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SPEAKERS

Anthony Sanders, Josh Windham, Will Aronin

A **Anthony Sanders** 00:16

"What is the matter, sir?" asked Marguerite; "and why do you thus disobey your physician's orders? I recommend you rest, and instead of following my advice, you do just the contrary." Oh, madame," said, Gillonne, "it is not my fault; I have entreated Monsieur le Compte not to commit this folly, but he declares that nothing shall keep him any longer at the Louvre." "Leave the Louvre!" said Marguerite, gazing with astonishment at the young man, who cast down his eyes. "Why, it is impossible—you cannot walk; you are pale and weak; your knees tremble. Only a few hours ago, the wound in your shoulder was still bleeding." "Madame," said the young man, "as earnestly as I thanked your majesty for having given me shelter, as earnestly do I pray you now to suffer me to depart." Well, those lines, from Alexander Dumas's Marguerite de Valois, came to my mind when I was reading the case we're going to discuss today from the Third Circuit, about how certain companies, such as, for example, Papa John's, send their computer code into your computer and track everything you do while they're on your website, ordering their—arguably delicious, arguably not—pizza. So is it like the company is coming into your own private Louvre without your knowledge and then scurrying away like the Protestant la Mole in the novel, or is it something else, and we shouldn't worry about this, and therefore there's personal jurisdiction for a lawsuit in the state of Pennsylvania. We'll discuss that and a lot more today 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 Tuesday, September 10, 2024. So, Dumas is better known for his novel The Three Musketeers, and I'm delighted to say we have two dashing young musketeers from the Institute for Justice with us today. One is Will Aronin—he's best known for his full locks of hair, kind of a feel that we get around the office. So I'm very glad that he's joining us, our trial expert in discussing this case that I'm warning you, may bring out some bad blood here at the Institute for Justice about both computer code and pizza. So Will, welcome back to Short Circuit.

W **Will Aronin** 02:51

Dude, I love being on this show, but you stole everything I was going to say about my case. I

was just going to quote Dumas, the only thing now,

A Anthony Sanders 02:59

Well, you'll just have to go to some other 19th century French novelist. But before that, before we dive into—you know, Dumas was crazy. He wrote, like 50 novels in a decade. Most of them were trash, but, you know, they sold well. He was a big spender, though too. But before that, we're going to do something that we have kept from the listeners and viewers of Short Circuit for years, and that is racing content. But this week, for all the NASCAR fans, all the Formula One fans out there, we're going to give it to you good and fast, and that is: Josh Windham, one of the leaders of our Fourth Amendment project, but also an expert on state constitutions and economic liberty, he's going to discuss a recent case from the Supreme Court of North Carolina, his home stomping grounds, and a ruling about speed racing, but more importantly, about bringing a claim under the North Carolina constitution, which is something that he has done in a case that is now pending at the very same court. So Josh, tell us about speed racing, your home state, and maybe a little bit about constitutional law.

J Josh Windham 04:22

I just want to go fast, Anthony.

A Anthony Sanders 04:25

We hear that a lot.

J Josh Windham 04:25

So this case—I don't think, I don't think you get the quote, man. All right, so this case is about—I'm sorry, have you not seen the Ballad of Ricky Bobby?

A Anthony Sanders 04:37

Yeah, you know, I know that I need to. That was actually linked to a recent Short Circuit newsletter.

W Will Aronin 04:47

Okay, maybe stop reading Dumas and start watching, like, the classics.

J Josh Windham 04:51

Well that's my thought. So, Anthony can go watch that classic. Will can go read Anthony's classic and then I'll just sit here and twiddle my thumbs. Okay, so let's talk about economic

liberty. Maybe I'll do a little bit of table setting before we even get to what this case is about. So this case, at a high level, is about a state constitutional claim involving the right to earn a living in North Carolina. But before I even get into the facts of the case, just a little bit of background: the Federal Constitution does guarantee a right to economic liberty. The Supreme Court has recognized that for well over a century. The problem that plaintiffs face when they go into federal court and try to litigate those claims under the federal constitution is they run into something called the rational basis test, something with which I'm sure our listeners and viewers are well familiar by this point, but the basic problem with federal rational basis review is that, as courts often articulate it, it is quite deferential to the government—so deferential, in fact, that courts often say they have to credit any conceivable justification for a law, they have to they have to credit any conceivable facts that might have motivated the legislature in enacting that law, and so it is extremely difficult and sometimes impossible, depending on how courts apply the test, to show that a law lacks a rational basis and therefore that the government has violated your right to earn a living under the federal Due Process or Equal Protection clauses. So that is kind of the state of play in federal courts under the Federal Constitution. And of course, IJ sometimes wins economic liberty cases under the federal constitution—it is not impossible. But this case we're going to talk about today is about North Carolina's constitution, and that matters, because North Carolina's constitution, like every state's constitution, can provide more protection for economic liberty than the federal floor set by the Federal Constitution. So this case is about how much more protection North Carolina's constitution provides. The facts of the case arise from a dispute during the early years of the Covid-19 pandemic. Governor Cooper, the governor of North Carolina, issued an Executive Order pursuant to a State of Emergency Declaration. And his executive order said that public gatherings, defined to mean gatherings of more than 25 people in a confined outdoor space, were prohibited—and that meant that things like outdoor concert venues, race tracks and other kind of gathering spaces in public outdoors were temporarily prohibited for the duration of the Covid-19 emergency And after Governor Cooper issued this executive order, a speedway owned in part by a guy named Robert Turner in Alamance County, North Carolina, spoke out about the executive order and opposed it and said, You know what, we're not going to follow that executive order. We are going to keep giving the people what they want, which is racing outdoors, and we're going to allow our full suite of customers to come and fill our stands and watch outdoor racing at our speed track. So of course, this got on the governor's radar, and a series of tit-for-tats came to be. So first Ace, this raceway, held its first race after the executive order. Governor Cooper then asked the local sheriff to try to convince Mr. Turner to postpone the next race he had planned. Turner declined that invitation, and the race was held the next week. Governor Cooper then sent a letter to the county commissioners in Alamance County and the sheriff explaining that these sorts of races violated his executive order and were criminal acts, and he asked the sheriff to quote "do his duty" to enforce the executive order. Ace declined again and held a third race in violation of the executive order, at which point the Secretary of the Department of Health and Human Services, which is of course under the governor's ambit, got involved and issued an abatement order that required the speedway to close as an imminent quote "hazard to public health." Now, I think that's kind of worth noting and pausing on here, because a lot of the economic liberty cases that were decided in the state courts in the early 20th century had to do with quarantine orders, where people were actually quarantined to particular spaces, sometimes because they were sick, other times because they had not gotten vaccinated. And the question in these cases was often, does the government have the authority under its police power to protect the public health by quarantining this person until they meet this condition? So a lot of early economic liberty cases and just general liberty cases were decided involving issues just like this—about supposed imminent threats to the public health. So we're really winding the clock back over 100 years of some of the earliest foundational cases in the space. Now, back to the case. At this time, a bunch of other large

