Short Circuit 139

Anthony Sanders 00:06
Hello, and welcome to Short Circuit, our review of the Federal Courts of Appeals. I am Anthony Sanders, Director of the Center for Judicial Engagement at the Institute for Justice. With me here today are two special guests. One is Dan Alban of the Institute for Justice. The other is Clark Neily, he used to have my job, and now it's a better job as Vice President of Criminal Justice at the Cato Institute. Gentlemen, welcome the short circuit.

Dan Alban 00:32
Good to be here.

Clark Neily 00:33
Morning.

Anthony Sanders 00:34
We're going to start things off with Dan about a case and a couple opinions, both of which issued in just the last seven days from the state of Michigan and the Sixth Circuit. So Dan, take it away.

Dan Alban 00:47
Sure. So this is the League of Independent Fitness Facilities case out of the Western District of Michigan. It was heard there and an opinion issued and on June 19. And then the Sixth Circuit, did a rapid appeal of an emergency motion for stay, and decided that on that opinion, on June 24, and they came out in different directions. And for somewhat interesting reasons. The case is about whether gyms should be allowed to reopen in Michigan, despite Governor Whitmer's executive orders that closed gyms because of the COVID crisis. And the district court takes a look at this and says, "Well, we have to apply the rational basis test, it's extremely deferential to the government. If there's any conceivable fact that would allow the government to impose this restriction. We will allow that to go forward." But then the court actually takes a look at the facts being presented by the government and the reasoning being presented by the government and says, this doesn't make any sense that there's an equal protection problem here. There are a number of facilities that are being opened by the executive orders that are essentially the same as the gyms that are being closed. Things like rock climbing facilities, bowling alleys, dance halls, other areas where people congregate, maybe exercise breathe heavily, that are allowed to operate and gyms nonetheless, remain closed. And so applying the rational basis test, the district court finds that the governor's executive order does not have a rational basis, as applied to these indoor gyms that want to reopen. And the court points out, this is a pretty unusual, usually, when you're just applying rational basis review to regular commercial activity not activity that is received special protection under Supreme Court case law, things like the exercise of freedom of religion, for instance. Usually the government wins. But in this somewhat unique case, the district court says, Look, there's no reason that one set of facilities where people exercise indoors, should remain closed, and the other one should be permitted to open. Well, the Sixth Circuit takes this

on an emergency state review and finds exactly the opposite. It says all of the same sorts of things about the rational basis test and how deferential it is, and simply points out like, “Look, it doesn't matter if the if the governor offered any evidence or not about those specific dangers of gyms, one could imagine how a gym could be a place where COVID is transmitted because of people breathing heavily and exercising and in close proximity to each other. And that's enough.” But one of the interesting things about this opinion is it seems to make a rather critical mistake of law, which is it relies on the wrong executive order when finding that other similarly situated facilities where people are exercising indoors. It finds that they're still closed. But that is incorrect. There were actually a series of executive orders that were issued. And this is quite confusing, and I can see why the courts made these mistakes. On June 1st, the order that the gyms are primarily challenging. Governor Whitmer issued Executive Order 2020-110 but then a few days later on June 5th, Governor Whitmer issued Executive Order 2020-115 the 2020-110 order keeps gyms and fitness centers and all sorts of similar things closed and it also keeps close to a whole bunch of other facilities as the as the Sixth Circuit notes things like rock climbing facilities and dance halls. But the June 5th Executive Order 2020-115 actually opens arcades bowling alleys, climbing facilities, nightclubs, sports arenas and similar venues as long as they impose social distancing rules and as long as they have certain capacity limits. But that June 5th executive order does not do the same thing for gyms. And that is why there is sort of a discrimination on an equal protection basis between gyms and these other exercise facilities. So, I think the Sixth Circuit got it wrong here, applying rational basis review, because it relied on an incorrect set of facts and came to an incorrect conclusion of law about what was permitted under Michigan executive orders and what was not.

