# ShortCircuit372

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Fifth Circuit, qualified immunity, Priscilla Villarreal, citizen journalist, video rental practices, 1980s, VHS cassettes, First Amendment, retaliation, Gonzales v. Trevino, Nieves rule, Video Privacy Protection Act, consumer definition, circuit split, standing.

**SPEAKERS**

Anthony Sanders, Kirby Thomas West, Jacob Harcar

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A **Anthony Sanders** 00:17

"What if someday or night a demon were to steal after you into your loneliest loneliness and say to you, "This life as you now live it and have lived it, you will have to live it once more and innumerable times more, and there will be nothing new in it, but every pain and every joy and every thought and sigh and everything unutterably small or great in your life will have to return to you, all in the same succession and sequence, even this spider and this moonlight between the trees, and even this moment, and I myself. The eternal hourglass of existence is turned upside down again and again, and you with it, speck of dust." Well, those heartening words from Friedrich Nietzsche's The Gay Science came to me as I was reading the case we will discuss this week, because we have discussed it over and over again. It's the Fifth Circuit's eternal recurrence 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're recording this on Thursday, April 10, 2025, and I have two of my Institute for Justice colleagues with me today to try to discern this latest chapter in a very long book from the Fifth Circuit about a citizen journalist who was arrested for no good reason and seems unable to have her constitutional rights vindicated for no good reason. We will also discuss video rental practices of the 1980s and what they have to do with how you interact with websites today. But first, I would like to introduce my colleagues. They are Kirby Thomas West, who will be talking about this latest case from the Fifth Circuit, Villareal v. City of Laredo. And also, we have Jacob Harcar returning to discuss the video rental cases in a little bit. So, we'll get to Kirby first with her case, but before that, I just want to ask Jacob. So, Jacob is going to discuss this case about legislation that was passed in the 1980s about keeping video rentals private. Of course, hardly anyone does that today, but the law still arguably applies in different contexts. But, Jacob, I have a question for you. You're a bit younger than me, so I'm wondering, have you ever gone to a store of some kind and rented a VHS cassette to watch a movie

J **Jacob Harcar** 03:07

Yes of course. I'm not that young. The transition from VHS to DVD happened when I was in second grade, and then I think we were a little later to get one compared to other people in my

town. But, yeah, we had A Second Cinema Video back in Streeter, Illinois was the place, and that closed down. And there's the family video. And I have very strong memories of going in there and just looking at VHS and then later DVDs. So, I'm old enough, I guess.

A Anthony Sanders 03:41

Yeah, I would say you're like the last flickering Twilight of the past-

J Jacob Harcar 03:45

Yes, because even my little brother is on the cusp, so he might not remember.

A Anthony Sanders 03:55

I think that's around the time I last rented a VHS cassette- it was probably mid 2000s maybe a little earlier than that. Kirby, I'm sure you have a similar memory to Jacob, but do you remember your last VHS rental?

K Kirby Thomas West 04:13

I do remember, I think probably about the same time from a Blockbuster Video in Clark Summit, Pennsylvania. But I was probably a little older. Anthony didn't point it out, but obviously Jacob is also a little bit younger than me. So I do have memories of that, but it's been a while now. Now my children don't even understand the concept of watching commercials on television, let alone having to go to a store to get what you want to watch.

A Anthony Sanders 04:42

Well, we had DVDs in our family for a long time. It's mostly been Redbox for the past few years, though even that feels a bit quaint these days. I think they're still around. What's also still around is Villareal v. City of Laredo. We've covered this case at least two, maybe three times before- I didn't go digging through the archives- but the last time was just last fall when we had JT Morris of FIRE on the show. He's lead counsel in the case and talked about his cert petition that went to the Supreme Court, which was granted, and then the case was GVR'd- granted, vacated, and remanded- based on our victory in the Gonzalez case last year. We'll touch a bit on what happened to Ms. Villareal today, but for the full story, you can go back to one of our previous episodes. It's just absolutely outrageous, and yet, despite the Supreme Court sending it back, the full Fifth Circuit still found qualified immunity against her. Now it's gone back down, and somehow, even though she won at the Supreme Court, she's still facing a qualified immunity ruling against her. So, Kirby, can you tell us how this could happen?

