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SPEAKERS

Brian Morris, Mike Greenberg, Anthony Sanders

A Anthony Sanders 00:25

Since ye distemper and defile. Sweet Here by the measured mile, nor aught on jocund highways heed. Except the evidence of speed; and bear about your dreadful task. Faces beshrouded neath a mask; great goblin eyes and gluey hands, and souls enslaved to gears and bands; here shall no graver curse be said than, though yare quick, that ye are dead. Well, that was Rudyard Kipling's 1904 poem To Motorists, which is one of the first odes to the automobile printed in that great repository of poetry, the Daily Mail. This is, however, 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 May 5, 2023: Cinco de Mayo. However, you are not listening to this on Cinco de Mayo because it won't be released for a few days. But from the past, happy Cinco de Mayo, everyone. And also, I hope you enjoyed that poem, and it is because today, we are talking about cars and speech. But unfortunately, it won't be about cases involving poetry, but it will be involving a couple other sounds to do with cars. One is horns that people are honking while they drive their cars, and the other is Facebook posts about retaliation to do with towing cars. We're going to put that all together with a couple new guests to Short Circuit that I'll introduce to you in a moment. First of all, I want to thank our listeners for listening to the last couple of weeks where we've had a couple of specials. We're now back to our regularly scheduled programming. A special hello to all our new listeners from across the pond that joined in for our program on the British Constitution a couple weeks ago. I hope our American listeners enjoyed that too. And also, thank you for indulging me in last week's episode where I talked about my new book. And thank you especially to my colleague, Josh Windham, for hosting that episode. It was kind of fun being on the other side of the microphone. If you want to read my book, you now can. By the time you're listening to this, it's completely free online. You can click the link in the show notes to get your own electronic copy, or you can order a copy for a reasonable price. You can even download it onto your phone. Some of you listeners may remember football on your phone. The whole Manning brothers thing, like it seemed really novel back then. Now, you know everyone watches TV on their phone. It's not that weird. Well, you can, of course, have a book on your phone as well. So, to free speech and cars. Joining me today are two IJ attorneys that I'm very pleased to have on the program for the first time. First, I'm going to introduce Brian Morris.

Brian is a Kentucky native, who also clerked on the Sixth Circuit and spent some time in Ohio, and he's going to be talking about a Sixth Circuit case, which makes a lot of sense. So welcome, Brian.

B Brian Morris 04:00

It's great to be here. Thanks, Anthony.

A Anthony Sanders 04:01

And where in Kentucky did you grow up?

B Brian Morris 04:04

I grew up in Northern Kentucky, just south of Cincinnati, so it's about a 15 minute drive into the city from where we lived.

A Anthony Sanders 04:13

So Cincinnati Reds and all that?

B Brian Morris 04:18

The Bengals finally got good, and I left to come to IJ and DC, but it's a good time to be a Bengals fan.

A Anthony Sanders 04:27

Yes, well, interesting life choices there, but I won't besmirch you because it's great having you here at IJ. And Mike, welcome to Short Circuit to you. You are a UCLA grad but also a Florida grad, so where do you consider your roots?

M Mike Greenberg 04:47

I'm a Florida man through and through Anthony, and thank you for having me.

A Anthony Sanders 04:50

But somehow also a Yankees fan I understand.

M Mike Greenberg 04:54

My family made the pilgrimage from New York down to Florida as many tend to do. And so my mood is entirely dictated by how well Aaron Judge is hitting on any given day.

A Anthony Sanders 05:07

Right. Well, we won't go into that this time. It could change as the season progresses, and we have you on again. But where we will want to go is to one place where you have lived: out to California, where they love their cars. They also love their protests, and they love honking their horns. So how did all of these come together here in this Ninth Circuit opinion?

