess you can reclaim them for more GoDaddy services or something. I don't know how valuable that is, I confess. I know that GoDaddy like reserves URLs online, but I don't know if you're like in the market for repeat purchases every year if that coupon would be valuable in a new way.

A Anthony Sanders 09:01

Most of what I know about GoDaddy is that old Superbowl ad. And then I see him online from time to time, but I don't know really what else they do.

B Bob Belden 09:11

Yeah, I think it's just web hosting and unwanted text messages. So the Settlement Agreement is challenged in the trial court by Pinto. He's an absent class member who looks at this proposed class settlement and says, the lawyers are gonna get paid too much money because this has coupon elements. And while he is raising those objections, the trial court has sort of

taken note that the class here might be subject to some sort of different treatment based on what circuits the class members live in because the question of whether a single unwanted text message can give rise to a cause of action under the Telephone Consumer Protection Act has arisen on a number of occasions, and in other circuits, one text message is enough. But the trial court notes that there's an Eleventh Circuit case from about two or three years ago that says one text message is not enough. But the trial court says "I'm erring on the side of allowing GoDaddy and these people to settle claims that I don't think are valid, but would be valid where those people are from so I'll let it go ahead and happen." Pinto objects to how the fee is calculated. The lawyers are gonna get paid at first, like eight and a half million dollars on this total $30 million settlement. That's 30 million between cash and coupons, and the lawyers are gonna get eight and a half million until Pinto objects and their fee drops to $7 million. And for the life of me, I couldn't figure out why exactly Pinto was objecting on these grounds. I don't know where the fee goes down by one and a half a million. I'm not sure what happens to that delta. Like if it gets donated or goes to the class. But if anybody knows, please send it to Anthony's DMs when he releases this episode.

A Anthony Sanders 11:26

I'm sure our friend, Ted Frank, could explain it all; who rails against these class actions. But yeah, it is a complicated business and seems like a business that, as we talked about in past episodes, usually benefits the plaintiff's lawyers and not a heck of a lot else otherwise.

B Bob Belden 11:48

I think that's right, and luckily, we're done talking about how lawyers get paid, so we can move on to the really exciting, sexy Article III issues we've got. So the trial court rejects Pinto's objections to the class and Pinto appeals and says, I want this to be calculated correctly. And you know, he's probably not expecting this to happen, but he gets to the Eleventh Circuit, and the panel at the Eleventh Circuit looks at the class definition and says, you've got a bunch of people in this class, about 90,000 of them, who only got one text message. And we said in 2019, one text message is not enough to give Article III standings, so we're just going to dismiss this whole case. So the panel does and then Pinto. And if you've listened to Short Circuit when I've been on before you knew there was going to be law French in this case. So you knew that this case was going to go en banc after the panel decided it, and that's what we're talking about today. The Eleventh Circuit recently decided that a single text message is sufficient concrete injury to give Article III standing, at least in this context where the injury caused by or the harm caused by an unwanted text message bears a "close relationship" to a common law tort. The one they talked about here is intrusion upon seclusion. So you can think about like, Finding Forrester. Sean Connery is at the end of the hallway and you're like bothering him when he does not want to be bothered in his home. That is what we are likening a single unwanted text message to. So with that close relationship, the Court says, you know, Congress can elevate this unwanted text message to the level of a concrete injury that somebody can sue about. So that is in a nutshell, the decision. They send the case back to the panel to consider Pinto's objections to the class definition and the the class counsel fee. But I think there are three sort of interesting things about the case that I wanted to mention before we sort of open it up. And one is the Court never really explains why it is changing its approach to this question. It does mention that Pinto has asked them to revisit the 2019 case, and they talk a little bit about the 2019 case, but they don't ever explain why the 2019 case was wrong. I