K Kirby Thomas West 06:12

I will try my best, Anthony, but I don't know that I can tell you exactly how this happened. I definitely recommend to folks the episode with JT for a fuller explanation of the case and the

definitely commend to folks the episode with JT for a fuller explanation of the case and the facts, because they are so egregious. But I'll start with a brief recap, just to catch people up if they've forgotten or haven't heard those past episodes. Priscilla Villarreal is a citizen journalist and vlogger who covers crime and other local events in Laredo, Texas. It's important to note how valuable this service is, as local journalism is struggling in this day and age. She's providing a critical service by actually covering local events in Laredo. As part of her work, she got information from police officers, often through back channels. She asked an officer to confirm some facts that had been freely given to her about a story she was covering. For this, she was arrested and charged under a Texas statute that, throughout this interminable litigation, no one has been able to point to as having been successfully used to prosecute anyone else. The statute prohibits the misuse of official information, making it clear that she was targeted for speech. Even more problematically, the evidence shows that she was prosecuted because the authorities didn't like her or the journalism she was doing. During her arrest, she was treated abysmally- handcuffed, mocked, and photographed by officers. Truly beyond the pale, and all because of the journalism and speech she was engaged in.

A Anthony Sanders 08:08

And that's considered bad under the First Amendment, typically right?

K Kirby Thomas West 08:13

That is correct, yes, as a matter of constitutional law, the Constitution says that is bad. If you are engaged in First Amendment expression, the government cannot expressly punish you for that First Amendment expression.

A Anthony Sanders 08:26

For example, there very recently was this case that the AP had that they were banned from the White House press roombecause they refer to a certain body as water, as the Gulf of Mexico. And the Court said that they actually had a claim, because that is viewpoint discrimination, and they were punished for their speech, essentially.

K Kirby Thomas West 08:48

Yes. I would have loved to have gotten that case- that's a big miss. I'm not sure what body of water you're talking about. I think it's the Gulf of America. Is that right? Is that the old name for it?

A Anthony Sanders 08:59

That's what it says on the map now, apparently.

K Kirby Thomas West 09:02

So, the latest installment in the courts, installment 1582 of the Villareal case, is, as you mentioned, Anthony, a remand to the Fifth Circuit to reconsider their past decision in light of IJ's win in Gonzalez v. Trevino. In Gonzalez, the court said that in First Amendment retaliation cases, there's generally a rule that you cannot assert a First Amendment retaliation claim if the officers had probable cause to charge you. But as the 2017 case Nieves said, there's an exception to that probable cause bar where you can say that other people, other similarly situated people, have not been charged with a crime, and people who did not engage in that kind of protected First Amendment expression that you're alleging you were punished for or retaliated against for. The Fifth Circuit previously interpreted that Nieves rule very narrowly, where you had to essentially find an exact, specific person who had done the exact kind of thing and been charged with the exact specific thing, and say "okay, this person didn't say what I said, and they didn't get charged, but I did say the thing, and I did get charged. So I can overcome that probable cause hurdle." In Gonzalez v. Trevino, the U.S. Supreme Court agreed with IJ that that's not the right way to look at the Nieves rule. You have to take into account situations like our case in Gonzalez or Ms. Villareal's case, where nobody has ever been charged under the statute before. So how could you possibly find a specific comparator?

A Anthony Sanders 10:41

And so bad there's no one to compare yourself to

K Kirby Thomas West 10:44

Exactly- essentially saying the worst case is you're going to have a hard time under this rule because it's never been done before, because you were so clearly targeted. So, in Gonzalez, the U.S. Supreme Court said, "No, you should be able to point to other evidence and that this is too restrained a reading of what was said in Nieves." In light of Gonzalez, they remanded this to the Fifth Circuit. Anthony, I was so happy to hear that you had the same interpretation of this that I did, because I was baffled to read this latest Fifth Circuit decision, where the court once again said these officers have qualified immunity, and essentially, we don't have to look at any evidence or anything like that; because not only does Gonzalez v. Trevino postdate the incidents in the Villareal case, but even Nieves, which ultimately established this rule, also postdates the incidents alleged in this complaint. So, under prong two of qualified immunity, there was no clearly established rule, and it was just "plainly objectively reasonable" that these officers did what they did, again, engaging in a concerted effort over time to retaliate against someone in this humiliating way, but "plainly, objectively reasonable," so they get qualified immunity. The Fifth Circuit's done with this case. Now, I'm confused by this, as I think you are as well, because that's exactly what they did last time. Presumably, when the U.S. Supreme Court remanded, and this is what comes up in the dissent in this case from Judge Higginson, the Supreme Court remanded in light of Gonzalez. It seems like they wanted the Fifth Circuit to do something related to what happened in Gonzalez, and the U.S. Supreme Court was presented with this argument on qualified immunity. Presumably, they are just as capable as the Fifth Circuit of saying, "Oh, actually, Nieves, Gonzalez, all this stuff happened after, so it wasn't clearly established, so sorry, they get qualified immunity." The U.S. Supreme Court could have said that, but it didn't. It said remanded in light of Gonzalez. So, I think it's just baffling why the Fifth Circuit can essentially give us the exact same qualified immunity analysis, or a very similar one, saying the officers get qualified immunity here.