Anthony Sanders 05:29
Well, Dan. I mean, given of course, the rational basis test is quite capacious as both of the courts pointed out it, it's interesting to think about how the court might have ruled if it had accepted the laws is it seems that it actually is for similarly situated facilities. Do you see a different result there given what else they said in the opinion or is this is one of these things where it seems like the courts going to rule for the government, whatever happens because it is the rational basis test?

Dan Alban 06:03
Well, you can't count out the fact that judges love to defer to the government under the rational basis test and will bend over backwards to do so. So I'm not certain that they would have come out differently had they identified the correct executive order and the correct set of facts about what was permitted and not permitted under Michigan's executive orders. But I do think the reasoning applied by the court to find that the gyms are not being discriminated against, would support a ruling that this fails under rational basis review, because on page five of the opinion, they cite a CDC research paper about the problems with ventilated indoor facilities, and exercise going on in those facilities. And all of those same problems are, are applicable to things like bowling alleys, dance halls, rock climbing facilities, other indoor exercise areas, there's no distinction between them. And so even though rational basis review is extremely deferential, when there is a problem where one set of similarly situated folks are being treated differently, and there's no meaningful distinction between the two, as appears to be the case here. That's an instance where the courts should strike down what the government is doing.

Anthony Sanders 07:23

Well. One other thing I thought was really interesting in this case is that the district court seemed quite nonplussed about the actual hearing where the government and the in the plaintiffs' attorneys argued, you know, orally about this. Yeah, they had also filed briefs. But he just seems incensed that the government had no answer to his questions about, you know, what, why do you treat these facilities differently? And then, and then the Court of Appeals said, "Well, we understand the hearing went pretty bad. But if you dig into the brief, and then you dig into the materials, the briefs cited, there's some there's some good stuff in there." This seems a little I don't remember a rational basis opinion really doing this before? It's not surprising. But what did you make of that?

Dan Alban 08:11
Well, yeah, the district court opinion does focus on how poorly the oral argument seems to have gone. From the government side, the failure to present any rational basis at all to support treating gyms differently. But I think again, the difference in approaches is based on the sixth circuit's misunderstanding of what is allowed and what isn't allowed, under the then current set of executive orders. I can see how the government attorney would have had a difficult time making the argument that gyms are differently situated from these other facilities where indoor exercise occurs in close proximity, because all of the government's evidence that was submitted was just about facilities where there's indoor exercise in close proximity. And it's extremely difficult to differentiate between a traditional gym and a rock climbing gym, or a bowling alley or a dance hall where people are dancing in close proximity to each other. And I think it's not surprising that the government would have had a hard time defending that. And I think the Sixth Circuit panel here failed to understand that that distinction, and that this newer Executive Order was actually allowing those facilities to operate with the social distancing in place.

Anthony Sanders 09:31
Clark, I know you have some thoughts about the rational basis test. What do you think about them in the context of this case?

Clark Neily 09:39
Yeah, I mean, it's you can't talk about the rational basis test without pointing out that it's a fraud and a charade. And so asking whether a court got a decision right under rational basis review is a bit like asking whether, you know, Peter Pan would beat the Jolly Green Giant in a fight. They're both completely made up. You know, I suppose you could make up a story for how one could win. The other one could win. Now that being said, one thinks that there's probably some bottom to all of the ridiculousness when it comes to rational basis review. Let me give you an example. Imagine that the state of Michigan ordered that all, you know, Gold's gyms be closed, but Planet Fitness can still be open. It'll be an interesting question whether the government lawyer might go in front of the court and say, "Well, you know, at Planet Fitness people aren't allowed to groan and grunt when they pick up a wave. They discourage that, but at Gold's, you know, people are constantly yelling and shouting and groaning and that could expel more Coronavirus into the air in the form of you know, aerosolized saliva. So that's technically irrational distinction because people make different noises when they worked out in those two different places." I kind of think that probably should fail rational basis review, that kind of a distinction. But again, the whole test is a fraud and a charade. And so how can you really say whether a particular explanation meets a test that isn't really a test, but it's just a giant, traditional charade to