mean, in 2019, a guy sued on basically the same facts saying I got one text message and I don't want text messages. But a panel at the Eleventh Circuit said that was not an adequate injury and there may be factual differences. Like in 2019, the guy equated this unwanted text message to an unwanted fax, and he's like, you know, the panel goes through and says a fax kind of occupies the entire machine for a whole minute. And I, I stopped reading the opinion for a second. I just thought about how blessed we all are to now be on the other side of that thing. A whole minute to get a message. But the the panel in that 2019 case said you can keep using your phone when you get a text message, you just ignore it. So those are different, those harms are different. But in 2019, the guy also said like, this is intruding on my privacy, I don't want unwanted messages. And the Court said, well, that may be so, but you didn't really allege where you were when you got the text message you didn't want, and this common law tort's about having people bother you in your home. So maybe if you told us you were in your house, when you got this text message. So maybe that's, you know, maybe that's a distinction that's explaining why the 2019 case was sort of so easy to depart from, but I'm confused about why the en banc Court doesn't discuss it more. And there's another thing: the 2019 case talks about how the FCC, rather than Congress, has decided that the TCPA should apply to text messages. And you know, the TCPA is from 1991, which is a long time before text messages. And if you're going to be interpreting the statute sort of broadly, in 2019, the Eleventh Circuit panel said we should wait on Congress to say affirmatively we think this applies. The statute applies to text messages. As far as I know, Congress has not done that since then. But you know, there's no mention of the FCC or nondelegation or anything like that. The other thing, in the en banc opinion, they talk about a prior en banc case that they had called Hunstein, where they sort of address a similar question about public disclosure, and the federal debt reporting act or something. Long story short, in that older case, a person's debt collector disclosed their mailing address to one person who then sent them a mailing. And the person who received the mailing sued and said, you gave out my private information to somebody, and you violated this federal statute, and I want damages for it. And the Eleventh Circuit in that case said, your harm, right, that there's an unauthorized disclosure of your private information, your harm is similar, or you're arguing your harm is similar to public disclosure, which is a common law cause of action when somebody tells your private information to a bunch of people, right? And here, you're only saying your information was told to one person and so that's private, that's different than public. But I'm curious if that strikes you as a sort of persuasive distinction because you could recast that as one text message and 30 text messages, right? I told one person or I told 30 people, or I told the public at large. You're sort of back into this difference of degree rather than a difference of kind. So I'm not sure I was totally persuaded by that, but if you go to that older opinion, I think it's Judge Pryor's concurrence, goes through a bunch of other things in that older case that were missing from the common law cause of action. So maybe that's why it's so easily distinguishable. But I think the last piece here is the the third cause of action in intrusion upon seclusion is that the interference with your privacy is highly offensive to a reasonable person. And I don't want to receive unwanted text messages as much as the next person, but like, the en banc Court says, right after they list those elements, they say, well, an unwanted text message maybe is not highly offensive to a reasonable person, but it's kind of offensive to some reasonable people. And so that's close enough. I don't know if you find that persuasive or not, but I was not convinced. Especially when in 2019, a panel decided it was not highly offensive to receive a single unwanted text message. So, that is Drazen v. Pinto.

A Anthony Sanders 19:54

Christian, have you ever had a text message intrude upon your seclusion?

C Christian Lansinger 20:00

I have in more than one occasion, but not from the same company more than one time, as far as I know. They seem to be from unidentified people trying to take my money one way or the other. I say that, but at the same time, I'm curious how they could come up with, how the settlement with $35 or $150 coupons. It seems to me almost, I understand the desire to not have these messages disrupting people's phones and their daily lives. But at the same time, I get these messages all the time, and I don't feel that I've been particularly harmed at a substantial level that would bring a lawsuit. This seems kind of a de minimis injury, if you will. And I'm curious kind of where these numbers come from, and why they would choose to settle for such a, what seems to me, still to be a high number given it's, as the Court puts it, one text message for a lot of people.