venues across the state were, in fact, allowing over 25 people to attend outdoor events in their spaces in violation of the executive order, and the Department of Health and Human Services happened to only issue an abatement order to Ace and Mr. Turner. No similar action had been taken against these other outdoor venues, and so this resulted in litigation. DHHS sued Ace seeking an injunction to abate basically a nuisance in violation of the executive order. Ace filed counterclaims to that lawsuit, alleging that the DHHS abatement order violated its right to earn a living under the state constitution, and we're going to talk a little bit more about the state claim later, but that state claim was filed under Article One, Section one of the state's constitution, which is known as the fruits of their labor clause and so more on that in a moment. Just to kind of wrap up the early procedure, DHHS then dropped its suit for an injunction because the governor changed his executive order, the emergency started to dissipate, and so racing was then allowed. They dropped their lawsuits seeking an injunction, but Ace did not drop its counterclaims. Ace kept going.

W Will Aronin 11:08

It was safe to be outside back then? You're kidding.

J Josh Windham 11:11

It was—according to the allegations and Ace's counterclaims. It was.

A Anthony Sanders 11:16

Even in North Carolina?

J Josh Windham 11:18

Even in North Carolina. Right. So, this case is really about whether Ace stated viable claims under the state constitution for a violation of its right to earn a living. And I want to kind of walk through the different steps of the case and the different issues involved, but start with the allegations in the complaint. Because when we're deciding whether a plaintiff states a valid claim, a claim that can survive a motion to dismiss, we look at the allegations in a complaint, we assume the allegations are true, and we construe them liberally in the plaintiff's favor. That is ordinarily how it works when there's a motion to dismiss the allegations in a complaint. And so Ace alleged that Governor Cooper took unusual steps to single its raceway out, to shut down a race, not because there was any distinct public health threat posed by Ace; in fact, there were other large venues operating in the same way Ace was across the state, and so Ace wasn't meaningfully different from those other venues. Instead, the allegation is Governor Cooper targeted Ace because Mr. Turner spoke out against the executive order. So this is basically an allegation of retaliation against Ace, retaliation in violation of the state's equal protection clause for exercising Mr. Turner's First Amendment rights, and retaliation that doesn't have a legitimate governmental purpose because it's not motivated by and doesn't rationally achieve any interest in public health or safety. It is really just meant to single out and target one specific business for its political speech. So that is kind of the thrust of the case. And before we get to kind of those constitutional questions and whether Ace had valid claims

according to the North Carolina Supreme Court. We need to talk about how the case even got here, because, you know, a lot of states have a doctrine called sovereign immunity. In fact, I'm not aware of a state that doesn't have a sovereign immunity doctrine. Maybe Anthony is, because he's a state constitutional expert...

A Anthony Sanders 13:17

I don't know one actually, that has like, nothing. Some states, they abolish sovereign immunity, but they kind of do it through the back door anyway.

