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SPEAKERS

Anthony Sanders, Diana Simpson, Tate Cooper



Anthony Sanders 00:10

Suing a probation officer, plus religious liberty, this week here on Short Circuit, your podcast on the federal courts of appeals. I'm your host, Anthony Sanders, Director of the Center for Judicial Engagement at the Institute for Justice. We are recording this on Tuesday, May 26, 2026 and I am very pleased to have two of my Institute for Justice colleagues to bring you some cases from the Fifth Circuit and the Fourth Circuit. Now they are two very different kinds of cases, which will give a great first chapter and second chapter to the show. The first case has some pretty awful facts and a good outcome, and a lot of mess along the way. So I hope you enjoy that. It's about the FTCA, which we have discussed here on the show a few times, the way that you sue the federal government and actually get money for your injuries. Then later we're going to discuss a religious liberty case, which is about kind of a remnant from a past age of the Supreme Court's jurisprudence, and whether it is still good law, whether it is zombie precedent or not, you might say. And so we'll close out the show with that. Now we're going to be hearing about that case in the Fourth Circuit from my colleague Tate Cooper. Now this case, as you'll hear, involves a woman who's in college, and she wants to go into music, but then she also wants to go into being a preacher, going into religious study, and so I was going to ask Tate if he has some kind of connection, in a very small way to this case, because I don't think he's trained to be a preacher, but in addition to some other training along the way, of course, he's got legal training, but he also had some math training, which we've talked about on the show before, and he was also a music minor, so Tate, you were telling me before the show you were definitely not like this woman in the chorus, but you're not a singer, but you were a music minor, so tell us a little bit about your journey there.

T Tate Cooper 02:27

Yeah, thankfully for everyone at my college, I did not sing, but I did minor in music, so I had played saxophone through high school, did all state band my senior year, and really enjoyed it, and wanted to keep pursuing it, and so thankfully the school where I went, William Jewell College, has a great music program, and so I was able to keep playing in the symphonic band and the jazz band, and also get a music minor, which was a great way to learn more about music history, especially music theory. There was one class that did require a little bit of singing, which was my lowest grade in college.

A Anthony Sanders 03:04

Oh man.

T Tate Cooper 03:05

But it was a great experience, and something I'm very glad that I did.

A Anthony Sanders 03:08

Was that required for the minor, then? Like, you had to do one choral class or something?

T Tate Cooper 03:12

Yeah, so technically it wasn't a choral class, was called ear training, and so you had to learn to hear intervals and then also sing them, and it made me a much better saxophone player, so there's a good reason to take the course, but the singing wasn't the—

A Anthony Sanders 03:27

Holistic approach, perhaps to music. Well, Diana Simpson is also here in the show, she's going to be discussing a case in a moment, but do you have an instrument that you've played in the past? Ragtime band you're part of?

D

Diana Simpson 03:43

Growing up, I did piano, like a lot of folks, and then I picked up the flute, and I played that for many, many years. I still have mine, but I haven't played it in a while, but I played it through middle school and high school, and then I did not play it in college. I spent my time studying and riding horses instead, so I traded one noise-making instrument for another. I suppose.

A

Anthony Sanders 04:06

Have you ever played a flute while riding a horse?

D

Diana Simpson 04:08

I can't say that I have, but if I did, perhaps I should. If I could, perhaps I should. And then go back and do some kind of 18th-century recreation of the Revolutionary War.

A

Anthony Sanders 04:20

I think we'll put a pin in that some other time, but speaking of the Revolutionary War and our rights and liberties, we're going to now go to this case in the Fifth Circuit, which unfortunately I think has no horses, but does have some pretty awful facts. So tell us, this is a pretty sad story, but it's also, I suppose, a hopeful story, at least in trying to fight for recompense when the government has done you wrong. But, man, I got confused along the way, and hopefully you can kind of unconfuse me and our listeners.

D

Diana Simpson 04:59

I will do my best, but I will start by saying that the FTCA is inherently confusing, and I think that's why it exists, and I think that's why Congress created it, and why the courts have interpreted it the way they have. It's just this very confusing law with a bunch of exceptions, and an exception to an exception to an exception, and it ends up requiring a lot of thought, but it does end with accountability. So, I'm putting the big stuff up front. I suppose it ends well, but you'll have to bear with me through a few bad facts to begin with. And so, Rondell Malveaux is a gentleman who—not a gentleman, a man who was serving consecutive state and federal sentences for illegal possession of guns and drugs and assaults on a public servant, he gets out of prison and gets sent to a residential reentry facility, I guess it's a halfway house, and he had to live there for three years, so he lived there for a while, and then decided he was over it, and just—

A

Anthony Sanders 05:45

He was almost done with the time he had to be there, he just took off.