B Bob Belden 20:53

Right, the older 2019 case, and don't quote me on it, but I think that the statutory damage number is like 500 bucks. So like, getting out at a $35 cash reward to people one thing about this Christian too, is a lot of companies can comfortably rely on the fact that if they send people a link to like, download a $35 cash award, or $150 coupon, like a lot of people are just going to ignore it. Because they, you know, they're suspicious of such a mailing, or they might just not want to go through the trouble of getting a $35 cash award from GoDaddy. So it is a substantial reduction of the statutory damages, and they're probably hoping people are too, too busy and too distracted to take them up on the settlement.

C Christian Lansinger 21:51

I definitely get that. I recently got a mailing myself, because apparently, my wifi company has been taking little bits of money from me every single month without my knowledge with these hidden fees. And so I signed up for it, but I'm sitting there while I'm going through this process of putting in all my personal information on this website that I've never been to before. While I'm doing that, I'm thinking this is not going to be worth the six cents that is going to eventually come to my wallet two years from now. But I have to do it because it's kind of like, when it comes to voting or any of these issues, these large class actions where it's like, well, if I don't do it, then then no one else is going to do it. And we don't have any kind of of incentive for this, GoDaddy or one of these companies not to do this again. So I felt this drive to do so even though I feel like financially for me, it was not worth my time.

B Bob Belden 22:44

Have you seen Office Space, Christian?

C Christian Lansinger 22:48

I have not.

B Bob Belden 22:48

Okay. Pennies at a time. I'm surprised your internet company got caught.

A Anthony Sanders 22:56

That's the first Office Space reference we've had in a while. We should we should have more of them, of course. So I had many Article III thoughts when I was reading this, and I am not a big fan of these types of lawsuits, as probably came through in my my earlier remarks. But I am absolutely, Bob, maybe you can enlighten me here. I am absolutely befuddled why this is even a question as to whether these people have standing. And it seems like a classic case of what we go through at IJ all the time, which is confusing standing with the merits. So like, I get that to have standing, a case or controversy, under Article III of the Constitution in federal court, you need to have, an injury, and there's this test for what an injury is. And part of what an injury is is some kind of, you know, actual harm. Not just like if I said, you know, if I said to a man on the street, you look ugly. That probably does not give that, that does not injure that person, and that would not be an injury under any known like common law tort or what have you. But I don't, I don't get how that goes like that situation or the text message, go to standing. So if I sue, if I sue you because you sent me an unsolicited text message. I can say you harmed me, and then you can file like a 12(b)(6), a motion to dismiss, and say, actually, that is not a cause of action. Or we go to trial, and it turns out that you were lying. You didn't actually send me the text message or someone else sent me the text message, so you didn't harm me. It's not like at that point, right, the jury comes back and says there's no standing for the plaintiff. It's that they come back and they say you're not liable. So that happens all the time in constitutional cases where the court will will say, this law violates my First Amendment rights because I can't speak or what have you. And then the court will come back instead of saying just the law is actually constitutional, or it's not suppressing your speech or whatever, the court will try to get around all that by saying, there's no standing here. And this happens in, frustratingly, in all kinds of contexts. So I don't get here why there's this big, I know they ended up saying there was standing, but why couldn't they just say there's standing. Whether or not, you know, you're actually harmed would be a question you would adjudicate in the case. But you're settling, so I guess you're not going to adjudicate it. But that's a whole different question than standing. What am I missing there?

B Bob Belden 25:56

I'm not sure you're missing anything. I think the explanation, it could go to that disconnect I mentioned with the 2019 case. Like sort of the question about whether the TCPA actually extends to text messages. Maybe that is it, but even then, your point? I mean, I agree with your point. Like if I come in and make a claim under the TCPA, but that doesn't apply to text messages, I think I've just failed to state a claim. It's not like I haven't been harmed. I think you're right. I mean, I think I would take I think Justice Gorsuch's sort of simple statement of standing at one of the oral arguments this year. I can't remember which case it was, but it was, you know, basically, your client says they've been hurt and like this other person did it. Alright. You know, that seems right to me, and whether it's a text message or a phone call, I think you should be able to get in and get over this hurdle without so much trouble.