M Mike Greenberg 05:29

Yeah, so this is Porter v. Martinez from the Ninth Circuit, as you said. In 2017, Susan Porter was attending a protest on gun control outside of Congressman Darrell Issa's office. She left the protest and then as she drove by the protests in her car, it was still going on. And as she drove by, she honked her car's horn to express support for the protesters. It's a thing I know I've seen before. I'm sure plenty of others have seen that before. I didn't really think twice about it. But a San Diego County police officer then pulled Miss Porter over because she had honked her horn. As it turns out, California is one of 40 or so states that has a law that outright bans the use of a car's horn except as follows: "The driver of a motor vehicle, when reasonably necessary to ensure safe operation, shall give audible warning with his horn. The horn shall not otherwise be used except if it's used as a theft alarm system." So Porter was given a citation for violating that law, and then she sued. She sought declaratory and injunctive relief against what she called "expressive honking." As she explains, people honk their car horns to express something all the time, whether it's to greet or to summon people, or if they're passing by a wedding or to voice support for a parade or a protest or something like that. The district court holds that honking is indeed expressive, or can indeed be expressive, implicating the First Amendment. But it grants summary judgment to California because it says that the law at issue here satisfies intermediate scrutiny, and we'll get into those issues in a little bit. So Porter appeals, and the first thing that the Ninth Circuit has to do, as in any case, is assure itself that has standing because attorney generals' offices love arguing standing. And the case can't go any further if Porter doesn't have standing. To establish standing, she needs to show that she has refrained from engaging in something that is prohibited by the statute, and that her self-restraint or self-censorship is well founded in a fear that the statute is going to be enforced. The court pretty quickly disposes of the government standing argument. It says Porter has recently driven by protests and banners on the freeway that she wants to honk your horn to express, I support that, but she's refrained from doing so. And that's good enough for the self-censorship prong. But the state says, and I found this interesting, the odds are vanishingly small that she will actually be cited if she does in fact do that. And, in fact, the state says the San Diego County Sheriff's Department, San Diego County having more than 3 million people in it, issues less than 10 of the citations per year. It's probably worth putting a pin in that for later. But the court basically says, come on, you've already cited her for doing exactly this. Her fear that she will be cited again if she does that is plenty well founded, and so, round one on standing goes to Miss Porter. Then the court goes to the merits of the First Amendment claim. The court starts by laying out some some basic principles. The First Amendment obviously protects speech, and speech includes at least nonverbal conduct that is intended to convey a message that people would understand. Second, restrictions that restrict speech in what we

call a public forum: its streets, sidewalks, the internet. The government is going to bear some kind of burden to justify a speech restriction there. And third, when the government is regulating speech, because of the content of that speech, it has to satisfy strict scrutiny. But when not, when the law is just content neutral, that is the government is regulating without really reference to the content of the speech, intermediate scrutiny applies. That's still higher than rational basis review. The government is still going to bear some kind of burden, but it's less strict than strict scrutiny. The first two of those questions the court disposes of pretty quickly. The government basically concedes them. The streets where you drive your car and honk your horn are public forums, and the government can see that at least some of the honking that is prohibited by the statute is expressive. It's intended to convey a message, and the court kind of explains that a little bit. Porter, her example is one the court looks to. She drove by a protest, and in a specific clustered pattern, honked her horn, and then the crowd cheered. So the crowd kind of understood her message that she was supporting them. The court does point out that horn honking makes more or less one sound; it's kind of inflexible as a medium. So sometimes, the listener may not really understand whether you're expressing support or anger or something else. But usually in context, it's pretty...

A Anthony Sanders 10:47

Let's say a clown car, I guess, there are exceptions.

M Mike Greenberg 10:51

I suppose there could be different kinds of horns, and even people can, kind of, tap the horn in a slightly different way that maybe conveys some different kind of message. But generally speaking, the court says it's kind of inflexible, but based on context, it's going to be discernible what the message that the person's trying to get across is. The court then gets into whether this law is content based or content neutral, and that's a pretty significant question for the level of scrutiny. The test is whether the government is regulating speech, again, because of the content contained in that message. And Porter argues, look, the statute says that honking to give some kind of safety warning is allowed, but honking for any other purpose is not. And the officer enforcing this law needs to examine the content of why I'm honking in order to enforce it, and that's regulating based on the message. But the Ninth Circuit disagrees. It says that's not quite right. It says that to conclude that a honk complies with the statute, an officer doesn't need to examine the purpose of the honk or the content of the honk the way that someone might read a sign or listen to a spoken statement. The officer only needs to observe the traffic circumstances and determine if a safety risk is present. The statute says honking is allowed when necessary to ensure safe operation, not when the person is trying to convey that there is a safety risk at play. So in other words, by the statute's text, it's not that honks for any particular subjective purposes is banned. Honks for any subjective purpose is allowed, so long as the an officer determines that a honk is or would be necessary to ensure safe operation. They quote the officer who pulled Porter over, who says that he was watching the traffic and he didn't see an emergency. So that's why he pulled her over, supposedly not caring about the message of the honk. The word honk is starting to sound a little strange to me, but I'm not sure if it is for listeners as well.