A Anthony Sanders 13:09

So, there's this interesting concurrence by Judge Oldham, which talks about the distinction between the right and the remedy. He argues that qualified immunity should be about the right, not whether the remedy- like the statute in this case, Section 1983- gives you a cause of action or what defenses might apply to that cause of action. The underlying right, in this case, the First Amendment right, is what should be the focus. He cites a 2012 Supreme Court case, Rachel v. Howard, which essentially set things up where you'd fail under this rule, or it wouldn't be clearly established, your First Amendment right. But that changed again with Nieves. I get his explanation- it's a lot better reasoned than the majority opinion- but I still don't fully understand, because Nieves is about qualified immunity and the remedy too, just like Gonzalez. So, what's he talking about?

K Kirby Thomas West 14:24

Yeah, it's almost like Judge Oldham was making a really interesting point about the distinction between rights and remedies, something I hadn't fully considered before, but it made a ton of sense. What Nieves is saying isn't that there was no First Amendment violation, because the First Amendment clearly prohibits punishment for protected speech. The violation happens when you're punished for that speech. What Nieves focuses on is when you might not be able to vindicate those rights, specifically when you can't achieve a remedy for them under Section 1983. I think that's a much more interesting way of looking at it, and it makes sense to me. But what I think Judge Oldham is getting at is that this distinction between rights and remedies itself wasn't clearly established. Under Rachel, it seemed the Court said there's no right to be free from retaliatory arrest if there's probable cause. So, Judge Oldham points to Rachel as the clearly established law, and in that case, it seemed like there was no First Amendment right at all. It wasn't until Nieves in 2017 that the Court clarified that while the right could have been violated, the issue was the remedy- whether you could actually get redress. So, Judge Oldham uses this older case to argue that the majority is right, there's no qualified immunity here. One thing I really liked about Judge Oldham's concurrence is that the second half calls qualified immunity into question broadly, which I liked, and I'm sure the IJ crowd did too. Specifically, he calls out how qualified immunity doesn't make sense, if it makes sense at all, outside of situations where law enforcement officers are making split-second decisions. I think his point about split-second decisions is worth quoting. He says, "Officers are often forced to decide in the blink of an eye if using deadly force is necessary to save or protect themselves or the innocent public. Those officers generally are not lawyers, and I hope they are not spending their days reading Fourth Amendment cases and going to CLE presentations. So what should the law do when an officer makes a reasonable, good faith split-second decision in such circumstances and he turns out to be wrong? The answer is qualified immunity." He goes on to argue that judges, from the comfort of their chambers, aren't in a good position to condemn officers for acting unreasonably in split-second situations, except in the most egregious circumstances. And then he says this type of reasoning for qualified immunity doesn't apply at all in cases like Villarreal, where there's a long-term, concerted effort to violate constitutional rights, and the officers are not under any threat, except possibly having their misdeeds exposed by a citizen journalist. I appreciated that a lot, although I do have a small quibble with his expression of judicial humility. He talks about the need for humility because judges aren't law enforcement officers, which I respect, but this humility feels a little odd given that qualified immunity was essentially created by judges themselves. It's a weird tension- "we have to be

humble and not judge law enforcement," but there was no judicial humility when it came to inventing qualified immunity in the first place. That said, I think Judge Oldham is right that qualified immunity makes zero sense in situations like Villarreal or Gonzalez v. Trevino.