A Anthony Sanders 27:03

Yeah. Though one last thing about this case that maybe is getting at what we're talking about, maybe not, is there's this weird concurrence by a couple judges that say, we've said a lot about standing in the past, and we're kind of angry about it, but we'll take what we can get. And so we joined this wonderful opinion.Do you have any sense more of what's going on there? I haven't gone back and read all those cases, but.

B Bob Belden 27:37

So Hunstein, the publicity case I talked about. The older Eleventh Circuit case where they were like, oh, no, your information was only given to one person, not the public at large? Judge Newsom dissented in that case and said, I've skimmed the dissent, and my understanding is the argument is basically what we articulated here, right? The injury here, the harm is that you disclosed my private information. That's the kind of thing that is covered by the public disclosure tort, and Congress has decided that a disclosure, a more limited disclosure should be a harm that gives rise to Article III standing. I haven't run down all of the cases in the string site there, though, so maybe there's something more interesting than that.

A Anthony Sanders 28:32

Well, it's a joint concurrence, very short. One paragraph by Judges Jordan and Newsom, and Judge Newsom has become rather famous, or he has a cottage industry of these concurrences, where he goes on in his own legal theories, which are usually quite interesting. So this one, I think you have to give the read the other cases. I will finally say, this issue of what you need for standing is becoming a big deal. I mean, it's always been a big deal, but it's becoming a big deal in a kind of a interesting and ominous way. There's the Seventh Circuit recently, including in an IJ case, but also another case has had some quite interesting opinions where they say you need some kind of injury beyond what traditionally I think has been understood. One of these cases, they quoted our good friend at Short Circuit because he has been on many times for a Supreme Court preview, Andy Hessick at North Carolina. They quote his article about what you need for standing, and say that therefore, there wasn't standing in that case, and Andy's article argued the exact opposite. Although he was talking about this recent Supreme Court case, and how it's very worrying because under some of these doctrines, something like a trespass on land, that doesn't actually harm the land. It's not an injury, so you couldn't sue if someone trespass on your land, even though traditionally, that of course, is something you can sue about. And that, of course, has all kinds of ramifications for some constitutional work that's done. So things seem to be going in the wrong direction in a lot of these areas.

B Bob Belden 30:27

You mean the trespass wouldn't be actionable as like a federal claim?

A Anthony Sanders 30:33

Yeah as a federal claim because under that theory of standing. But I mean, if a state court had the same theory of state court too because, right? If I was thinking about this case that

everyone reads, well, we've all read the first day of law school and torts, The Case of the Thorns. Did both of you read The Case of the Thorns?

B **Bob Belden** 30:53

The Case of the Thorns, no.

A **Anthony Sanders** 30:56

1466. And so, Case of the Thorns, some two buddy landowners. So many lawyers are probably listening right now like, oh yeah, I remember The Case of the Thorns. So two buddy landowners, one clips some thorns off a hedge, they land on the neighbor's land. The neighbor sues, and the one to clipped them, takes them back. Like they're not there, it seems, very long, but the other landowner's sue, which makes you think there's something else going on. But all we know, is this ancient report, right? For this case, in law French, the original is in law French. And sues and they say, yes, you have a cause of action because there was a trespass. It doesn't sound like there was a lot of damage. Maybe there was a little bit to the lawn, I don't know. But that is traditionally a cause of action you can bring. And yeah, under these new standards, that becomes questionable. So that is something to put in the future, though. We'll worry about it another time, but I wanted to flag that for folks, as well. So a different area where there definitely are injuries and harm, it's just kind of who is responsible for them, is talked about in a recent case. The aspect of the case we're going to talk about is a recent dissent from a denial of rehearing en banc, which some people, as we have talked about before on the show, call "dissentals". Dissental is not an official word. It is not usually used in the official reporters, but some judges throw it around, and a lot of legal commentators throw it around. So Christian, before you talk about this case, I want to get your stand on the word "dissental".

C **Christian Lansinger** 32:54

I think I'm open to it. It keeps it simpler than this is a dissent from the denial of a rehearing en banc. It definitely keeps it much shorter than what it would otherwise be.