J Josh Windham 13:25

So, the basic idea of sovereign immunity, just at a high level, is that the government can't be held liable for a wrong unless it consents to being sued for that type of wrong. And again, there are all sorts of nuances on a state by state level. Some states say that you can never name the government as a defendant. Pretty sure Georgia is one of those states. Some states say that you can, but only for certain types of claims. Most states say that you can't sue for damages, but you can seek prospective declaratory and injunctive relief to prevent constitutional violations. So there's all sorts of nuances to sovereign immunity, but by and large, they do prohibit a plaintiff from seeking damages against the state directly for a violation of the state constitution. Some states have started to go the other way on that. One of the issues that's bound up in this question is an issue of whether the state constitution itself provides a cause of action: whether the government needs to enact a statute like section 1983 at the federal level that authorizes you to seek damages from the government for violating your constitutional rights. This is an issue that, if you're familiar with IJ's Devillier Supreme Court victory from last term, comes up not infrequently, including in federal courts. That was an issue about whether the takings clause of the Fifth Amendment is itself self-executing and you can sue for damages for taking of your property under the Federal Constitution. Bu the point is, this question of whether you need a statute to authorize you to seek damages or some other relief from the government comes up in all sorts of constitutional litigation, and it came up here. And what's nice about North Carolina is that there's a case called Corum from 1992 where the state Supreme Court recognized that you have a quote, "common law cause of action directly against the state, directly under the state constitution for a violation of your state constitutional rights." There are a few conditions on that. But basically, when a Corum claim exists, there's no such thing as sovereign immunity. So one of the issues in this case is, is this a viable Corum claim? And one of the qualifications for a viable Corum claim is that you're suing under the state constitution, another is that you have no other adequate remedy at state law. So for example, Mr. Turner and Ace in this case are seeking damages in their counterclaims against the state. There's no state cause of action statutorily for damages. And so they do have a viable Corum claim, because Corum is the only avenue through which they can seek damages from the government in this case. And so the only the third and final prong, the only one that really matters in this case is, did they state a viable claim under the state constitution? If the answer to that is yes, sovereign immunity doesn't apply. If the answer to that is no, their case is dismissed both under sovereign immunity and because they lack a substantively viable claim. So that's kind of the the table setting I had to do to get you to understand what's actually going on in this case. But let's start talking about the constitution now. So because the central issue is, did they state a viable claim under the state constitution? And North Carolina, again, is a really, really great place to bring a claim like this, because they have a provision—the fruits of

their labor clause, which is Article One, Section One of the state constitution, it doesn't show up anywhere in the federal constitution—that says, and I think it's worth quoting here: "We hold it to be self evident that all persons are created equal, that they are endowed by their creator with certain inalienable rights, that among these are life, liberty and the enjoyment of the fruits of their own labor and the pursuit of happiness. And so that's Article One, Section One of the state constitution. It was adopted after the Civil War, my view is that it was adopted in part, in large part, to convey and confirm the rights of freedmen to economic liberty that they were deprived of prior to the Civil War. And so really, it's kind of a way of according equal constitutional protection for the right to earn a living that was otherwise conveyed only to freedmen under the state's law of the land clause, which is Article One, Section 19. But today, and basically since the Civil War, this provision has applied to all North Carolinians. It's protected the right to economic liberty, and it's right there in Article One, Section One, as an inalienable right under the state constitution, that again, appears nowhere in that form, at least in the Federal Constitution. And so what the court says is really what matters here is what is the standard that we have to apply when deciding whether the government has taken action that violates your right to earn a living under Article One, Section One. If we apply the federal rational basis test, that's going to be the deferential test I talked about earlier, and at least according to the federal courts that treat it in its most deferential form, facts are going to be largely irrelevant in that kind of framework. But the supreme court here says that's not the way we do things in North Carolina, and that's not the way we've done things for a very long time. So there's a few questions we have to answer. The first question is, is the government pursuing a legitimate end? And what's fantastic about the court's analysis of this part of the opinion is it says "the first step in this inquiry requires the reviewing court to identify the state's actual purpose for the constraint on private business activity. Initially, the state may simply assert that purpose without the need to come forward with evidence, but the plaintiff may rebut that assertion with evidence demonstrating that the state's asserted purposes is not the true one, and instead, the state is pursuing a different, unstated purpose." And again, here's another part of the opinion, "simply put, courts assess fruits of their labor clause claims based on the actual purpose of the state action, and that may not always be the purpose initially put forward by the state." And so right here we have a clear departure from the most deferential form of federal rational basis review, which requires courts to basically defer to conceivable justifications for laws. Here instead, we have the court saying, No, the court's job is to figure out the actual purpose of the law. The state is free to come forward and assert a justification, but that is a rebuttable assertion, and the plaintiff can use evidence to show it's not the true purpose of the law. There may be illicit motivations going on, but the key question is, is the government using its power to pursue a public purpose and not a private purpose? And what the court says here is Ace has alleged that even though the government has claimed that the point of this executive order and the point of the Department of Health and Human Services abatement order was to protect the public health from an imminent hazard, that is not actually the true purpose of its action, because the governor had a different motivation in mind, which was squelching political speech from a dissenter. And so the court says even at step one, they've stated a viable claim under Article One, Section One, because the government's asserted purpose, according to the complaint, is not a valid one, which is awesome, right? So then we've got step two. The court says even if that weren't true of step one, the law, still has to have some kind of "reasonably necessary" relation to a legitimate purpose. Reasonably necessary. So that is not the same thing as the federal rational basis test. And part of how we know that is just go look at Georgia, which, last year in Raffensperger v. Jackson, decided a case unanimously in an IJ case involving lactation care, which said that actually, Georgia's Constitution requires a reasonably necessary standard under which facts and the plaintiff's evidence—

A Anthony Sanders 20:48

An opinion we talked about on Short Circuit. We'll put a link in the show notes to that episode.