A Anthony Sanders 13:01

I'm following along..

M Mike Greenberg 13:02

So because it's not content based, intermediate scrutiny applies. And in this context, that requires the government to show that the regulation furthers a substantial government interest that is unrelated to the suppression of speech. The restriction has to be no greater than is essential to further that interest. And it also has to leave open ample alternative channels for communicating the message. For the first part, California puts forth traffic safety as its interest, and everybody kind of agrees that's a pretty substantial interest and that it's not related to the suppression of speech. But then the question is does prohibiting the honks that Porter wants to make further those interests, and is it narrowly tailored to achieve that goal? And the government relies on the testimony of a California highway patrol sergeant who basically says, the horn is great as a safety warning device. But if people like Porter can go on honking all day when there's not a safety hazard, it'll dilute the horn's uses as a safety warning device, which means people won't pay attention to it, which is dangerous, and on and on and on. And the court buys that, and to show that it agrees with that kind of evidence, it quotes the boy who cried wolf, which is certainly substantial evidence in any case.

A Anthony Sanders 14:30

Yeah, it's in the U.S. reports, I believe.

M Mike Greenberg 14:33

Yeah, it's one statute, one basically. The court also says, look, in cases where there's a long and widespread history of regulation like this, there's less of a showing that the government has to put on, and here the law has been on the books in relevant forms since 1913. And something like 40 other states have exactly identical laws. So that's good enough for us for intermediate scrutiny. And the court also notes that no one seems to have figured out a better way to not dilute the horn as a traffic safety device without also prohibiting all the other uses of the horn that Porter wants to engage in. So that's good enough for narrow tailoring. And then there's the final question of whether it leaves open ample alternative channels. And Porter says it doesn't because honking is a uniquely spontaneous method of communication. It takes less than a second, and it's very quick and to the point. The court brushed that aside and says, this inquiry doesn't require us to invalidate something just because it restricts your favorite way of communicating something. And in any way, you can spontaneously roll down the window and wave at the protesters or give a thumbs up at them. And that's basically the same thing. And you can also put bumper stickers on your car. And so the court says this survives intermediate scrutiny. There's a dissent, and the dissent is by Judge Berzon. And the dissent goes right into the narrow tailoring inquiry. But it starts by going to the testimony that supports that narrow tailoring inquiry. The testimony was provided by a California highway patrol sergeant, and it was admitted as an expert opinion. And there was a dispute in the district court about whether this testimony from this sergeant was sufficiently expert, sufficiently reliable, such that it meets the test as an expert opinion. And the majority opinion says, yeah, usually experts rely on scientific studies and things like that, but sometimes, you can rely on your years of first hand experience in dealing with traffic safety. There aren't really studies out there on this issue