A **Anthony Sanders** 33:03

I mean, to me, it's like a kind of dissent. It's like a little dissent, a "dissental". But some of these dissentals are massive, but they happen to be in from denials of en banc, so we call them dissental. Anyway, people have written about this. If anyone wants to go back and listen to the shows where we've talked about dissental, they're fine. I'm sure 99% of our audience really wants to get on with it. So tell us about the State-Created Danger Doctrine.

C **Christian Lansinger** 33:35

Yes, so this is a dissental, or if one would like to call it, they can call it a denial over hearing en banc. I'm not sure what "on bank" means but it is a denial for rehearing en banc.

B Bob Belden 33:49

Shots fired.

C Christian Lansinger 33:53

And so in this case what we're dealing with, as Anthony mentioned, is the State-Created Danger Doctrine, or really the state-created danger exception. This is a fairly new theory that would allow someone to bring a suit under the Fourteenth Amendment substantive due process clause for really saying that this state did not cause, to back up for a second. The Due Process Clause allows individuals to sue for violations or deprivations of their life, liberty or property if they're not granted due process of law. So when it comes to the Due Process Clause, there's a general rule that when someone is having a due process action, they must be against a state government. That was what the the Due Process Clause way back in the Civil War era and the Reconstruction era. The reason that this Due Process Clause came to be was to prevent the abusive actions of state governments. It was not to handle private actors or to prevent individuals who are not related to the state from depriving one's life, liberty or property. It was specifically aimed at targeting state governments' abuse, or state government officials' abuse of one's life, liberty or property without due process of law. So that's what the general rule is, which is that the Due Process Clause does not require the state to protect a person against private violence or harms that come from means other than the government. This was the rule that was reiterated in 1989 in a Supreme Court case called DeShaney. And that's really where this exception, the state-created danger exception, comes from. There, the Supreme Court reiterated the default rule, Due Process Clause. You can't, for dealing with private violence here, you can't create a cause of action. So just to go back to that case, before getting into this dissental.

A Anthony Sanders 35:53

And I will add the sirens in the background are not sound effects for the cases that Christian is talking about. They are the lovely sirens that go past our headquarters at times.

C Christian Lansinger 36:05

And I should take that as an opportunity to note that some of these cases, we're dealing with acts of private violence, so some of the facts are quite gruesome or otherwise uncomfortable, and we won't get too much down into the facts. Because we're really dealing, this dissental really is going into the legal issue of whether this exception should exist in the first place. But going back to the DeShaney case, that was a case in which there was a social worker who had received complaints that there was a child being abused by his father. And in that case, the social workers took some steps. They even temporarily removed the child from the setting to ensure the child's safety, but they eventually allowed the child to go back to the father, where the father committed very harsh abuse, leaving that child severely harmed. So the Court again reiterated that Due Process Cause. Can't be suing the government for the actions of a private party. And here, what they said, is that the father was the one who caused the harm, and in