D

Diana Simpson 06:01

Yeah, he was. It was August of 2019. He decided he was out, and he only had to stay through basically Thanksgiving of 2019. And so, if he'd stayed for just a couple more months, he would have been done with that part, or really that his sentence, right? Because he was released in 2016, three years' supervision, almost out, but then not so. When he decided to leave, he called his ex-girlfriend, Brittany Morris, and said, "Come pick me up," and she said no. And so she instead told his probation officer, explaining that he was a threat to her and her kids. And so the probation officer, a woman by the name of Beverly Matt, told Morris, the ex-girlfriend, that a warrant would issue for Malveaux's arrest. So the next day, the probation officer petitioned for a warrant for nine different violations, but didn't refer to the threat that Malvo posed to Morris or state that the petition was urgent at all. Two days later, Malveaux burgles Morris's home, his ex-girlfriend. He confronts her, she's there, about not having picked him up, and he attacked her friend, who was also there at the same time. He then leaves before police arrive. Well, under the adage that criminals are not always particularly smart, one of the things he burgled from her house was her cell phone, which, as an iPhone, had this find my phone feature, and so Brittany Morris was able to track him down.

A

Anthony Sanders 07:26

Why would you steal someone's phone? You can't even use it. It's their phone.

D

Diana Simpson 07:30

I think we're at the place where he's not very smart, Anthony, right? An

T

Tate Cooper 07:35

And high on PCP.

D

Diana Simpson 07:37

That too, which probably doesn't lend to one's logic abilities anyway, and so she calls the police. She tells the probation officer. The probation officer, Matt, assures that an arrest warrant is going to issue immediately, and that she would make sure that Morris was not in danger, and that she would ensure that Morris had a safe place to stay. Instead, over the next two days, Matt didn't do anything. Matt's the probation officer. She didn't tell the court, she didn't tell the US Attorney's Office of these new developments or notify local law enforcement. She just didn't do it. Unfortunately, then Malveaux breaks into Morris's home and attacks her, stabs her repeatedly and renders her a quadriplegic, which it sounds like she still is today. So then she sues. She sues under the FTCA against the federal government, based on the probation officer's conduct, asserting negligence and a negligent undertaking against the federal government.

A

Anthony Sanders 08:39

She sued, just to be clear, she sues the federal government itself, but for the act, because of the actions of this officer.

D

Diana Simpson 08:46

Yes, and so the federal government can kind of step in and represent Beverly Matt in kind of this employer responsibility arrangement. And anyway, and so you could just like you can sue an employer, you can sue an employer for having employees who are out violating the law. You can also sue the federal government under the FTCA in this particular way. The district court dismissed the case and said that the FTCA exceptions prohibited the case from going forward, and so we're up to the Fifth Circuit on a granted motion to dismiss, and so recall that the FTCA, it waives sovereign immunity, it lets people sue the federal government for certain torts committed by federal employees who are acting within the scope of their employment, and it is subject to a host of exceptions. I'm not going to go through all of them today, because there are too many of them, but there are two at issue in this case, and one is the misrepresentation exception, and one is the discretionary function exception, and the discretionary function exception - we've talked about a lot, both within IJ and on Short Circuit.

A

Anthony Sanders 09:55

It came up, I should add, in our Martin case at the Supreme Court a couple years ago, that if people want a refresher, we'll put a link in the show notes to the Bound by Oath episode that discussed it.