rubber stamp whatever the government does, I tend to agree with Dan. Just making a blatant mistake in terms of what actual government authority it is that you are reviewing seems problematic. And, you know, I think that this points in the direction of something we've been arguing all along, which is that there's no room in any system of government that claims to embrace the rule of law for such a fundamentally fraudulent standard of review. The rational basis test doesn't work. It's a bad faith test. And the real question should be essentially, whether there's any genuine distinction between one facility and another facility, I think Dan makes a pretty good case here, that there really isn't a significant distinction, any meaningful distinction and in terms of the types of facilities that have been allowed to remain open, and gyms that have been ordered to be closed.

Anthony Sanders 11:47
Well, there's a lot more we could say about that case, including that the court is citing this this case, Jacobson from 1905, that we're seeing suddenly get a resurgence in citation, the same year that the Lochner decision was, was issued. And there's a lot that more that can be said about that. But we'll have to wait for future cases, this case is only on a stay. So I imagine we might see more from the Sixth Circuit unless it suddenly becomes moot. So stay tuned to Short Circuit for more on COVID-19 litigation. But now we're going to move to something else. The Mike Flynn case and the opinion that came out of the DC Circuit this week. Clark is going to talk about that. And I encourage him to both talk about this exciting issue that most people are looking into it for, which is the precise wording of rule 48(a) and the more mundane issues of how this goes to the core of rot at our in our criminal justice system, which Clark might also say a thing or two about.

Clark Neily 12:54
Yeah, thanks. It's sort of hard to know where to begin with this giant circus of a case but they're really distilled essence is that former National Security Adviser, Michael Flynn, was prosecuted by the Department of Justice for allegedly making false statements to FBI agents during a January 2017 interview where they asked him questions about certain conversations that he had had with the Russian ambassador, Sergey Kislyak. The FBI took the position that some of his answers were incorrect, and a decision was ultimately made to prosecute him under a federal law that makes it a crime to make false statements to federal agents. Skipping over a lot of very interesting procedural history earlier this spring, after. So initially, General Flynn asserted his innocence and vigorously defended against the charges that were brought against him. He later pled, decided to plead guilty, we can get into why that seems to have happened. But before he was actually convicted, because you're not technically convicted in our system until the judge issues a sentence which had not happened yet. So between the time when he pleaded guilty, and the time of his sentencing, which again has not happened yet, the government filed a motion under federal rule of Criminal Procedure 48(a) to dismiss the charges against Flynn, actually is just one charge: lying to federal agents. The district court Judge Emmet Sullivan did not grant that motion which is normally done just you know, out of course, and instead appointed an amicus to oppose the government's motion to dismiss and explain why the district court should require that the prosecution proceed. Mike Flynn's legal team then filed a petition for a writ of mandamus in the DC Circuit saying that or requesting that the DC Circuit direct Judge Sullivan, actually that the DC circuit, send the case back down to the district court reassign a new judge and order that judge to grant the motion to dismiss the case under Rule 48(a) and the decision is what we're here to talk about very interesting decision and went two to one. Judge Neomi Rao wrote a majority

opinion that Judge Henderson joins saying that Flynn had made a strong enough case for a writ of mandamus. They did not reassign it to another judge. They just ordered Judge Sullivan to dismiss the case. And Judge Wilkins wrote a dissent in which he said in essence, putting aside the merits of the request, this does not meet the standard for issuing a writ of mandamus which is requires a that relief be clear and indisputable the right to relief, and that's that standard is just not met here. And so we should not issue the writ of mandamus. And that's where things stand now. We have, depending on how you read the rules, we either have, the parties either have 30 or 45 days to file a petition for rehearing en banc. If I were a betting man, and I am a betting man, I would guess that we're going to see one pretty soon.