this instance, all the state did was they took the child out of the danger of the father's home, and then put the child back in the father's home. So really, there was no increase in danger, there was no creation of danger. But rather, this was an action or a deprivation of life or liberty that came from the father and not from the government. There's no action there, is what the Court said. But what really created this exception was the Court, in dicta, in two sentences, said exactly that, which is that this is not a case in which there is an increase in danger or enhancement of danger. And in particular, there's no custody here. And what I mean by that is to say the individual, the son was not in the government's custody, but rather was in the father's custody when these harms happened. We see these cases in which there's a special relationship between the government and an individual, either because the individual is an inmate in custody, or they're institutionalized for one reason or another, where the courts rather do put a burden on the government to ensure they're not deliberately indifferent to the individual or otherwise. Likely to, it's their responsibility, because at that point, they're in the government's custody. But here, what we're dealing with is a noncustodial situation, which is that the child is not in the government's custody. And what the Court says is that absent this increase in danger, on the part of the government where the government somehow put the child at further risk using the government's, or rather abusing the government's power, there's no cause of action. So that's where we get to this dissental of the Ninth Circuit as background. And what the Ninth Circuit was grappling with was a similar case dealing with child abuse, but rather from the mother. And in this case, what we know is the mother and the father had a tumultuous relationship over 15 years, and fast forwarding to the Deza issue, the father had called the police multiple times telling them the mother is having mental problems. She needs help, she needs psychological help, and the police left the house after hearing that. They said, call us back if she's actually threatening to harm someone, whether herself or others, and the following day, the mother threatens to harm herself. And the father calls again saying I need help. Someone needs to be here. So the police come, and they again see a lot of these things that the mother is going through, but at the same time, instead of separating the mother from the children, they separate the father from the children. They have the father come out of the house, leaving the mother with the children, and again, this mother, she's threatening to harm herself. She's at times said that her older son is going to shoot up a school. And she's been saying a lot of, calling her husband a devil worshiper. There's a lot of facts in here that indicate that the mother is going through a mental crisis and needs help. And the father tries to tell the police this. That they need to do something. That they need to, that the kids are not safe. But again, the police instead of separating the mother from the children, they separate the father from the children, and ultimately. To speed up these facts here, but basically the father reaches out to the neighbor who knows them, and the neighbor actually takes the mother and kids from the home and takes them out to church because that's what the mother said she wanted to do. She wanted to go to church. Meanwhile, the father was at home and the police stayed there to ensure that he didn't follow the mother and the children. So there's calls that happen at the church because she continues to go through this mental crisis. And eventually they take her to a women's shelter instead. And at this point, the neighbor is gone, and the child is left with a different adult. The child is left with the competency of the women's shelter where the mother continues to act up. At this point, a crisis intervention technician is what they're calling this individual, is called to help with this situation. And he calls the county's social services where a social worker picks up the phone, and that social worker, according to the complaint, lies to the crisis intervention technician and says that this mother has no instances of prior child abuse or neglect. She has no instance, there's nothing to indicate from what we know that she is a risk to the child. And in response, the crisis intervention technician lies back and says, she's already been checked out by a hospital even though in this instance, the police would refuse to send her to the hospital. She has already been to the hospital, she has been checked out, and they said that she is not in a condition for involuntary commitment. So go through all these facts,

and all this is to say that the government, through various actors, have set up a situation in which the child's life is in risk. And sure enough, the crisis intervention technician drives the mother to a motel that night, as just to offer it up. It was a free motel room. And then they get a call next morning, and unsurprisingly, the children have have been found dead. So the mother is found not guilty of murder by reason of insanity, and the father wants some kind of compensation, or rather at least some conclusion that the officers just did something wrong here. He brings an action with over 50 claims against 22 different government defendants trying to find anyone that would be at fault here for what looks like to be a tragic circumstance. But as you put it, Anthony, who's to blame here? Who are they going to pin the blame on if not the mother by reason of insanity? Is there someone in the government that should be held responsible for all of these various acts throughout this several day period of them? What, frankly, are acting negligent, at minimum. So it goes up to the district court, and the district court dismisses because there was no instance of custody here. That is to say that there's no, there's nothing here where the government is, where the government has complete control over the victims here, which in this case, would be the two twin sons. There's nothing here to indicate that there is custody, but the Ninth Circuit on a panel reverses in part, and invokes the state-created danger exception. So they invoke the state-created danger exception and say, although the first officers who took the child from the father and left the child with the neighbor, they did not increase any kind of a danger because in that instance, the child was taken from one competent adult and given to another competent adult. But when it comes to this crisis intervention technician or whatever you'd like to call him, he took the child where they were at a women's shelter where there was at least supervisors there to make sure that the child was safe, took the child from there, despite what the court seems, from the allegation seems to be against his better judgment, and instead leaves the child alone with the mother in this motel room, where the mother had been continuing to act up at the women's shelter. Saying that she was about to give birth that she had been raped that she, she started acting out that she was having contractions, she was doing all kinds of things at the women's shelter to indicate that she was not going to be, she was not in a mental state to care for these kids. The kids were apparently unsupervised by her, and she had nothing there to take care of them at all. But yet, that's what the technician did. And in that case, they said this is a state-created danger. The government official left the child without any supervision, and the same goes to the social worker. The social worker, by lying. What they say is, and this is a question of causation here, but they say is the social worker left the child as well, in that state. The social worker lied, and therefore, if the social worker had not lied, then perhaps the child would have remained at the women's shelter. But because the social worker lied, she increased the likelihood that this child, or rather these children, would be left with the mother alone. So all those facts is to say that this is a state-created danger, and hence why there was such a argument when it comes to the Ninth Circuit, on a vote en banc whether to review this en banc. They ultimately chose no, not to review this. And therefore the state-created danger exception remains true in the Ninth Circuit as it does in all of the other circuits with the exclusion of the Fifth Circuit. So that dissental discusses that this is a creation of a state-created doctrine, and what they mean to say is that the Due Process Clause was meant to prevent abusive uses of the government power. But here, what they argue is that the individuals, the police officers, the crisis intervention technician, and the social worker, none of them really used their government power, or at least the later two. The crisis intervention technician and the social worker didn't actually use government power, because the Due Process Clause, as mentioned, is meant to protect against the abuse of one's government power to deprive someone of their life, liberty, or property. And the way they view the Due Process Clause is that the Due Process Clause is meant to ensure that the government does not coerce someone by using these powers. But here, the crisis intervention technician drove them to a motel voluntarily, to a free hotel. And the way that they see it is that this was not a use of government authority, to restrain