anyway, so it's good enough for us, basically. The dissent takes them to task for that and says, the expert's opinion has to be reliable, and the expert here, the sergeant, couldn't articulate any reasoned explanation between his experience in enforcing traffic safety and why he thinks prohibiting these honks is necessary to ensure traffic safety. Experts need to have some kind of specialized knowledge. But what the sergeant offered here was only his personal experience that he's been distracted by honks in the past, which is what a normal witness offers, not an expert witness. And so his conclusion that prohibiting all these honks is necessary to prohibit distracting drivers and ensure that the horn is a proper traffic safety device was just speculation that was no different from what any of us could offer. And the reason why they go back and forth on this, and it's really important, is that his testimony is the only evidence offered by the government. And the evidentiary burden, even under intermediate scrutiny, is on the government. So if his testimony is out, the government's case completely falls apart. And so the dissent leads off with that because absent that, there's no way to hold for the government. The dissent then turns over to the merits, and it kind of pulls an interesting move. Porter challenged the statute as applied to all expressive honking, whether political protest or just kind of greeting a neighbor. But the dissent focuses on and says it would only enjoin the statute as applied to political protest honking. And that's because Judge Berzon says she actually disagrees with the majority that any other kind of expressive or any other kind of honking other than to indicate support for a political protest actually conveys a message. She says that the honks Porter says are meant to greet a friend, for example, are just noise. They're not actually conveying any message. They're just to get the person's attention. And it's when the driver actually waves to that friend or shouts at them that you actually have expression. So that's an interesting move. The dissent then says that under that framing, banning political protest honking doesn't further the government's substantial interest in traffic safety, even with Sergeant Beck's testimony. And that's because Sergeant Beck didn't cite a single accident caused by any type of horn honking or improper horn honking. But perhaps more importantly, and the dissent really hones in on this, this lawsuit is never enforced, as the state itself argued in arguing standing. The supervisor of the officer who wrote the ticket, the dissent points out, basically told the officer not to do so because "Everybody does it." And if there's no real enforcement, it probably doesn't mean that the government has a huge interest in enforcing it if it never enforces it. And that's especially so, the dissent points out, at political protests, where things are already loud and kind of a ruckus and potentially pretty distracting for drivers. And in fact, the officer's body cam footage shows that lots of other people right then and there are honking in support as they drove by, but seemingly only Porter was the one who got a citation. So the dissent concludes this is not narrowly tailored at all; it's not furthering any substantial government interest. And then as for other channels of communication, the dissent also takes the majority to task for suggesting that waving or giving a thumbs up is a suitable alternative because that requires taking your hand off the wheel, which if we're being strict traffic safety gurus here, that's probably even more dangerous than just a sound. So ultimately, the dissent says this is by no means narrowly tailored and it shouldn't survive First Amendment scrutiny as applied to honking to support some kind of political protest. But the dissent was just that: a dissent. And two to one, the law of the land in the Ninth Circuit is that honking your horn when not needed to warn of a safety concern is not protected by the First Amendment.

A Anthony Sanders 21:26

Brian, have you ever honked your horn to support a protest as you drive past?

B

B Brian Morris 21:30

I think I have. And, you know, I would disagree with the court that different forms of honking don't convey different messages. You know, I think the way I honk when I come up to greet my son on the front porch or picking up somebody for a carpool is certainly different than the day to day DC traffic and the way I use my horn, out on the highway.

M Mike Greenberg 21:54

Yeah, it's a curious aspect of the statute, that it's not targeted to the person's purpose. It's just the outer lying kind of traffic situation that triggers the coverage. But I think it may be impossible for an officer, as you're saying, to be able to tell that the little beep beep to kind of say hello to someone is very different from the kind of slamming on the horn to warn about a safety concern. And the majority kind of, in its closing remarks, points out that there could be a way that this is improperly enforced in a certain way. Perhaps the officer is pulling people over, or officers are pulling people over, specifically when they disagree with a political protest, as opposed to people who are doing the same kind of beep to greet a friend. The court says that goes to improper selective enforcement, not to narrow tailoring, and that's not before them. But it does kind of raise other potential constitutional concerns, and maybe in the other 39 or so states that have laws on this books, whether there's a vagueness problem or an improper selective enforcement problem.

A Anthony Sanders 23:21

Yeah, it seems like it would be easy to write a statute that more so says you can't use your horn when it would be unsafe, or would be distracting, or what have you, instead of the default being this thing that is right in front of you in your car and it's totally part of your car, you cannot use it except in this particular situation, when everyone does use it for this, more just kind of friendly saying hi to someone or or supporting somebody. I think it didn't help. It seems in the facts that this woman laid on the horn like 14 times in a row, or something like that. It might have caused some of the behavior. But I thought the really interesting part of it was actually the standing analysis, where they say this has only been done 10 times a year. But still, it's chilling her speech, and it seems reasonable that it would chill her speech in honking her horn at other protests. And I I think that's absolutely right. But you know, that the canonical case in this regard about whether something unusual can be enjoined in the future is case we all know all too well at IJ: the Lyons case from 1983, which involved the city of Los Angeles and a police speeding. And the court there said, this guy was beaten by the police after a traffic stop. And they said it's so unlikely that you're going to be beaten again, that you just don't have standing. Well, I'm betting the LA police beat more than 10 people in a year. In fact, I bet that number is a lot higher than 10. And yet, 10 in a year in San Diego was enough for standing, which I guess just shows you how the courts think about the frequency of occurrences. It might not just be the frequency but what they're actually talking about.

M Mike Greenberg 25:26

Yeah, it may go to how unserious this underlying conduct is in the first place, or kind of give a window into the court's view of that, perhaps?