D

Diana Simpson 10:07

Perfect. And so, the misrepresentation exception was new to me. I was not terribly familiar with it. And so, basically, what it says is that the FTCA doesn't apply to any claim arising out of misrepresentation or deceit, so this is both intentional and negligent—affirmative acts and omissions of material fact. So basically, if a federal employee is lying in the scope of their employment, you can't sue the federal government for that, and so you have this two-step analysis in the case law. The first is whether the chain of causation from the alleged negligence to the injury depends upon misrepresentation by the government agent. The misrepresentation has to be the gravamen of the action. If yes, then you go to step two, whether sovereign immunity has been waived independently of the FTCA. Okay, so then we get to the application of this. So, Brittany Morris, the victim, contends that this exception is not available to the US government, i.e. without this exception, that her claim can go forward, and she can make the government accountable for what has happened to her, and so she says that the focal point of her claims is this probation officer's failure to act with reasonable care. It's not about what Beverly Matt said, it's not about kind of the comments she made, but it's about Beverly Matt's failure to kind of handle the situation appropriately, so not that she lied, just that she was bad at her job, and so this is a very important distinction, both in the case law and in her ability to continue the case, and so the government comes back and says, well, actually, this is really just about misrepresentation, you're just trying to argue your way around the exception, to which I say, yes, that's how lawyering works, right, is that you try to get your way around the thing that is bad for you in the case law, and so the Fifth Circuit kind of drills down on this particular exception and says there's a lot of overlap between the negligence and the misrepresentation. It's okay, like you can still have a claim even when that's true, and the case law really differentiates between being bad at your job and miscommunication, and so an example they give in the case law is mishandling a mortgage payment that leads to an erroneous foreclosure, that's bad, and that has nothing to do with what you said, that's like the actual failure of your duty to kind of handle the payment for your house, right, so that's about you being bad at your job, not about you saying something—

A

Anthony Sanders 12:43

Even if you said, as part of it, that you, you mailed the check, even if you didn't, right?

D

Diana Simpson 12:48

Yeah, so the next example is telling someone that a life insurance policy had not previously been assigned, even though it had been, so that's really just about what the person was telling you, not about the underlying activity, so really, that's clear as mud, right? It's whether you're bad at your job, whether you're talking about being bad at your job, there's a lot of overlap, perhaps not a lot of sunlight there, and that's kind of the way the FTCA seems to me to be keeping in mind, I haven't personally litigated an FTCA claim, but that's my assumption of them, and so really, where the Fifth Circuit kind of broke out on this was that the problem here was that Beverly Matt, a probation officer, she broke her promise to obtain a warrant quickly, she was obligated to supervise Rondell Malveaux, the bad guy, and that to do that with due care, and to pursue a warrant expeditiously. This was true regardless of what the probation officer said or didn't say. And so the quote that I thought was really relevant here was, Officer Matt's misrepresentation punctuates the injury, the injury does not spring from it. So she didn't do her job, which was to supervise Malveaux, and so even though she told Brittany Morris what she was going to do, and then that wasn't actually the case, that wasn't what actually happened, it was that she didn't properly supervise Malveaux, so then the court moves on to the discretionary exception and says, and so this is the one where basically a policy-based judgment call exempts the federal government from having to pay the piper, so anytime there is a policy-based judgment call, anytime you have kind of this level of discretion that the government can exercise you're out of luck as a plaintiff. What is a policy decision? I don't know. The case law is very varied, right? It's really on this case-by-case approach, and so if there is a regulation conferring discretion, that probably means that it's going to end up being within the discretionary function exception, you can overcome that presumption, but here there was this federal policy manual for probation officers, and this is what the feds pointed to here, saying, oh well, she has this policy manual about what she's supposed to do with her probationers—the people she's supervising, and so look, it's just all about policy considerations, and the Fifth Circuit rejects this, and the court says, look, yes, there are policy considerations about whether to seek a warrant immediately and how to do that. That's fine, but that's not what she's challenging. What she's challenging, what the victim, Brittany Morris, is challenging is this negligent performance after the probation officer had made the decision to secure the warrant, and so really you're talking about not the first step of whether you should go get a warrant, that's discretionary, that's fine. They can skip that. It's the second step where she doesn't do her job right, that subjects the feds to suit—

A

Anthony Sanders 16:12

Right? She chose the policy, there's no dispute about that; it's just actually doing the policy after that.