A Anthony Sanders 18:26

Yeah, and I mean, that's on top of the usual confusion, which he doesn't go into, about how this split-second decision-making allowance you would give to officers in that situation is already built into the actual test of whether there's a constitutional right violated, whether reasonableness under the Fourth Amendment or excessive force, whether that excessive force was called for. Like, the split-second situation itself is built into that. So it's just another level of kind of split-second protection, which, okay, fine. And I guess he's saying, "Okay, I'm willing to give that right," even though it's already built into the test of the underlying constitutional right. But it's bonkers to give it when someone has months to think about whatever the situation. Jacob, do you have a better way to untangle whats going on here?

J Jacob Harcar 19:24

Unfortunately not. And I didn't go back to read the older panel. So, I kind of thought, "Oh yeah, they did something there, and now they're addressing the qualified immunity question," and they made the decision. Then hearing you talk about it earlier, I was thinking, "Oh, they must be wrong. They must have misunderstood what happened." But, yeah, with respect to the points themselves, I think the point that was most persuasive was- and this gets into weird questions about appellate procedure that I'm not as familiar with- but the dissent makes the point that this should be remanded to the district court so they have a full opportunity to brief this and just allow all the considerations to be made, opposed to deciding everything right now. Do either of you know, like, what the usual procedural rules are governing what exactly you do when you get remanded by the Supreme Court?

A Anthony Sanders 20:38

Yeah, that is a great question. And the answer is, it varies all over the place. And this is unusual because it's the en banc court that had it last time, so they're just kind of like, well, we're still en banc. We're going to take it here. Often, it could go to a three-judge panel. It could be remanded all the way. I find maybe it's a little cynical, and I haven't read a full study on this or anything, but just seeing these cases happen over and over again and be remanded often, what happens is it goes back to the three-judge panel. And if it's a real legal issue, and something that's been waiting to be addressed, the three-judge panel will often deal with it instead of sending it all the way back down. But if it's anything factual, or if it's a whole new thing for the case, then they would often send it back to the district court. And, you know, the thing is, there are pros and cons to both. If you go back down to the district court, it's probably going to be another appeal, so the wheels of justice move even slower. If you're a plaintiff, you might want to stay at the appellate court, but maybe you think you'll get a better shot and create a better record in the district court. So, there's no one right answer. It does seem a little funny, though, that the en banc court did it here, where it's essentially doing the same thing it did last time, just with different reasoning. Kirby, do you have a better answer than that?

K Kirby Thomas West 22:19

I don't. I mean, I found that a little strange too. One thing the dissent mentioned that surprised me about the need to remand, almost in passing, was that the dissent also mentioned that the district court should consider to what extent probable cause actually existed at all, which seemed like it should have been addressed before. I'm not deep enough into this case to know to what extent that has come up or was addressed below, but it definitely seems like there's ample reason here to at least send it back down to the district court.

A Anthony Sanders 22:58

I think if we had JT Morris back on here, I'm sure he could fill us in. But I think from reading the other opinions, what's going on is whether that statute- because the statute is really wide. I mean, read literally, it's almost unconstitutional, which says that any non-public information, if you report about it, if you disseminate it, then it violates the statute; which includes calling up a police department, asking a question, getting information that the department considers non-public, and then disseminating that. Right? That's a violation. That's what she did. So whether the statute is unconstitutional on its face, then there might not be any probable cause, because there's no statute in the first place. And I think that's part of what's going on. The initial rulings- there were two initial panel decisions where the majority found there's no qualified immunity, that this is obviously awful, what's happening. But Judge Ho wrote that, and then it went en banc, and then we get this total reversal. Then it goes up. Now, one thing I'll say is I re-looked at the cert petition, which we discussed last time we were on the show talking about this case. The cert petition was very pointed at kind of the obviousness of the way to get around qualified immunity- that this was obviously unconstitutional for whatever reason. That's not exactly the same thing as what was going on in Gonzales, which was then remanded in light of Gonzales. So, we'll know more soon, but I'm thinking if this case goes back up, or they try to go back up, it's going to be- maybe they'll go for that again instead of this odd temporal argument that they cooked up the second time around. We may be getting all of this totally wrong, and hear from our friends at FIRE that, no, there's this, this, this. And if that's the case, we'll talk about that on a future episode. But what we're going to do on this episode is now turn to the heady days of the late 1980s when people were renting VHS cassettes, not Betamax. At that point, Betamax had pretty much gone by the wayside, although everyone says it had better quality. I've only actually seen Betamax a couple times myself. I don't think I've ever rented it because I never had a Betamax machine. But there was this incident where Judge Robert Bork, went to be confirmed as a U.S. Supreme Court justice. A lot of people know this story. He was "borked," he was voted down. Now, at IJ, over the years, we've said a lot of not-so-great things about Judge Bork, who died a few years ago, because of his judicial philosophy. It was like an arch, kind of avatar of judicial restraint. He wasn't a big fan of unenumerated rights- stuff like that. He said the Ninth Amendment was an ink blot, said the same about the Privileges or Immunities Clause. Okay, so that's all true. But he didn't deserve some of the things that happened to him in that confirmation hearing, even if you were going to vote against him. One was that a journalist went out and tried to find what his video rental history was to try to dig up some dirt. And there was outrage against that, enough bipartisan outrage that we ended up with this law against digging up your video rental history. So, Jacob, tell us about that. You're being ambitious here. You've got two cases that came out in short order from the Sixth and Seventh Circuits. Tell us a bit about what's going on there and why we're still talking about a law enacted about video rentals.