A Anthony Sanders 25:40

Yeah, or the remedy that they're going for, which is probably more what was going on in Lyons, is my guess. Well, Brian, a lot of people like to honk their horns, but nobody likes to have their car towed. Sometimes, it's a happy tow, a break down, and you're so glad that tow truck showed up to bring you home, or to bring you to the garage. And often, of course, it's the unhappy tow where you park in the wrong spot and you come back and you're like, "Dude, Where's My Car?" So tell us about these gentlemen in the Sixth Circuit who, we don't know if they had happy tows or unhappy tows, but they were quite unhappy with how they were being treated by certain local officials.

B Brian Morris 26:22

They were. This case from the Sixth Circuit is Lemaster v. Lawrence County, Kentucky, which is a rural county in Eastern Kentucky near West Virginia. And as you mentioned, I grew up in Kentucky so I was raised on basketball, horses, and bourbon. And you know, it may be Cinco de Mayo, but tomorrow is the best and fastest two minutes in sports. And just in case, Anthony, you wanted to make a bet there is, as listeners know, your British connection. There is a Lord Miles running in the race tomorrow if you have some money to put down.

A Anthony Sanders 27:03

I'll have to check that out. So listeners, I may have mentioned before that my aunt was a champion British jockey. I don't think she follows Kentucky Derby too closely, but maybe I could check that out.

B Brian Morris 27:16

We never miss a Kentucky Derby. I also couldn't come to my first Short Circuit without a little SCOTUS trivia for you, Anthony. Do you know which chief justice was from Lawrence County, Kentucky?

A Anthony Sanders 27:36

You know, I'm not really good on which chief justices had drawls and which didn't. Mike, it seems, might though.

M Mike Greenberg 27:44

I know John Marshall Harlan was from Kentucky. Was it Lawrence County, Kentucky?

B Brian Morris 27:50

It was not. It was actually Chief Justice Vinson, who predated Warren. The trivia about him was

he was the last chief appointed by a Democrat. It was in 1946 by President Truman.

A Anthony Sanders 28:09

...whose heart attack basically made way for Brown v. Board of Education, or that's how the story goes.

B Brian Morris 28:16

So this is from Lawrence County, Kentucky, which as the appellee's brief puts it: this is small town Kentucky where everyone tends to know everyone else's business. The rumor mill can run rampant and personal squabbles can snowball into legal fiascos. So I think that's a pretty good setup for this case. The Lemasters were a husband and wife who operated a small towing business. The husband also served as the fire chief. It was a full-on volunteer fire department. And the Lemasters, in small town Kentucky, clashed with the county judge executive, which is not a judge in Kentucky, that's the head of the executive branch, much like a county manager or county mayor. And the big disagreement was over the management of what was called the rotation list. And the rotation list was a list of tow companies that the 9-1-1 call center had, so that when they needed to tow a car. For example, if there was an accident or there was an abandoned car, they would go through the rotation list to call the tow truck company. The Lemasters were complaining that they were not receiving their fair share from the rotation list. So after an election, there was a new judge executive, a guy named Carter, which actually made the situation worse. One of his first lines of business was to fire the director of emergency management, which as the fire chief, made the Lemasters pretty upset. So as you know, any good American does, what do they do when they're upset? They take to Facebook. So Mr. Lemaster wrote a Facebook post criticizing the firing decision and calling for the county to reinstate the director. This actually upset the new judge executive so much that the next day, he called Mr. Lemaster and complained to him and used some choice words that Mr. Lemaster characterized as cursing. There's some back and forth. I think a funny side note is Mr. Lemaster acted fast enough to actually record the conversation and then threatened to post that on Facebook too. But the cooler heads prevailed, I suppose. He agreed to take down the Facebook post if the judge executive promised to fix the rotation list. That seemed to work for a while, until the judge executive started to criticize the Lemasters management of the fire department. So according to the Lemasters, the judge executive started spreading rumors and had some baseless investigations into their purchasing of different fire equipment. And the judge executive even conspired with a former fire department volunteer named Wilma that started to spread gossip about the Lemasters around the county about stealing fire equipment and actually started a petition to remove him as the fire chief. So again, the Lemasters were upset about this attack on their character, so they went back to Facebook. This time, they posted a comment that just said is Phillip Carter, that's the judge executive, and Wilma McKenzie, that's the former volunteer, a couple now? Asking for a friend. And then he tagged them. So there's some factual question about whether or not this couple implied a political couple or romantic relationship. But the result was five days later, the 9-1-1 dispatch center gets an email from the judge executive, saying that the Lemasters were off the towing rotation list for good. So they basically were not allowed to be called to pick up cars anymore. In the district court's opinion, the Sixth Circuit doesn't actually talk about this, but the Facebook posts went on and on. There was actually another one that went even further, I think the next month, where the district court described Mr. Lemaster as, "Logging into Facebook to caustically