J Josh Windham 20:54

Awesome. And so what we have here is North Carolina saying we apply a reasonably necessary standard, just like Georgia does. They didn't cite Raffensperger, but just like Georgia does. And under this part of the analysis, the court says, quote, "This is a fact intensive analysis, the means used must be measured by balancing the public good likely to result from the utilization against the burdens resulting to the business being regulated." And honestly, that's a fantastic way to put the analysis, not just because it says facts matter, clearly, unequivocally and directly, but because it's incorporating a question of burden into the analysis—burden on the person whose rights are being infringed, the business whose rights are being infringed. And that question of burden shows up in other state Supreme Court decisionsrecognizing heightened protections for economic liberty over the federal floor. So the Patel decision from the Texas Supreme Court in 2015 requires the court to consider oppressiveness: burden on the plaintiff. The Pennsylvania Supreme Court's decision in Ladd from from 2020, another IJ case, also requires the court to consider burden on the plaintiff, and so this question of burden is starting to factor into more and more state Supreme Court decisions recognizing heightened protections for economic liberty.

W Will Aronin 22:11

Josh, who is the lead attorney in the Ladd case?

J Josh Windham 22:14

It might have been me. [Laughter]. So the court applies this reasonably necessary standard, this fact intensive analysis, and says, actually, when you look at what Ace has alleged in its complaint, there's not a reasonably necessary relationship between the abatement order and what Ace is doing, because all sorts of businesses, just like Ace across the state, are doing this exact same thing, and you have only targeted Ace, and so this action can't be reasonably necessary to protect the public if you're selectively enforcing this abatement order, right? So that's the thrust of the case. The court says you have stated viable claims under the state constitution. There's also a question of selective enforcement under the Equal Protection clause for exercising First Amendment rights. It's basically a retaliation claim of the sort that we see and litigate at IJ all the time, and the court says that's viable too, for pretty similar reasons. But what's really remarkable about this decision is the part of its decision recognizing that the State Constitution, Article One, Section One, require a fact intensive analysis both of the government's asserted justifications and of the relationship between the abatement order and all government actions to a legitimate—

A Anthony Sanders 23:23

Both of which in federal court, the court can just make up. But they're saying in state court in

North Carolina, you can't make up either of those.

J Josh Windham 23:31

At least federal courts say you can make it up a lot of the time. Of course, in the better decisions, the courts don't say that. So it kind of depends on which court you've got and which judge you've got, but by and large, courts do say what you're describing. So um, I want to kind of just take a step back. I mean, the long story short is motion to dismiss denied, this case is getting remanded for further proceedings on the merits. Let me just make kind of three comments about this case, and then I'll get to you guys. So first of all, I'm particularly delighted about this case in part because I, as Will mentioned earlier, am litigating a case before the state Supreme Court, involving a challenge to the state's Certificate of Need law. One of our claims is under the state's law of the land clause, which is not the same as the fruits of their labor clause, but it, according to state precedent, requires the exact same constitutional test. And so this is truly fantastic for our case, because I think the court is is right on the money about the direction this litigation should be going, the direction the state constitution should be going. And in fact, we filed an amicus brief in this case, on behalf of our client, Dr. Jay Singleton, arguing the court should adopt a fact based reasonably necessary test, which is exactly what the court did. Now I'm sad the court didn't give us credit for that, because we are the only party that actually advocated for that specific language, but nevertheless, I'm really happy to see the court taking cues from our amicus brief and going in the direction that we wanted to go. And so I think that amicus brief is going to be available in the show notes. And one thing we noted in the brief, just for what it's worth, is the court really had a choice between two ways of thinking about the state constitution. One way of thinking about the state constitution is to say that the right to earn a living, which is inalienable, it's right there, first and foremost, in the Declaration of Rights, doesn't deserve meaningless judicial review when other state constitutional rights get meaningful judicial review. Why is this one beingsingled out for deferential review of the sort you would see in federal courts, when all other state constitutional rights get real, fact based review. And I'm happy to say the court didn't want to continue doing that. The other thing that the court could have done here, and I'm glad it didn't, was follow its worst precedent. So there is precedent North Carolina applying a very deferential rational basis test, similar to the federal test under the state constitution. The worst form of that shows up in a case called Moore Sterilization, which applied the U.S. Supreme Court's decision in Buck v. Bell. This is a 1970s case from the North Carolina Supreme Court affirming that the forced sterilization of children is constitutional because it, quote, "might be benign for those children." And I'm very happy to say the court rejected that line of precedent. Now it didn't talk about Moore Sterilization explicitly, in it's opinion. But, that is— Wow. That was from the 1970s? Which is astonishing, because Buck v. Bell was from the 1920s.

W Will Aronin 26:33

Look at Anthony's—I was about to say, it's bringing up your your favorite Supreme Court justice. I heard you talk about how great he is recently.

J Josh Windham 26:41

So that's point one. Is the court hewing to its better precedent and going away from its worst precedent right, which is great, and I think that kind of bodes well for our pending case before

precedent right, which is great, and I think that kind of bodes well for our pending case before the state supreme court right now. The other two points I want to make just kind of quickly are this decision is both radical and kind of not radical, and it's worth teasing out the ways in which both might be true. So it's radical in the sense that it is departing from federal precedent, and it's doing so unanimously, as the Georgia Supreme Court did last year. And this is a really promising trend, because I think, on the one hand, it shows that state courts are more and more willing to take their constitution seriously and to not just defer to what federal justices say about the Federal Constitution when construing their own document. I mean, North Carolina's constitution predates the Federal Constitution, and the language here is totally distinct from anything you find in the Federal Constitution. So I think it's really, really healthy that state courts are doing this, but it's radical in the sense that you often find judges still that are really, really skeptical of departing from what the Supreme Court has said about these issues. So that's what makes it radical. It's not radical, though, in the sense again, that the court really is just applying the 12(b)(6) motion to dismiss standard in a serious way. You know, generally speaking, when courts are deciding whether to dismiss a claim at the pleading stage, when you've just filed a complaint, they're supposed to take your allegations as true. They're supposed to construe them liberally and in your favor, which is why the court, at the very beginning of its decision says, quote, "these events concern matters that are controversial in contemporary politics. The legal issues in this appeal, by contrast, are so time tested that they border on the mundane." That's an astonishing way of framing this case, because I take it that the court's constitutional ruling is relatively radical, it's doing something on the vanguard of constitutional litigation that's much needed. On the other hand, it's applying standard, traditional principles of pleadings practice. And so it's nice to see those coming together in a way that is pro-plaintiff, not pro-government. And with that, I'll kick it to you guys.