someone. To keep them unlike, say, an instance of institutionalization, or when they have an inmate that they failed to supervise. In those instances, an individual has no way out. No way of really keeping themselves safe, or keeping themself from any harms that may happen. And that's when the burden is on the government, the special relationship that's talked about in DeShaney. The burden is on the government there to keep someone from these substantial harms that would deprive them of their life or liberty. The Court warns that, or the dissental warns that this extension of the state-created exception, as they call it, the state-created danger exception, would create instances in which the substantive due process clause is transformed into what does essentially this go-to for any violation of tort law. Any harm that government individual may cause, whether from, as they describe, from just driving someone to motel room to, as they put it, describing false information over the phone can lead to a cause of action. And they're concerned about this opening the floodgates of litigation and to transform this constitutional law into tort law. And so what they would have it be is that you need to have this element in addition. If we're going to have a state-created danger exception, which they advocate should not exist, but if we're going to have something along those lines, we need to have at least a coercion, the abuse of government power. And they reference a secondary source that they rely heavily on throughout the dissental to make this argument. This issue seems primed for the Supreme Court. The Fifth Circuit had a similar fight en banc recently with, again a lengthy dissental, but that time in reverse where the dissental was arguing that the Fifth Circuit should recognize the state-created exception doctrine and join the other ten circuits, but this is an issue that seems prime for the Supreme Court because if this is to be a cause of action, where if the state creates a danger, then there might be a remedy on the Substantive Due Process Clause. There might be a lot of plaintiffs and civil rights groups who frankly want to have a piece of that because they want to be able to ensure these government officials are held accountable in ways they have not been able to get them to be held accountable through ways of the Federal Tort Claims Act or these other avenues. So this avenue of state-created danger exceptions creating a lot of attention and disagreements between judges in the circuits and we'll see if it if it continues or if the Supreme Court is interested in finally answering. Is the state-created danger exception a thing? Or did they never create one in 1989 in the first place when the with the DeShaney case?

A Anthony Sanders 50:19

Bob, do you see a State-Created Danger Doctrine?

B Bob Belden 50:24

I was gonna ask you, Anthony, because you're our man on unenumerated rights here at IJ. I'm thinking about the distinction that's made about the use of coercive government power, right? The dissental mentions that's what due process is about, limiting the government's coercive use of its sovereign authority. But I, you know, I wonder if you buy in to the limitation that it has to be coercive, like an actual exercise of coercive authority. Like do you, Anthony have an unenumerated right to just not have the government make you, put you in harm's way or make you more endangered? I would say you do. And that whether they do it through express coercive conduct or something like negligence. I would think you would think you do have that right, but I'm curious what you think.