update his internet friends about happenings in Lawrence County." And where, Mr. Lemaster, again, this is in the district court's words, "Colorfully referred to miss McKenzie as a holler hag and Carter's one true love." Is that a Kentuckyism? Are you familiar with the holler, Anthony? I guess, I'm not. So the holler is a term mostly from like, Appalachia, part of like, Eastern Kentucky. It's technically very hilly, so it's kind of the hollow part in between the valley, but you call it the holler. So you say, I live down in the holler.

A Anthony Sanders 33:26

So is it kind of like valley trash, is what he's saying there?

B Brian Morris 33:30

Yeah, that's exactly right. That's exactly right. So Miss McKenzie was in the holler, and unsurprisingly, the Lemasters calls dropped off tremendously. And then they filed suit against the judge executive and the county for retaliation, which, as a side note, IJ sees a lot of retaliation like this in our cases. We have a trial in Wisconsin about aggressive zoning enforcement after Facebook comments criticized the local town board. I'm on another case in Ohio where there's retaliation against a driver for displaying an ad for the mayor's opponent. Then we have the Castle Hills, Texas, case with retaliation against a council member for questioning the city manager. So unfortunately, it seems like this has become way too common in towns across the country.

A Anthony Sanders 34:26

Yeah, I mean, Facebook really has changed local politics. You could call it good or bad, but it seems like it is different than when everyone just waited for the local paper every morning.

B Brian Morris 34:36

That is very true. The district court on this case made it to summary judgment, but Judge Bunning dismissed all the claims. And for the First Amendment retaliation claim, just to remind our listeners, to make out a claim, you have to show basically three things: that you engaged in protected speech, that an adverse action was taken against you, and that the adverse action was motivated at least in part by the speech. The district court dismissed the First Amendment retaliation claim on the third part, saying there was basically no connection between the Facebook comments and the adverse action of taking them off the towing list. It called the link too weak for any reasonable jury to find causation and characterized the dispute as a purely personal one that was "intensified by a few rash Facebook posts but ultimately was a personal dispute that didn't implicate the First Amendment." It also, for good measure, while dismissing the case, ranted a bit about social media. But the Sixth Circuit reversed. It started with the second element, which it called the easiest, which, the removal from the towing list was an adverse action. Think about it, an ordinary company would absolutely keep quiet if it meant keeping its government contracts. And the defense on this part, I think, was a little frustrating but common. And thankfully, I think the Sixth Circuit saw through it, but the government's briefs basically tried to characterize the removal from the towing list as, oh, this was just a

mistake or misunderstanding. And it was nice to see the Sixth Circuit see through that and say, well, that may or may not be true, but that's a jury question. But a lot of times in these cases, the government resorts to characterizing evidence because they don't want to go to the jury. Then, the Sixth Circuit went back to the first question, whether or not they engaged in protected speech, and said this was a little bit of a harder question. So here, analyzing whether or not they engaged in protected speech, the court had to distinguish between first a situation where the government denied a benefit due to the speech versus another scenario that we commonly think about where the government criminally punishes somebody for their speech. So for here, we're in the first bucket, where removing them from the towing list was denying a benefit because of their speech, so they have to show that the speech was a matter of public concern. This goes back to the the good old Pickering Test, if listeners may be familiar with, which was the old case about the high school teacher who got fired for sending a critical letter to the newspaper about the school board. And looking back at that case, I didn't realize that the school board actually wanted the court to create a duty of loyalty for its employees so that when it spoke out about the school, it had a duty of loyalty to speak in the school's best interest.

A Anthony Sanders 37:52

Wow, I didn't remember that.