D

Diana Simpson 16:20

Exactly, and so I think, for me, as a litigant, as a litigator, the upshot of all of this is that the FTCA can do whatever you want it to do, which isn't like a really great way to operate and to handle people's rights, right, because one of the interesting things about this case to me, that the Fifth Circuit doesn't even talk about is the fact that Brittany Morris does not have a constitutional claim against Beverly Matt. This is probably why she sued under the FTCA, because there's 30-year-old case law at this point saying that the federal government has no constitutional obligation to do anything for any of us, they don't have to help any of us at all. It's from this series of cases, DeShaney and Gonzales, like there's a series of cases with really terrible facts where awful things happen to people, and the government has no obligation to help you, and so these are the victims or their families sued afterward. There's one out of Castle Rock, Colorado, which is not far from where I grew up, that really lands on this and says, look, what happened was sad, but the police had no obligation to save you from these people, so that's your problem, no constitutional problem here, and so what people are left with is you can't bring a constitutional lawsuit in these circumstances. You certainly can't bring a 1983 claim. The way the case law currently exists, a 1983 claim is likely to not be successful.

A

Anthony Sanders 17:54

If this person was—well, not a federal official, but if this person was a state official, that it probably wouldn't work either, right? For a similar reason, right?

D

Diana Simpson 18:02

Right, so under the, there's no constitutional claim under DeShaney, and if she was a federal probation officer, and so then that at least under 1983 that erects another problem under Bivens, because last I checked, Brittany Morris is not the same as Webster Bivens, so she can't succeed there, probably, but in any event, it's you don't have a constitutional claim, so that leaves you in the FTCA land, and the FTCA land is basically, I know it when I see it, and that seems to be the standard that applies. Oh, it's a case-by-case approach, when they use that language, that to me says anything goes, it's whatever the luck of your draw is with who's deciding your case.

A

Anthony Sanders 18:46

Tate, do you have anything more clear for us? Do you have the answer?

T**Tate Cooper** 18:51

No, certainly not. But I have some more things that I think point to the lack of clarity, the discussion of the discretionary function exception, especially the precedents, I thought was really interesting, because the court sort of walked through several cases. Some came out, the exception applies, it was a discretionary function, some didn't, and the facts didn't seem clearly differentiable to me. So, for example, the decision to provide emergency housing units to hurricane victims, that's a policy judgment, and it's a discretionary function where you can't bring an FTCA claim. The decision to not attach stairs to those units is not a policy judgment, so the exception doesn't apply. The Forest Service's decision of how to post trail closures, that was a policy decision. The exception applied, but the National Park Service failing to properly sign road dangers on its road was not a policy judgment, so the exception didn't apply. So, Forest Service trail closure, it does apply. National Park Service road warning, it doesn't, but it did apply to a claim that the National Park Service didn't properly maintain the road. So if you can figure out what the through line is through all of those, you're smarter than me, I think.

A**Anthony Sanders** 20:06

I have absolutely no idea what the through line, what those might be. There isn't, there really isn't.

D**Diana Simpson** 20:12

No, it's frustrating because you want some kind of discerning principle to guide you as you're debating whether to take these kinds of cases, how to litigate them, how to best represent your client, who by all accounts was horribly injured because of someone's intentional activity and someone's negligent activity, allegedly. And so she's not left holding the bag because she was able to draw a panel that said, "Okay, there's no discretion here, This is not a discretionary decision, so have at it. You can seek relief against the federal government for Beverly Matt's failure as a probation officer.

A**Anthony Sanders** 20:56

Digesting this case, Diana, and you, like me, being lawyers who kind of stand outside from the nitty-gritty, like some of our clients who are doing a few of these cases. Do you get the sense the blame here is primarily the case law and maybe what the Supreme Court's done, or primarily just the language of the act and what Congress mangled together in passing the act?

D

Diana Simpson 21:21

I don't know. I hesitate to cast aspersions on Congress when they do stuff, because it doesn't happen very often. But I don't think they did a great job to start with, and I think the federal court's inclination to narrow the ability of people to seek relief from the government when their rights have been violated, is just this ever-present problem that guides a lot of the decisions, and so there's perhaps a less than ideally clear law, and then the courts interpreting it and saying we're going to kick you out, we're going to rule for the government here, we're going to, we're going to always keep ruling for the big guy, not the little guy, and that's unfortunate for you, but not always, because, as I said, Brittany Morris is able to kind of go on to the next phase of her case, get some discovery and go for one thing.