A Anthony Sanders 28:53

So Will, I guess the question is, pro-plaintiff, pro government?

W Will Aronin 28:56

I mean, obviously here at the Institute for Justice we are pro government. And I just have to say, I'm so glad this is on video, because just watching you, Josh, I don't think I have ever been quite as happy about anything in my life as you are saying that this is a fact based analysis. It's just, it's truly incredible.

J Josh Windham 29:14

Well, when you stood in front of the court, as I did in April, and argued that the State Constitution demands a fact based standard before this decision camed out, and get fire from some of the justices about that and from your opponent, I think it's really refreshing to see a decision that unanimously affirms the exact position that you've argued for for, I don't know, five or six years now.

W Will Aronin 29:36

I'm not hating on it. I am so happy to watch the sheer joy that you have on this. My favorite

personal anecdote about rational basis is back in law school when we learned about I'm like, this is cool. I will never have to think about this again in my entire life. And now I bang my head against the wall about it every single day.

J Josh Windham 29:52

I have a different experience, which is that my professor in Con Law told me that you can't win rational basis claims, and that no plaintiff since the New Deal has won a rational basis claim. That that was untrue when he said it. Maybe he didn't know about IJ. I would come to learn that, you know, I would work with colleagues who have done so for decades, and ultimately become one of those people as well. And, you know, I think it's not just that I have some academic interest in facts mattering as a kind of technical or scholarship type matter. You know, this has real impacts for real people and real impacts on the outcome of cases. So Will you and I had a trial in the in the Ladd case after the Pennsylvania Supreme Court's decision, the facts in that case ended up mattering a lot to the judge who presided over the trial and decided that case, and we ended up winning that case on behalf of Sally Ladd. But you, of course, also had a trial in our Nebraska CON case, and that one is now before the state Supreme Court. So facts really do matter in these cases and can control the outcome of these cases.

W Will Aronin 30:55

Yeah, it's honestly the biggest thing. I was not as happy as you, but I was really smiling in my office reading this yesterday. It's just an incredible decision. It also means that some of these cases probably should be going to trial, which is really incredible. I don't think you should shout out the professor's name, but like, you might want to just send him an email being like, Hey, look at what I've done.

A Anthony Sanders 31:15

So, not to single you out, Josh, but I had a similar experience from my Con Law professor who I can shout out his name, Dale Carpenter. Some of you may have read him on the Volokh Conspiracy over the years, great guy, but he taught us Con Law, and we did the same thing with rational basis. And then I was gonna intern at IJ, and I said, Hey, there's these couple like district court opinions they've won on rational basis. And one was the the Craigmiles case that some listeners may remember about casket licensing, that whole business, and they won at the the district court, so I said, What about these? And he read them and wrote me back, and he's like, Oh my gosh, this is never going to stand up on appeal. This is kind of crazy, what the judge did, I don't understand. And then a couple months later, the Sixth Circuit opinion comes out, and we won at the Sixth Circuit.

J Josh Windham 32:16

One thing before we move on to Will's case, which I know we need to get to, but, um, just a final note on this. So, you know, on the one hand, I'm really excited that the state courts are doing something different than what the U.S. Supreme Court is doing right now on this issue.

But it's worth noting that the standard that the courts are applying in these cases—this reasonably necessary test or some other courts call it real and substantial review, you know, all these kind of different turns of phrase that are different than rational basis test—all of that comes from U.S. Supreme Court precedent. All of it comes from U.S. Supreme Court police powers precedent from the late 1800s, from the endof the 19th century. And it's that's neither good nor bad. But the point is, the U.S. Supreme Court also used to be good on these things, or at least a lot better than it is now. And at some point around the New Deal and the decades afterwards, kind of through Lee Optical in 1955, the Supreme Court turned away from all of that, and started to apply this conceivability, or more fact-free form of review. And so it's really the case that the Supreme Court has turned its back on a better way of doing things, and the state courts have said, You know what, we don't have to dance to that tune. We can do things the traditional way, and we're going to do the traditional way. So I'm really excited to see this, but it's also we should to be aware this isn't the state courts inventing something out of whole cloth. It's the state courts hewing to a standard the Supreme Court used to apply,

A Anthony Sanders 33:51

And as far as used to apply, we used to apply the minimum contacts test for jurisdiction in court, in state or federal court when we had an age where everything was physical, but now everything is not so physical, and the lines are a little gray, especially when it comes to pizza delivery. So Will, this case, on its face, looks kind of boring: on the Third Circuit, about personal jurisdiction, minimum contacts. Why should we be excited about it?