Anthony Sanders 15:54
So before we turn to the some of the wider aspects of this case, one thing I thought particularly strong and that I had a reaction against was the court statement that inquiring into why the Justice Department was doing this, which is essentially I think the only reason, right, that you'd have this hearing because the court itself is not going to convict and imprison Mike Flynn if the executive branch doesn't want to. But in stating that that would be a harm to the government because it would enquire into the executive branch's reasoning, which is somehow cabined off, I guess from the judicial system. What do you make of that? Is that is that something that we have elsewhere in the in the case law on that form? It seemed pretty unique to me.

Clark Neily 16:46
I think that's right. It's an interesting question, whether the, you know, what is the standard for denying a rule 48(a) motion, the Supreme Court has quite a bit of dictum on this not a whole lot of directly on point cases. But the gist of it seems to be that the point of rule 48(a) which again, is the rule that requires the government to get leave of court before they can dismiss an ongoing criminal prosecution, is that was designed to protect defendants, in other words, to avoid a situation where the defendant wants to get the case over with and for whatever reason the government is trying to prolong it. And part of the government's strategy is to dismiss the case, you know, maybe for now, but with the ability to bring the case again later. So this, this comes up in a sort of an interesting posture where like everybody, except for the district court judge wants this case to go away. The defendant wants it to go away. The prosecution wants it to go away, and only the district court judge, you know, is the one who's questioning whether the case should go on. But your point, Anthony is an interesting one, and the main rationale that's articulated by the DC circuit, for you know, what the harm would be in this case is that it might require the government to expose its deliberative process and coming to the decision to dismiss the case. There are two interesting things. There's a bunch of interesting things. But two interesting things about that, in particular, first of all, the government did not join the petition. The government actually didn't file anything except for an amicus brief in this case, but it's not technically a party to the petition for writ of mandamus. And Judge Wilkins in his dissent makes a lot of that. And then the second point is, and this is a pretty meaty point. Why shouldn't we get to find out what the real reason for the decision to dismiss the prosecution is? I mean, these people work for us, it seems to me we do have some interest in that. And my personal belief is that while I don't completely discount the proffered explanation, which is that, upon further reflection, the Department of Justice felt that they essentially never had a case because the alleged misstatements were not made in connection, they were not material to any legitimate ongoing investigation, which the Department of Justice considers to be an

element of so called 1001 false statements charge. I personally believe that, well, that may have played a role, what is at least as likely and perhaps even a bigger part of the decision was that DOJ is trying to sweep under the rug, a tremendous amount of prosecutorial malfeasance that went on, at all stages of this prosecution really pretty much up until the motion to dismiss. I think probably that's the real basis for DOJ is desire to get rid of this case is because the longer it goes on, the more clear it is just how incredibly persistent and objectionable the prosecutorial malfeasance was in this case, and they're essentially trying to cauterize a wound. So I think maybe as a member of the public, I'd like to know more about that. But now I'm not going to.

Dan Alban 19:35
I also found it very odd the idea that the court can't look into the motives of the government for the actions that it takes. That happens all the time in courts across the country in a wide variety of cases, including criminal cases. The dissent talks about selective prosecution cases being one example where the court will look into the reasons for the prosecutors actions, but there are lots of other examples. Of course, people remember the travel ban case where the Supreme Court was asking about why exactly was the travel ban imposed? What were the real reasons. And in many instances, courts are asked to examine whether the state of justification for the government's actions is pretextual. And in order to do that you have to examine, you know, what are the reasons? What are the stated reasons? And what are the real reasons for the government to take a given action? And there's tons of examples of this. One example that we deal with somewhat often at the Institute for Justice is in eminent domain cases where the government may offer a pretextual reason for a taking. And the court is asked to examine: are the government's motives or the government's stated reasons for the, for the taking, actually matching up with whatever real reasons there may be underlying the taking? And that's just one example of many where courts look into the difference between the government stated reasons and the government's actual motives for taking a given action. And it matters, it really matters why the government is doing things even in a fairly deferential proceeding like these 48(a) motions, it still matters. And I think it's odd that the majority here thought that that was just something that was beyond what courts could review.