J Jacob Harcar 27:16

So, first, I want to read a quote from the article itself, which is available online. You can find it through the Wayback Machine. There are also links through Wikipedia. It segues into what you just said about one of the unfair things done to Judge Bork- someone finding his video rental history. He writes, and this is from a local reporter in D.C., Michael Dolan, who just happened to go to the same video rental store as Robert Bork. I think it was called Potomac Video. He says: *“What if you were a nosy parker Washington reporter and a little bird offered to slip you a copy of the complete list of VHS tapes rented from a D.C. video store by a prominent citizen being considered for a gig doing vocals with the Supremes? Would you scream First Amendment Ali Ali yaakson Free and start doing your news Hawk dance, succumbing utterly to the febrile desire for sensationalistic scapegoating? Or would you take the high road and decline to say an arbitrary and capricious opinion derived from such circumstantial evidence?” *I find this entire article very amusing. One of the other points in the article is that there was no salacious detail uncovered by this list. This author definitely has fun with it. Anyway, this article was published in the middle of Bork’s confirmation hearing. Of course, every senator in D.C., knowing that their video rental history could soon be freely given out by some random clerk at the video store, quickly passed this bill that was called the Bork Bill at the time. It’s formally known as the Video Privacy Protection Act. This bill basically makes it unlawful for videotape service providers to disclose this information. We’ll get into the exact statutory language as I discuss the opinions, but the reason this is still relevant is you might think, Wait, it’s about videotape service providers, those don’t exist anymore. The definition, as conceded in the opinions, actually applies to regular video or online video, and that’s where the action is in these cases. So, we have two opinions. The first one is from the Seventh Circuit, and it’s an opinion by Judge Easterbrook. The underlying facts here are that MeTV is a website. It has a lot of old, classic TV shows. There’s this segment of code that you can put on your website called the Meta Pixel (after Meta, the owners of Facebook). What it does is, if you are currently signed into Facebook on that browser, it takes whatever information you have from visiting the site and sends it to Facebook. That’s where the violations of the Video Privacy Protection Act come in. It’s not the cashier at the local video store giving the info away. Instead, it’s done automatically through code- whatever information you have on that website is being sent to Facebook.

A Anthony Sanders 31:11

And I couldn't tell from the opinion, but is there a click box that says, "Is it okay to share the information?" Or does it just work without you doing that?

J Jacob Harcar 31:22

So, I’m pretty sure it just works. Now, there might be implementations where you have to consent, like, Do you consent to us sending information to Facebook and XYZ? And I think that’s very common. It’s one of those things you just click through when you’re engaging with a website. But that doesn’t appear to have been the case here. At least at this stage, there’s no indication that consent was given. So, essentially, there’s this lawsuit, and the main question in both of these cases is the definition of the word consumer. To read the actual statute, this is at 18 U.S.C. § 2710(b)(1): *A videotape service provider who knowingly discloses to any person personally identifiable information concerning any consumer of such provider shall be liable to

the aggrieved person for the relief provided in the statute. *The real question here is, what is a consumer? And the statute does provide a definition. It says: *The term “consumer” means any renter, purchaser, or subscriber of goods or services from a videotape service provider. *Again, it’s conceded that these are videotape service providers. So the real question in the Easterbrook opinion is whether or not you are a subscriber. To start, he establishes that the term subscriber doesn’t necessarily require a monetary exchange. If the company is receiving data in exchange for providing a service, that counts as being a subscriber.