W Will Aronin 34:23

Yeah, first of all, that was such a good transition, Anthony, I just have to give you credit for that one. So I'm basically changing the show entirely into so what grinds my gears? And this case just really grinds my gears. Now, warning this case is about jurisdiction, and I cannot talk about law nearly as well, if my life depended on it, as Josh did. So I'm really not going to talk about jurisdiction very much, because also, I imagine everyone will leave the show as soon as I start it. So this case is Hasson v. Fullstory, and I'm also going to name one of the other defendants—it's Papa John's—because this is terrible behavior and I'm calling them out by name. So basically, what happened is Fullstory, Inc. sells software for websites, and that software allows them to track every single thing that a user does on the website without knowledge or consent. It tracks mouse clicks, it tracks scrolling, it tracks time. There is some discussion of credit card information, I would imagine that's during a checkout process, email addresses, GPS location. Basically, if you do it while you're on that website, the software that Fullstory does, knows.

A Anthony Sanders 35:33

So quick question on that I was confused by, Will: if I'm on the website and I have it up and I'm doing stuff, but then I get distracted and I do something else, and maybe I even buy something from a totally different vendor on a different website and use my credit card. Does it track all that? Or is it only stuff I'd interface with their website?

W Will Aronin 35:54

Yeah, I had the exact same question, but because, spoiler alert, the court didn't allow the case to go forward. We talked about motion to dismiss, facts mattering. We didn't have discovery, so we just know a little bit. We only know the allegations of the complaint, but like, I'm not going to accuse Fullstory of doing that, but I don't know why, technically, they could not, and I would like to see discovery, I would like to get a trial about what exactly this type of service is capable of what they do and like, what other technology they could implement, and should probably be open to suit for.

J Josh Windham 36:26

Just so we're clear, my understanding of the facts in the case is that, like, basically everything—everything you do on a website, is tracked. So how you move your mouse, zooming, key cards, key things you enter in. But even if you delete the text, if you enter text and then delete it, that's tracked; like every single thing you do.

W Will Aronin 36:45

Yeah , oh, absolutely. But I have another question, and we don't know, what if you go to a different tab? What if you have the website open in the background and open other things? Now, I'm sure there are some limitations like, I would hope, and I would assume that this isn't just pure unadulterated spyware, but I also wonder what the court's decision would allow for bringing a lawsuit against someone that makes full unadulterated spyware. So you can tell I really have feels on this case. I definitely have feels on this case. So Papa John's and a lot of other companies buy this software, and Pennsylvania has an anti-wiretapping statute. So someone in Pennsylvania brings a class action suit against Papa John's and against Fullstory in connection with another company that they've sold it to. It's a mattress company. I don't have to call them out by name. I don't know which one it is, and I don't really care. Papa John's I'm calling out though. So they bring a class action suit against Pennsylvania's anti wiretapping statute, which is designed to prevent people from being, you know, spied on. So, Fullstory and Papa John's asked the court to dismiss the case, saying there is no jurisdiction, that the court cannot reach and cannot allow a suit against us because we don't have enough of a presence in the state, and we did not act intentionally in Pennsylvania. They said we're a Delaware company—both companies, Papa John's and Fullstory are actually headquartered in Georgia. Whether that's a coincidence or if the laws are favorable, so be it. And the court says, look, there are two tests for personal jurisdiction. One is minimum contacts and one is the effects, and neither one applies here. Now the traditional minimum contacts test for jurisdiction basically asks, did a company quote "purposely avail itself of the forum when conducting activities and invoke the protections of the forum's laws?" Are they there? Can we reach out to you? So Papa John's has 85 locations in Pennsylvania. You'd think they'd been purposely availing themselves of Pennsylvania. The first thing I googled—I would not go to the website, because God knows what they're tracking—the first thing I googled was, Hey, I wonder if they've ever sponsored the Philadelphia Eagles. That sounds like they're purposely availing. Yep, they used to have a concession stand in the stadium, they've advertised during the Super Bowl that was mentioned much later in the case after I googled. So you would think they're doing business, but the court says it's not enough, because although these stores may be doing business in Pennsylvania, they do not expressly say that the website is doing business there, that the advertisement does not actually direct you to the website.

A Anthony Sanders 39:28

But the website works, or you can use the website to order from those 85 stores, I'm sure, right?

W Will Aronin 39:34

And like pizza, you can order pizza delivery on the website again, I assume, because I refuse to ever go on that website now, but like, you order pizza and then a local store delivers, but the court says no. And I think what's in the background of this is they don't want just companies with websites to be able to be sued in every single state. And I get that, you don't want a race to the bottom where states can just interfere with other companies. And libertarians have different feelings on this, but like this is just, they are making a website that tracks every single person that uses it, regardless of the state. And maybe if they're going to take such widespread conduct, they may have to be subject to lawsuits in those states where people act. It's not the end of the world. So, like I said, I don't want to talk too much about jurisdiction, but I think there's a theme of courts making very early tech decisions based on some like, some analogies that end up causing major problems with the internet for decades. So I joked about the law school not thinking about rational basis. The thing I did think about in law school, and it's been bothering me ever since, was the shrink wrap license case that was decided in '98 by Easterbrook in the Seventh Circuit. And that was about a CD, a CD that compiled 3000 phone books. That's how dated it was. And basically the court said that those types of licenses that no one ever sees, that may be hidden, that may be long, that no one learns, they're contracts, they can absolutely enforce it. And that's what led us to the Terms of Service problems that we all have today, where it just gives you, "I agree to any type of term," and then it can totally be enforced against you. And I worry that this type of decision has the same long standing consequences. If you really can't sue anywhere but the company's home state, there can be a race to the bottom to allow these companies to basically spy on absolutely everybody everywhere, and it's impossible to sue them unless you go and play on their turf.