A

Anthony Sanders 22:15

I will say about the opinion that I don't think this opinion really broke new ground, but it was new to me, is that when you have a, so you have this exception misrepresentation, and then you have the negligence that the woman is saying no, this case is actually about, and the court admits they overlap a lot, but just because you have aspects of the exception doesn't mean that you get your actual claim thrown out, like you described earlier, Diana, that is refreshing to see that, if you mix the two together, it doesn't all fall apart, because there's so many areas in civil rights law where if you do get into, say, the gray zone, the bad zone, then that just taints everything, such as, we've had cases about whether someone is a federal officer or a state officer, and often they're mixed together because they're deputized, and courts are increasingly taking the view that, like, well, if you're a federal officer at all, then there's no cause of action unless it's against them as a federal officer, because it just preempts everything, basically. And that there wasn't that impetus here, and that was pretty cool. I thought it was.

D

Diana Simpson 23:35

It was. It's like the tie goes to the runner, with the runner being the government every time, which is ironic, because the government is the opposite of a runner, and here, whether it was close or not, look, the court spent 27 single-spaced pages walking through the facts and the law and the case law, and how varied everything is, and the upshot to me is just a triple coin flip.

A

Anthony Sanders 24:00

Well, I will say, given all that history in case law and the facts, kudos to the clerks who put this opinion together. One thing I was thinking as I was reading it is I would never want to have to be someone drafting this thing. So, whoever you are, good job, good job. And we're going to go to another opinion, where, of course, the clerk spent a good deal of time, and the judges too, I should add, on these opinions, but this one seemed like it was a little more straightforward, so this is the one we were alluding to earlier, about a woman who had wanted to go into the music field, but also wanted to go into the preaching field, and yet there is, there was a case from when I was in law school, I remember when it came out that says if you're going into the preaching field, there are special rules that apply to getting aid for your education, so Tate, tell us this woman's story.

T

Tate Cooper 25:03

This woman is Bethany Hall. She's an undergraduate student at Liberty University here in Virginia, and Virginia has a program, the Virginia V-Tech program, Tuition Assistance Grant Program. And so, essentially, if you stay in state and meet certain criteria—you attend a private accredited nonprofit school, you get \$5,000 per year toward your tuition. And so she enrolled originally to study choral studies, and so that qualified for the grant. She received \$5,000. The program also has a requirement, though, that it not be spent on certain religious things, so the exact language is not to provide religious training or theological education. And after a semester, I believe Ms. Hall decided to change her major, first into youth ministries, and then into music and worship, and both of those are classified as professional practice for a theological vocation, so essentially theological training that the Virginia Tuition Assistance Program won't pay toward, and so she doesn't receive the money after she changes her major, and she sues. The lawsuit is very simple, it's one claim, and it says that this part of the program in Virginia violates the Free Exercise Clause, so pretty simple facts. At this point, we're just at a motion to dismiss. The government for Virginia comes in, moves to dismiss, and says this has already happened: this case is *Locke v. Davy*, which is a 2004 opinion, and under that case you lose, and Ms. Hall, through her attorneys, admits that yes, my case is factually indistinguishable from *Locke*. She says, though, that the law has changed, and that in recognition of how the law has changed, I actually now win. So, it's worth talking a little bit about what *Locke* held, and so that was a case out of Washington State in 2004. They had a similar program that provided tuition assistance to people staying in state to attend college or university. It couldn't go toward theological vocational training, and so in that case, the plaintiff was training to become a minister. Washington said he didn't qualify for the scholarship, and he sued. The Supreme Court in an opinion written by Chief Justice Rehnquist, seven to two, said that there was no free exercise violation. The Court looked at it and said, well, yes, it doesn't allow funding for religious training, but it goes a long way toward accommodating religious exercise. You can go to a religious school, you can take theological classes, you just can't study to become a preacher. I—

A

Anthony Sanders 27:44

I think you could even, like, major in theology if it was religious studies, if it was just, kind of a more theoretical level. It's just being an actual preacher is what you couldn't have your major in, or something.

T

Tate Cooper 27:56

Right? So, it was a much—it was a very narrow scope, although the Virginia law is a little bit more narrow, because if you have a dual major, it will cover part of it, which, yeah, and *Locke v. Davy*, he was a dual major, and that disqualified him entirely, and the court says, well, this isn't discriminating based on religious status, it's based on the specific use, there's some play in the joints between the Establishment Clause and the Free Exercise Clause, and there's this substantial historic tradition of states not wanting to fund the training of clergy, so it's all right. And then about 12 years pass, and then we get this trio of cases, two of which are *IJ* cases. The first one isn't an *IJ* case, that's *Trinity Lutheran*, which is a church in my hometown of Columbia, Missouri, that had applied for a scrap tire program, where the state would give recycled tires to resurface playgrounds, and everyone could apply for that program, except for any religious institutions, and the court said that that violated the Free Exercise Clause because it discriminated based on religious status, it was a generally available benefit, and the only way that you could get it, if you were a religious institution, was basically to give up your-

A

Anthony Sanders 29:10

Have you ever been past that church? By the way, I'm just curious. Do you know where it is?