Clark Neily 21:27
Yeah. Let me add to that and say, I do you think it's important to understand that just because we might be interested in knowing something like I am actually very interested in knowing how much prosecutorial misconduct happened in this case. I think it's clear there was, at least some and my guess is that there was a tremendous amount of prosecutorial misconduct, that, again, the DOJ is trying to sweep under the rug. But just because I'd like to know that doesn't necessarily mean that the court has an obligation to allow the proceeding to go on. And I do think there are very serious concerns about a situation where a court is taking the position that a given prosecution must continue, even when neither the defendant nor the government wanted to, that's just not an appropriate role for judges in our system. I can absolutely understand. I think the essence of the majority opinion, the DC Circuit, at least as I read it is this, the circumstances for denying a motion to dismiss an ongoing prosecution under 48(a) are incredibly narrow, and they really would only come down to something like, there's bribery going on. Or this is literally, you know, a rogue decision by a prosecutor who's not even under the control of, you know, the normal chain of command within DOJ. And, and short of something that, you know, outrageous, just completely beyond the pale. Even if we might want to know more about what

what's really going on and what the government's true justifications are, in this particular context, it's just not relevant to the decision whether to grant the government's motion to dismiss. I'm almost torn exactly down the middle on this, because I actually think that's a pretty powerful rationale. On the other hand, I really do want to know what was going on the case. And then the third thing to point out, and this maybe is the in some ways, the most interesting for sort of federal courts nerds was the standard for a mandamus met in this case, even if the merits cut one way or the other way, there is this additional question of the posture that the case reached the DC Circuit in? Did the government, I'm sorry, did Flynn show a right by clear and indisputable showing that he's entitled a writ of mandamus? I'm pretty skeptical about that, personally.

Dan Alban 23:32
Yeah. And I think that's what's so odd about this. It's not the court deciding, and it's not even reviewing Sullivan's decision, he had not made the decision yet that he had yet to have the hearing. And so when the when the majority says on the record before the district court, "there's no clear evidence contrary to the government's representations." That doesn't seem very strong. When Sullivan has not, when Judge Sullivan has not had the opportunity to have that hearing, to find out what evidence there may be. And so that's why I think it's really an odd seeming overreach here by the DC circuit to reach out and take a case out of a District Court judge's hands before he can even have a hearing to find out, you know how he's going to decide. This is not a case where Judge Sullivan had, you know, issued a ruling about whether the case could be dismissed. It was a case where Judge Sullivan had scheduled a hearing and appointed an amicus to contest the basis for the dismissal, but had not decided anything.

Anthony Sanders 24:33
Do you guys think what ultimately might have tipped the scale, I mean, who knows what actually did but it seems like what might have tipped the scales here was the decision to appoint the amicus. Because Judge Sullivan could have scheduled a hearing, had everyone come in who is agreed about the hearing, but still had some probing questions. And we know if he has had some probing questions in past hearings in this case, and could have gotten a lot of the value out of, what why it seems he wants the hearing, which is to have some sunshine on all these decisions. And instead he goes beyond that to appoint an amicus to file a brief which of course, is a normal thing in our judicial system in certain cases, but maybe seemed that he stepped out of his judicial roll in doing that.

Clark Neily 25:21
I think there's no question that that seems to have been what mostly motivated the DC circuit here. There was, I you know, I want to say this a little bit tongue in cheek, this opinion could have been a lot shorter, could have been two sentences: "You're embarrassing us, stop." I think that the concern the DC circuit or a major concern of the DC circuit's was Judge Sullivan's decision to sort of throw the whole case open to, honestly, to public participation. He was actually soliciting amicus briefs from any interested party. He'd then appoint somebody whose position was well known. Judge Gleeson wrote an op ed saying that he believed that the case should go on, and a few days later, he was appointed as, as the amicus to take that position officially. I think that the DC Circuit probably even though, you know, this is not a doctrinal point, was deeply concerned that this case was about to go from merely unseemly to a full blown circus, and it needed to be shut down immediately. That to me is probably the pragmatic takeaway of this decision. You can put doctrine, and when we, all of us know constitutional litigators

and other litigators know, there are times when doctrine goes out the window. And I think this may have been one of those times because the pragmatic, or the Prudential concerns that drove this decision strike me is plainly more powerful than the doctrinal reasoning that's formally decided by the court and the opinion.