J Josh Windham 41:39

I think Judge Phipps had a good dissent on this. I'll read a little quote from it that I took down that I think is pretty on the money. He says "Papa John's chose to use its website to make sales in Pennsylvania, use the session replay code in Pennsylvania. And Schnur's claims are based on Papa John's recording his website behavior on his browser in Pennsylvania." And it seems like the majority's approach to this basically says something like, you can't have jurisdiction over this activity by this defendant because it's everywhere, right? Like, because they're doing it to everyone, because the code is everywhere, even Papa John's, their stores are everywhere. You can't sue us here, because we're everywhere, just kind of seems counterintuitive, if not wrong, and I think Judge Phipps's dissent kind of puts his finger on why that might be. Now, of course, the majority does say, look, one of the problems here is that there's no connection between the software itself being targeted to Pennsylvania or there's no jurisdiction, because the software is not being targeted at Pennsylvania only. But that just strikes me as odd. I mean, like, if we think about the Fourth Amendment, for example, which Anthony said, I work on our Fourth Amendment stuff, and so it's on my mind often. You know, if the government decided that it wanted to just surveil everybody all at once, right? Is it really the case that, like, nobody would have standing because everybody's being surveilled? I mean, certainly there's decisions going

the other way on that front, the Fourth Circuit held, in a case called Leaders of a Beautiful Struggle in 2021, that you do have standing to challenge citywide surveillance of everybody in Baltimore from an aerial drone. So I don't understand, really, the logic of the majority's decision, other than it's applying older personal jurisdiction precedent that maybe doesn't map super well onto the way the modern economy works.

W Will Aronin 43:45

Yeah, the majority focused on like Fullstory and Papa John's were essentially indifferent to where the user was. They didn't care that the person was in Pennsylvania. He could have been in New York. He could have been anywhere but Delaware or Georgia. He could have been in North Carolina, and it didn't matter. Just anyone who uses the website is subject to that. And it strikes me that indifference when you're committing a horrible act, when you're committing an intentional tort, it doesn't really matter. So I struggled with trying to come up with other analogies outside of the Fourth Amendment context, and this may not be a great one, but what if there were a bunch of migratory birds, and no one really cared where they came from, but you got them in Georgia, you put bombs on thousands of them and release them to other states. Like, you're going to tell me, those states where there were victims could not reach the actions of the Georgian who just put those bombs there.

A Anthony Sanders 44:40

Yeah, absurd.

J Josh Windham 44:41

Yeah, I see what you're saying, and you know, one thing that's kind of bothering me about this case too, is it seems like the court thought that maybe if he had just pled it a little bit differently, there would be jurisdiction. I don't have the exact quote in front of me, but there's a part of the opinion where the majority says, basically, like, if he just alleged there were efforts to promote the website in Pennsylvania that would have sufficed under the traditional personal jurisdiction standard. So if that's true, like, it strikes me as totally implausible that Papa John's hasn't engaged in efforts to promote its website in Pennsylvania. Why can't they just amend their complaint? Like, why can't the court just give them that chance, rather than just dismissing the case? Like, it's, I don't know. It strikes me as odd the case is being dismissed without a chance to amend.

A Anthony Sanders 45:26

I'm guessing because there are more potential plaintiffs than just the ones on the heading of this case, that that may be in the future for these lawyers.

J Josh Windham 45:36

So, you're saying it's like a docket control thing?

A Anthony Sanders 45:39

Um, no, I'm saying that, that although these particular plaintiffs won't be able to amend, I don't think that's probably a problem in the long run.

J Josh Windham 45:49

Um, that makes sense. I did have one more thought. I don't—Will, if you had more to say about the case...

W Will Aronin 45:54

I will never stop you from talking.

J Josh Windham 45:55

Okay, so a lot of what's going on with your rendition of the case is you have vibes about it, right, which I understand. So one thing I wanted to ask you is, I don't have strong opinions about this, but here's a question, because earlier you mentioned consent, like it's all being done without a user's consent. And I kind of want to try to map this a little bit, like, setting aside jurisdiction, but just kind of maybe chatting about the surveillance aspect for a minute. You know, like there was an amusement park where I grew up, down the road, and, you know, they had cameras around the amusement park, whatever. I'm sure that was for security. But like, thousands of people are going to this park a day. You buy this ticket, which gives you a license to go onto the property and ride the rides. And so like, I could see a world in which the amusement park uses the cameras to, like, track foot traffic patterns and who's going to what concessions, and then uses the data from that tracking to optimize the experience of people at the park. Maybe like, tweak walking paths, or move this concession stand to that location, or whatever. And it feels like if they did that, we wouldn't be that skeeved out by it, right? Because you're walking into their property, and the cameras are all around. And so I guess, like, one concern might be do you have notice? So maybe they post a sign that says we're going to be doing this, but do they even need to post the sign, or is that just kind of like what they can do, because it's their property?