T

Tate Cooper 29:14

Yeah, no, I know exactly where it is. I drive by it a lot. I have a couple friends that worship there.

D

Diana Simpson 29:20

Do they take their kids to the playground?

T

Tate Cooper 29:23

So the funny thing, I actually now I'm curious, what happened to the playground.

A Anthony Sanders 29:27
We're gonna get to the bottom of this eventually.

T Tate Cooper 29:30
Yeah, next time I'm home, we'll do field reporting.

D Diana Simpson 29:33
So you'll go on the swings, you'll fall, you'll see what happens, and then if it hurts too bad, because the line in that case—

A Anthony Sanders 29:40
Is it's more than a few scraped knees, the practical effect is a few scraped knees. So, I want to know what the kids are doing these days.

D Diana Simpson 29:49
You'll have to take your friends with you, so that you can see if there are more than a few, because you don't presumably have more than two possible scraped knees.

T

Tate Cooper 29:56

Yeah, no, that's good. We've got to get the right quantitative data. Reporting back, yes, we'll follow up. So that's the first of these cases, and then come two IJ cases, which are school choice cases. So the first is Espinoza, which comes out of Montana. Montana allowed money to be spent by families at private schools, but not religious ones, and the court said basically we just went over this in Trinity Lutheran. The same principle applies. Carson was very similar. It was a program in Maine where school districts that didn't have their own high schools, would pay to send students to other high schools, including private ones, but Maine said no religious institutions, and the court said, applying the basic rules of Trinity Lutheran and Espinoza, this is unconstitutional in all three cases. The court was careful to distinguish Locke, so it said, "Well, Locke was different, right? It didn't discriminate based on religious status. It was just this very particular use. Locke was narrow, it was a mild infringement on religious liberty, which is an odd phrase to say, and so that was different than these programs that were almost entirely cut out based on religious status, and then they said the funding of clergy is such a unique, specific historical thing that it doesn't apply in these other cases, and so that brings us to this current case with Bethany Hall, before the Fourth Circuit. Her argument is that, well, whatever Locke once said, and our facts are the same, these three cases completely undermined it, and so now it's clear under the rationale of these cases that not allowing this tuition assistance program to be spent on religious training, religious courses violates the Free Exercise Clause.

A

Anthony Sanders 31:48

Zombie precedent, as they say.

T

Tate Cooper 31:50

Yes. And Lemon comes up quite a bit. The opinion is interesting because it's really not a religious liberty case as much as a vertical stare decisis case, and the whole question is, how much of Locke is left? She says, not very much. The Fourth Circuit panel disagrees, and so the majority opinion says, well, whatever you may think of where the Supreme Court is going, it hasn't overruled Locke. Those three cases were all very careful to distinguish Locke, to say why it's different, so it remains good law, and we're bound by it. Judge Richardson has a very interesting concurrence, in which the very first line is that Locke is wrong, and the Supreme Court should overrule it. We also have a fun new formulation of zombie precedent, so we had the line about the Lemon test from Justice Scalia that it was a ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad. What Judge Richardson added was that Locke is a moth-eaten shell of its former self, so it's nice to have options to describe zombie precedent.

A

Anthony Sanders 32:54

So moth-eaten precedent, that's a little stronger, maybe, than zombie precedent.

D

Diana Simpson 32:59

Don't know. Well, zombies suggest that something's still—it's dead, but it's alive. Maybe moth-eaten sounds like it could just not be moving at all.

T

Tate Cooper 33:07

Neither one's good.

A

Anthony Sanders 33:10

Neither one's good, but they're not. It's not like it's overruled in either case, I guess, is the point.