Dan Alban 26:36
I think Clark's right. But I think that the DC Circuit went further than it needed to in order to protect those goals and protect, you know, the public perception of the court. The mandamus petition sought three different types of relief, the first being, directing the court to grant the motion to dismiss which the DC Circuit did do, but the second was vacating the Amicus appointment. And I think the DC Circuit could have remanded you know, vacated, the Amicus appointment, remanded with instructions to conduct the hearing, possibly, you know, with some language suggesting this had better not be a circus, and more properly exercised its role. It's the appointment of this Amicus that I think, as Clark points out is what got the DC Circuit stander up, and I think had that simply been the remedy that the DC Circuit approved, then I think this would be a lot less controversial. But when a when a circuit court reaches down, tells a district court how to rule on a hearing that hasn't had yet. I think that's something that goes out of the normal order of proceedings in American courts.

Anthony Sanders 27:52
Clark, anything else before we finish?

Clark Neily 27:55
I do have one more point that I think is not getting sufficient attention. And it's this: what we should really be talking about, whether Mike Flynn committed crimes or not whether he's sleazier than the average, K Street lobbyists or not, regardless, the thing we really should be talking about here, in my opinion, is the fact that the Department of Justice coerced one of the most powerful men on the planet into pleading guilty to a crime that the Department of Justice now itself said he didn't even commit. He was vigorously defending himself right up until the end of November of 2017. It's reported that he racked up more than $5 million in legal fees from Covington and Burling, one of the biggest and most prestigious firms in the country. So he was fighting hard. And then suddenly, and I mean, suddenly, like overnight, he decided to stop fighting and plead guilty. And it's been credibly reported that the thing that made him decide to do that was when the prosecutors, the special counsels office, prosecutors threatened to indict his son, the father of his four month old grandchild, and that's what made Flynn finally decided to plead guilty. And that's a that's a common DOJ tactic. So that, to me is the real story of the Flynn case is not even so much what happened to Michael Flynn other than he was coerced into pleading guilty to a crime that DOJ now says regardless of whether he did or didn't committed, he was, in my view, certainly coerced into relinquishing his right to a trial. And I think what's going on behind the scenes By the way, as the DOJ knows, it could never have proven these charges in an open trial. There were just too many problems with the case, including the extent to which it would have exposed horrific malfeasance by the FBI. So the question that I think we should all be left with is, if the Department of Justice can coerce one of the most powerful people on the face of the planet into pleading guilty to a crime that it says he did not commit. Imagine what it can do to the rest of us and imagine what it routinely does to the rest of us when it manages to obtain 97.4% of all federal criminal convictions today are obtained through guilty pleas and the levers that prosecutors apply to obtain

those guilty pleas to get people to waive their trial are extraordinarily coercive. And the question that you're keeping should be keeping us all up at night is what percentage of those 97.4% of criminal convictions that come from plea bargains involve actually guilty people? That's an answer or the answer to that question is when we don't know we should be lying awake in bed worrying about it.

Anthony Sanders 30:17
Well, just like the Michigan case, there may be some life left to the Flynn case and hopefully we'll answer some of the questions that Clark poses. Please follow Clark if you would like on Twitter, he's @conlawwarrior. Dan Alban is also on Twitter @DanAlban, and both of them have many interesting things to say about many subjects, Clark, especially lately on the criminal justice issues. In the meantime, I want all of you to get engaged.