A Anthony Sanders 51:20

Well, I see a lot more and a lot less here, I think, than the dissental makes out. And I do think Christian, I think you're right, this very likely is going to the Supreme Court. I mean, it's framed as a substantive due process right, and that's what the Fifth Circuit also was talking about and in some of the judges there. I guess it's not a substantive due process right, in the same way that you know, the other rights that are often argued about, that the Supreme Court has actually recognized as a substantive due process such as the right to raise your children or for a while, of course, abortion or procreation rights. I mean, this is really just the right to be free from bodily harm from the government. So there is absolutely a substantive due process. It's called substantive due process, but I just see it as a due process protection of your life or liberty. If say an official comes up and just beat you up, a state official. And now there's this test that they've come up with, shocks the conscience, which seems to be part of the State-Created Danger Doctrine too, for how that actually would work, so it can't just be negligence. But yes, that's protected by the Due Process Clause. And it seems like this opinion, that Judge Bumatay wrote, this dissental, you could almost see the wheels turning as like he's thinking out loud. I mean, it's a well written opinion, but because near the end, it starts saying, well, really the State-Created Danger Doctrine is a subset of the special relationship exception that Christian talked about. So of course, if you put someone in prison, you have to feed them because you created that danger. So all the State-Created Danger Doctrine is like, where's the line? That's really all this is. So it's not like the Supreme Court is going to get rid of the need for the state to have to feed prisoners. I mean, I hope not. I don't think that would happen. So here, it's just where that line is. I think that line is definitely a lot closer than Judge Bumatay is saying. Say if you have a police officer. You have two police officers. One says to the other, there is a fugitive in that house, so you need to shoot tear gas into that house to try to get him out. And this is a fact pattern, not the lying part, but this is a fact pattern that we deal with a lot at IJ and recent cases that we've had at IJ, including one that we just got involved with not long ago. And so then they fire tear gas, and then it turns out, there's no one in the house, and so there's a takings claim, or a due process claim. Now, if that all happened because the first officer lied to the other one, is that state-created danger? Is that an exception or whatever the terminology is? I think that's constitutionally a constitutional violation. Because how is that different than the cop just firing the tear gas in the first place? He knows the lie is going to cause the other cop to fire the tear gas into a house that in no way should have tear gas fired into it. So then you can get to well, what if he was unsure, and start drawing lines in that hypothetical or any others? So what I would say is, I think that there's a line here. Maybe the Supreme Court can step in and say where line is. I think the line is different than Judge Bumatay says, but I don't think it's like that ten circuits after the Eleventh Circuit and D.C. Circuit have recognized this doctrine. One hasn't. If the Supreme Court says the doctrine doesn't exist, yeah, that's gonna move that line, but it's not going to make it go away. Because that's really what we're talking about here. And, you know, it's another species of just all these other aspects of immunity and accountability, where the government is not held to account for the wrongs that it has done. We'll close in a moment, but I just say about this case. The facts of this woman lying about the mother not having been institutionalized. I think that's, or not having, you know, harmed children in the past. I think that's pretty close to the one cop line to the other, in my mind. And now the dissental doesn't think so, but I think that's, that's pretty close to the edge. Well, we are at almost an hour of Short Circuit content, so I think we will leave it there. But I hope our listeners enjoyed these two very interesting opinions. And Christian, thank you for coming on for the first time and giving such a great description of that case and your own thoughts and views as well. Bob, thank you for coming back. On en banc, right. We figured this out that the article that will be out soon by Matt Liles and me. You can say

en banc, on bank however you want because it's completely made up. But with that reminder, I'm gonna say adieu to everyone. Thank you guys for coming on. Check out Unpublished Opinions soon. And in the meantime, I want everyone to get engaged.