T

Tate Cooper 33:17

So, that was the question: is it overruled or not? And the oral argument is actually really interesting to listen to, because a lot of it is Judge Richardson sort of going through his own personal difficulties of this question with the Supreme Court, because he had a case last year—I believe it was two years ago, where he wrote a concurrence saying essentially, I think I'm bound by precedent, but the Supreme Court should provide clarity on this, and the court issued an opinion last year. The case was called Medina, and basically said, no, you should have read the writing on the wall to the lower court judges. And, of course, this happened with the Lemon test in Kennedy, where they said, we've long since abandoned Lemon. Some of this came up with Chevron, too, in the oral argument of Loper Bright, where they said, well, we haven't applied Chevron in almost a decade—

A

Anthony Sanders 34:03

Right. Yeah, lower courts, it's a precedent—

T

Tate Cooper 34:07

And so Judge Richardson is asking, how far can I go? Can I do this? What if they haven't officially overruled it? What's my power? And so it's sort of this debate between these two lines of cases, half of them where the Supreme Court says lower courts, you don't have any power, you have to follow our holdings and leave the overturning to us. And then another half where the Supreme Court seems to be saying, look, we made it clear we were going to overrule this. How didn't you see where we were heading? And so there's sort of not a good way to reconcile it. So the oral argument is very interesting, listening to the judges try and work through this, especially Judge Richardson, Judge Agee, a couple times, says, I think this will go to the Supreme Court. At the end, he even says, I expect there will be more briefing in this case. He says he may have a good argument there. So, the bottom line is that the panel says it hasn't been abrogated or overruled. Our hands are still bound by Locke, as you admit, this is on all fours, and so until the court overrules it, no matter how wrong we may think it is, we have to apply it, and the plaintiff loses.

D

Diana Simpson 35:12

It's so frustrating to me when courts do that, because the Supreme Court takes fewer and fewer cases each year, right? And we're now, I think, they're taking 60 a year, if that, and it's shockingly few. It's vanishingly few, and there are all kinds of good petitions that come to them, and they just. the Supreme Court says, for whatever reason, no, not this year.

A

Anthony Sanders 35:35

You haven't written any of those petitions, have you?

D

Diana Simpson 35:38

I have written some really good ones, Anthony.

A

Anthony Sanders 35:40

Maybe they should take a look.

D

Diana Simpson 35:41

And yet I don't have my quill yet. Maybe next year we'll see, although that requires, well, we'll see. I guess I don't want to lose at the appellate court, so perhaps I'll just get victories, and then the government's petitions will be denied too, and then I will happily not have a quill, but in any event, it's frustrating, because, like, the Supreme Court does kind of lay these stepping stones where it makes clear where it's going, and it's not there yet. And so, are you just a victim of having brought it too soon before the court was willing to do it? And if the Supreme Court's not going to be taking these cases, you want the appellate courts to read that writing to take those stepping stones and say, okay, well, that's where we are, then here you go, you can win, and yet that's just not happening, and so lots of people are having their rights violated by government, which is obviously not going to be volunteering to recognize that their rights exist broader than it thinks, and the appellate courts aren't fixing it, so that leaves it to the Supreme Court. But the Supreme Court takes so few of them. What do you do in the interim? Yeah.

A

Anthony Sanders 36:50

It's a tough nut to crack. I'll say that Locke itself was a really interesting case too, and I think this has something to do with how the courts are reading it, right, because it was, as Tate said, it was seven to two. Chief Justice Rehnquist wrote it, and it's one of these cases where a chief justice writes an opinion, and you're pretty sure they don't agree with it, because I'm pretty sure Justice Rehnquist would have rather sided with Justice Scalia and the dissent in that case, but because he was the chief, right, he got to assign it to himself and then write it. He did this a few times when he was the Chief, whereas if he had been on the dissent, then it would have been, Justice Stevens or Justice Kennedy, or whoever would have probably, in a case like this, you'd imagine Justice Kennedy, and then it would have been different; it would have been worse in his eyes than this very narrow kind of just money going to someone actually studying to be a minister, right, kind of holding that Locke has, and so in that way it's kind of a little bit unserious, and so that I think the Supreme Court has not grappled with it as much as it would otherwise in these recent trilogy of cases you're describing, Tate, but at the same time it's also really narrow, and you almost start wondering, like, would the Supreme Court bother, despite what the Fourth Circuit judges say, would they bother with this case? Because it's really just about people like this, someone trying to be a preacher. maybe they will, I don't know, and it's a stain on the precedent, but it's pretty narrow, and otherwise it really has no force.