W Will Aronin 47:25

I am so glad you asked that, because this case sent me in a rabbit hole, and it's funny you bring up an amusement park. This was not planned. I just want to point that out. So one of the things that this brought up, is a few weeks ago, you heard that Disney filed a motion to compel arbitration in a wrongful death case. Someone died, I don't know all the details of the case, someone apparently died from an allergy in a restaurant in a Disney amusement park, and Disney filed a motion to compel arbitration because that person who had passed away had signed up for a Disney+ temporary subscription or subscription, and there is a arbitration clause in there. And it was like, well this is with Disney. I pulled the motion yesterday. I went

into a real rabbit hole on this whole case. And so, the motion, I read it and it wasn't frivolous. It's not crazy. It was filed by one of the biggest law firms in the world, and they point out that the arbitration clause says it applies to all disputes between that person and Disney and its affiliates. You have signed up, you have agreed that all disputes going forward are subject to arbitration. It's kind of what the agreement they signed says. That's the shrink wrap license. Nobody reads these things. Everyone just click I agree. The worst lie, the number one lie ever told: I agree. Yeah. So Disney, or the lawyer, whoever it is, actually withdrew that motion to compel, but it wasn't because it was crazy, or the court, like, shot them down and sanctioned them for it. They withdrew because the media went nuts and said, like, how dare you do this? But like, if you follow some of these decisions from the early days of the internet, like those 3000 phone books, into "I agree" means you've actually consented to absolutely anything a tech company wants to do, because you haven't read the 9000 page Terms of Service. Like it may mean that you have agreed to arbitrate a wrongful death claim because you signed up for Disney+ for free for half a month. So yeah, there's some lines there, and they're blurry, and I don't exactly know where to draw them between like it is a private company's private property, and maybe they have signs saying, Hey, you're on camera, and we're using it to make sure that the concession spaces are really great. But sometimes it's like, you have absolutely no idea what you're agreeing to.

A Anthony Sanders 49:54

And I think this points out something that we, lawyers who went to law school, often talk about in our first year contracts class, and that, for non lawyer listeners, maybe has never crossed their mind before. And that's the whole question of, do you just look what's in the contract, including a shrink wrap contract? Or do you look at what's expected, and what if the two deviate? Because obviously, here, you know, I have not gone to the Papa John's website in a while. I have ordered pizza from it, and the last time I was there, I have to say I did not pay too much attention to any terms of service. But it may be that you have to click a box, "I agree to everything," and if you really scroll down, it will say something about surveillance. I have no idea, but it may not, and whether you have a 20 page contract no one reads or not, should that make a difference on whether you're contracting to have all that surveillance that we were talking about earlier. That's kind of a question of contract, and perhaps tort law that is not going to be answered by the terms of a contract, but I could see how reasonable people disagreeing with that, and I think what you were asking about earlier Will is, are you being kicked out of the libertarian club for thinking that this is terrible, what Papa John's is doing, and I don't think you're being kicked out at all. I think that when you're talking about contractual freedom and, you know, expectations of people and their privacy, there's not a hard line here. This is a gray area, and we're still working, and it depends on the technology, which is why maybe a little discovery in this case could have fleshed this out and would have been worthwhile.

W Will Aronin 51:49

And that's why this case really grinds my gears, because I don't know why, but at least once a year, I think about the shrink wrap license case, ever since law school, and I pulled it yesterday, and it's from 1998 it's about a CD with phone books, and it is still being cited by courts today. June 2024, May 2024—it's having impacts. And look, I want to be careful not to be sued for defamation, though I'm a New Yorker and I'm going to call out Papa John's quality of pizza.

That's my opinion, that's not defamation. But, like, I'm not going to call this company's software spyware, but there is a version of it that could be. There is a version of this that could definitely push into just straight up malware. And like, what we've said is there's effectively no easy way to sue about it, or, more importantly, that a state like Pennsylvania can't create laws that protect its citizens, its residents, from what could potentially be interpreted as malware and spyware, because it's only in Delaware or Georgia or whatever state. And these types of decisions could have serious impact for the internet for five years, 10 years, 20 years, just like the shrink wrap license is used today to mean that, like, I have to arbitrate a wrongful death case because I watched, like—which Disney+ show do I want to shout out? I don't know. I like the Star Wars Show, so because I watch them, and I have Disney+ because I am a nerd and like—

A Anthony Sanders 53:19

You can never go to a theme park now, unless you want to arbitrate.

W Will Aronin 53:26

Now I have an excuse not to take the kids, I guess.

J Josh Windham 53:28

Before we before we wrap up, I do have a pop quiz for you guys. So assuming you didn't read the court's footnote about the percentage of Americans that eat pizza.

A Anthony Sanders 53:39

Oh yeah. Of course.

W Will Aronin 53:40

I totally did.

J Josh Windham 53:42

Okay, so maybe you know it, but listeners, listeners then, ask yourself this question, and then I will give you the answer: what percentage of Americans on a given day consume pizza? Two second pause. The answer, according to the court in a footnote, is 13%.

A Anthony Sanders 54:00

That's impressive.

J Josh Windham 54:02

Get engaged. [Laughter].

A Anthony Sanders 54:07

I guess, I don't have to end. Well, for those of you aren't currently eating pizza, which probably is less than 13% but I don't know. I don't know what you guys do. This has been a great conversation. Thank you both for coming on, our two musketeers. We will have more shows for you coming up, some more live shows in the pipeline, including a Supreme Court Preview from the hills of North Carolina, in fact. But in the meantime, be sure to follow Short Circuit on YouTube, Apple Podcast, Spotify, and all other podcast platforms, and remember, to get engaged.