B Brian Morris 37:54

Yeah, which thankfully, the Court rejected and said that teachers and students don't shed their constitutional rights to free speech at the schoolhouse gate. But regardless, the two step test is you have to look at the nature of the speech when an employee is involved, or contractor here. If it's pursuant to the duties, then the First Amendment doesn't shield the individual from discipline, the thinking going, that's basically government speech at that point. But if it's a citizen, if they're addressing a matter of public concern, then the First Amendment might apply. And you go to step two, which is kind of the balancing test of whether the speech interest outweighs the interest of the employer. And for the Facebook post, at least for the first one, which was about firing the employee and criticizing that, the Sixth Circuit said that's protected, that's a core matter of public concern. It was about a decision to fire another employee, so that was an easier one to say that was protected speech. The second post about them being a couple seemed to be a closer call that the court really didn't wade into but said it could be just a personal squabble. But it could also be a public concern, depending on kind of how you look at it, but it's just ultimately a jury question. At oral argument, they kind of got into that as well. And basically, I think that the Lemasters punted and said, well, we don't need that anyways because we have the first post. So, the Sixth Circuit then goes to the third and final prong, which is causation. This is where the burden shifting analysis comes in on these retaliation claims, which the Lemasters have to show that this speech was a substantial or motivating factor, and if they do, then the burden shifts to the government, where they have to show that they would have taken the same action even if no speech had occurred. So I think this is where it got a little bit interesting. The government was actually challenging the first part of that. They were saying, well, the Facebook posts, in no way, did it motivate their decision to remove the Lemasters from the tow list, which is an interesting strategy because then the question on the summary judgment was whether there is evidence that would allow a rational jury to find that the Facebook post, at least in part, motivated the judge executive's decision. So then, the

court goes into a lot of detail about how courts should make this causation determination and what you need to show to get to a jury in these situations. The district court, I think, was confused on how to attack this and so were the defendants, and in their briefing, they argued that the adverse action must occur very close in time for the speech to be connected. And if you don't have that close temporal proximity, then you're out of luck. But the Sixth Circuit explained how the time gap works as a sliding scale. So obviously, if there's more time between the speech and the adverse action, you need, let's say, it's a couple of years, then in that situation, you probably need a smoking gun. You need the email that says, hey, remember that thing that they said two years ago? We're going to do this because of that. But on the other end, if it's within a couple of days, or maybe a week, sometimes that can permit an inference of retaliation with no other evidence at all. And the Sixth Circuit, kind of, qualified that a little bit, saying that situation is rare. But most cases fall into the third bucket, which was the case here, which they call a moderate time gap and where it's a matter of months here. It was four and a half months between the protected speech and the adverse action. It just requires some other evidence of retaliatory motive, but not necessarily a smoking gun. And then, the Sixth Circuit went into explain how there's plenty of that evidence here. The judge executive had the upset phone call, he told them to take down the post, he engaged in a pattern of mistreatment. There's the allegation that he spread this gossip. All of those are, at least, evidence that a jury could rely on to find that there was motive for retaliation beyond just the four and a half months. Yeah, there's some evidence that seems it's pretty close to a smoking gun. It's not quite time for some traffic, as they say in New Jersey, but it's along those lines it seems. I would agree. The other thing I liked is what the court did in this situation. It pointed out how the burden shifting works in Title VII claims. So just to remind listeners, Title VII makes it unlawful to for employers to discriminate based off of race, color, religion, sex and protected characteristics. And it has a similar burden shifting analysis, where if there's an employee who says, hey, you just fired me because I'm a woman. Once they establish that, then the employer has the opportunity to give a nondiscriminatory reason for the firing. They can say, oh, no, we didn't fire you because you're a woman. We fired you because of your poor work performance history, or you're always late for your shift, etc. And I've always been a little weary to use the Title VII employment world cases for First Amendment retaliation because there, you have a private employer, it's all statutory versus the First Amendment and constitutional litigation, kind of, feels a little bit more heightened. But the Sixth Circuit relied on that to say in those Title VII claims. If the employer can't even come up with a legitimate reason for the adverse action, they're pretty much dead in the water. And so here, there's the same thing. They're saying, look, the government offered no reason why they took the Lemasters off the towing list. There's no constitutional reason that they did it. The court suggests that that alone could show that this was retaliation because they can't even offer a constitutional reason for doing so.

A Anthony Sanders 44:29

And notice that the court does not cast around, for a hypothetical reason, that perhaps would justify that, like with our friend the rational basis test.