D

Diana Simpson 38:38

Well, and I wonder if there's an active circuit split, like I assume there are not other appellate courts dealing with this right now. So, is a circuit split going to be ripe and ready to go, or are you just saying this decision conflicts with the Supreme Court's decisions, which is not a great way to get cert granted?

T Tate Cooper 38:55

Yeah, nothing in the opinions or oral arguments mentioned a circuit split, so as far as I can tell, this is, kind of the leading edge of trying to move the needle on that issue. It's interesting what you said, Anthony, about the way that it's narrow, because obviously the Supreme Court didn't have a hard time distinguishing it in the following cases. It's also an odd opinion, just in a few other ways, which is there's clearly an establishment clause motivation to Locke, but it's not an establishment clause case. It never actually applies a particular standard of review, so it doesn't say we're doing rational basis, intermediate scrutiny, or strict scrutiny. It just sort of lists all these things and says it's okay, which is a bit of an odd mode, and Justice Scalia called that out in his dissent, so it's an odd opinion, but I do think there's something to your point that it's so narrow, is there enough to convince the court to really take it, and that I have an easier time predicting what I think the court would do if it did take it—

A Anthony Sanders 39:58

Yeah

T Tate Cooper 39:59

- than whether it would want to, in the first place.

D Diana Simpson 40:01

here's an interesting theory. I think Richard Re was the last one, or was the one who kind of pitched it, is that the Roberts Court is the doctrine of one last chance, and so that it takes a lot to get from A to B, where B is the overruling of the previous precedent, that the court in the first one they take up, they never overrule it. They say, okay, well, this has some issues, but, like, basically gives the parties a chance to work it out, even when the party is, a government entity. Did it with the Voting Rights Act, did it with a bunch of these cases, and then, as the cases continue to come, the warnings increase until finally the court says, "Okay, now we're going to overrule that and declare it unconstitutional, or declare it illegal, however the issue is challenged. And so then now we're going to overrule it. It took almost, what, 13 or 14 years to overrule the Voting Rights Act from the start, like during Shelby County—

A Anthony Sanders 41:00

And the Shelby County case kind of started it.

D

Diana Simpson 41:01

Yeah. And then there was one before that too. I never remember the acronym, but it was—

A

Anthony Sanders 41:06

Yeah.

D

Diana Simpson 41:07

Northwest Austin, yeah. And so it took a long time to get there. And so, can you read that as the writing on the wall as an appellate court, and say, okay, well, it's coming, so we might as well just, quickly overrule it if you wanted, if you want to assure that the Supreme Court is going to take a case, have an appellate court declare federal law unconstitutional, they'll grant review real quick. Yeah.

A

Anthony Sanders 41:30

I wonder also, how many laws like this there are out there. Maybe they're fairly common, like the Washington state law in Locke, and then this one in Virginia. I know here in Minnesota, where I live, there are a couple really weird regulations, like you can't get child care if you go to a college that you have to do a statement of faith, which is—yeah, it's this tiny little program, but it's kind of driven by the whole Blaine Amendment in the background from, 40 years ago, the policy was put together, so there probably are a few things like that out there that I imagine folks like the litigators in this case will find and keep pushing, but I wonder if also sometimes these things just don't happen because there's not enough to litigate about, and I'm sure people are mad at me for saying that, who are listening to me. But anyway, Tate—

T

Tate Cooper 42:27

So I don't know. In this case, one of the things that kind of stood out was in Locke itself, and in Trinity Lutheran, a lot of the discussion was the state constitutional interest, because Missouri argued that it wasn't a Blaine amendment, but it functionally was, and Washington had something that was equivalent to a Blaine amendment, and the state partially argued, but we have a substantial interest in enforcing our own constitution and the values behind it, and that just isn't in the opinion here at all. So, I don't know the status of Virginia's constitution, and if it includes any provision like that, but it is interesting, sort of how the law has shifted, that that's not even something that was really argued about here, that might just be because the whole question was how much does Locke control, so why waste your time with other things?

A

Anthony Sanders 43:15

Well, that is one we're going to leave for a future Short Circuit, if any of these other cases pop up, but in the meantime, I'd like to thank both of you for discussing clear-as-mud case law from the Fifth Circuit, and then also this religious liberty issue from the Fourth. And thank you all for listening, and please be sure to follow Short Circuit on YouTube, Apple Podcasts, Spotify, and all other podcast platforms, and remember to get engaged.