B Brian Morris 44:42

Yes. Yes. We don't want to go down that road. So in the end, they reversed the claim. The First Amendment retaliation claim gets to go to a jury. There was also a Monell Claim in the case against the county. And this is where the Lemasters run into an all too familiar wall in litigation,

so they also sued the county. And just as a reminder to our listeners, Monell Claims can hold the county or municipality liable for an official decision if it was acting under an official policy or if he had authority to make a final official decision. Now, you think that the head of the county would have that final decision making ability, but the Sixth Circuit said no. I think the court gets this wrong. For removing the Lemasters from the towing list, technically a county board and not the judge executive has final say on who's on the rotation list. But in this case, the Lemasters had deposition testimony from the 9-1-1 dispatchers saying that they did not question the judge executive's orders. So if he said don't use a company, they didn't use a company, and that's exactly what happened here. The deposition testimony said, "You don't question the judge." So I think that there was some evidence for a jury to say that, in this situation, the judge executive did have a final official decision making authority. But the Sixth Circuit said that that evidence wasn't enough for a reasonable jury to find that the judge executive had final decision making authority over the rotation list. So in the end, the jury gets to sort out the claim against the judge executive for retaliation, which here at IJ, we love to see. But unfortunately, there's no jury for the Monell Claim.

M Mike Greenberg 46:44

Yeah, on the Monell Claim, I thought it was kind of interesting that there's quotes here from the deposition testimony and other evidence, saying the choice to remove Lemaster towing was not the judge's decision to make and other things to that effect. But we just went through pages and pages of how the judge did, in fact, do this. And everybody is listening to that decision. So it seems like all of the positive inferences in favor of the Lemasters that the court spends pages and pages doing on the individual retaliation claim get thrown completely out the window when it comes to the Monell section. And I don't know what caused that distinction at all. Another thing that kind of stood out to me is that in a lot of these legal standards, Pickering and the balancing test as you see here, come from a time before summary judgment was kind of loosened, back when trials were a lot more prevalent. And so I think a lot of the time in these cases, courts don't do what they're supposed to do, which is take every factual inference they can in favor of the non-moving party. And instead, because summary judgments are more prevalent now and trials are a lot more rare, they kind of say that they're taking every inference in favor of the non-moving party but really kind of massage things in favor of the government's narrative. And it's good to see that the Sixth Circuit didn't do that here because trials are good.

A Anthony Sanders 48:26

Trials are good. We have more and more of them at IJ recently. Brian, one thought I had was did it seem that the in Monell situation, like Mike was just discussing, you have the guy who maybe on paper should know this says, oh, no, the executive is not in charge. But it seems like everyone actually thinks the executive is in charge. Of course, you can have a Monell Claim about an unwritten policy. That's black letter law. So the fact whether there was a policy or not, should that have been a jury issue also? Is this maybe how they could have sorted it out?

B Brian Morris 49:11

Yeah, I think so, and that's right. You don't have to have an official policy. Oftentimes now, counties want to defend themselves and say look at this wonderful official policy that we have

that says you're not supposed to do this.

A Anthony Sanders 49:25

That no one's ever read.

B Brian Morris 49:27

No one's ever read it, nobody follows, and they don't know it exists until there's litigation. So, it's frustrating. It's also our retaliation case in Wisconsin. It's a similar situation where there's a town board, but then there's the head of the town board. And the defense was, well, everything that the guy did in his individual capacity doesn't count because only the town board has the ability to make the final decision and that's what the rules say. But in reality, he's the mayor, and everyone listens to him and he has de facto final decision making authority. So if he says, this is a policy, that's a policy, and everyone follows it. I think that's the same situation here, where even if on paper there's some mythical board that approves the towing lists, the reality is that this judge executive totally controls the list. He's emailing the dispatcher, saying these are the people on the list, these are the people off the list. I would have loved to see that go to the jury as well, but it's not that surprising to see the court shy away from endorsing a Monell Claim.

A Anthony Sanders 50:45

I've been in many of these cases against local governments over the years. When you have a civil rights defense attorney for local government, they'll say nothing is official unless it's decided by the city council because they are the sovereign here. And then, if it is decided by the city council, then the police power is so broad that they can do whatever they want, and the Constitution doesn't even apply. That's the last two lines of the fence they have there. Well, thank you guys both for coming on and talking cars here on Short Circuit and talking some free speech as well. And we'll have both of you guys on again in the future. Thank you listeners for coming back to our regular scheduled programming. We'll have more of that in the future. We have one live show coming up in a couple of weeks. But in the meantime, I would ask that all of you get engaged.