A Anthony Sanders 33:29

Right. Because all these free websites, are not really free. It's that they're getting the data about you that they can sell to whoever- and that is why it is free.

J Jacob Harcar 33:42

But the other part of this definition, right, is the term goods or services. And this is where you get the disagreement between the Seventh and Sixth Circuits. There’s this argument that these goods or services have to be video services. It’s not just goods or services- it’s the goods or services from a videotape service provider. And the argument is that this means you’re only a consumer if you’re getting video-related services. The Seventh Circuit disagrees. It points out that the definition doesn’t say subscriber of video services; it says subscriber of services from a videotape service provider. So, for example, if you bought a Flintstones sweatshirt, a Scooby-Doo coffee mug, a Superman action figure, or a Bugs Bunny puzzle- all of which are available on MeTV’s website- then you’re a consumer. And if the company discloses information about you to a third party, they’re potentially liable. This approach aligns with a Second Circuit opinion in Salazar v. NBA that reached a similar conclusion. But then, within the same week, the Sixth Circuit released an opinion written by Judge Nalbandian, with a dissent, that takes a different view. He argues that the term goods or services needs to be read in the context of the statute as a whole. The statute says from a videotape service provider, and he reasons that even though the general dictionary definition of goods or services might be broader, the context of the statute limits the scope to video-related services. There’s a dissent here too, by Judge Bloomekatz, who strongly disagreed, essentially accusing Nalbandian of editing the statute itself- which, of course, is a common point of contention when you’re fighting about textualism often.

A Anthony Sanders 36:17

And cites to the Seventh Circuit opinion-

J Jacob Harcar 36:21

Both cite to it. That’s why I thought I had to talk about these two cases- they kind of came up right after each other. I’m pretty understanding of people having different linguistic intuitions than me. It’s one of those things where you read something, and it sounds like one thing, but then you see it another way. But I just don’t see it that way. To me, it seems like it’s a very broadly worded statute. And again, you could’ve easily said video services, right? It’s not like

this type of plain meaning is in contradiction to the obvious purpose of the statute, or anything like that. So, I'm kind of more on the Easterbrook/Bloomekatz side of this debate. But do either of you have any different kind of immediate linguistic intuitions about this?

A Anthony Sanders 37:36

Yeah, Kirby, where are you on the video law of the 80s, protecting your data in the 2020s

K Kirby Thomas West 37:44

I am totally with Jacob. I think the very Easterbrookian phrase in the Seventh Circuit decision, where he says "linguistic imprecision is a part of the human condition," is spot on. And it's like, maybe when they wrote the statute, they should have said 'Visual Services' or whatever, but they didn't. The U.S. Supreme Court has said to give the text its meaning. That's what we're engaged in here; that's our business, and that's what we should do. And like you said, it doesn't flatly contradict the purpose of the statute or anything like that. I think it's just an easy case textually. And I think the Sixth Circuit decision almost reminded me a little bit of Judge Kagan's quote, which I think she's since been irked at having quoted back at her, where she said, 'We're all textualists now.' This is the fighting ground now. And even if you want to come to a result that's kind of anti-textualist, you have to at least clothe that in the tools of textualism. The Sixth Circuit tries to do that with using the Canon nos socius. I don't know if I'm saying it right, and probably never am, with Latin phrases.

A Anthony Sanders 38:53

I've heard it said that way. So you're with those people at least.

K Kirby Thomas West 38:56

Okay, I'll take it, but it just doesn't seem applicable here, right? We don't really engage in the canons of construction unless we have an additional matter, something that's ambiguous. And here, we just really don't have that. And that can be the tricky gray area of textualism- how much ambiguity is enough ambiguity to bring in these tools of construction and really analyze. But it just doesn't seem like that's where we are here. One quote from the Sixth Circuit case that stood out to me was when they quoted from another case, saying, 'The meaning of a sentence may be more than that of the separate words, as a melody is more than the notes. And no degree of particularity can ever obviate recourse to the setting in which all appear and which all collectively create.' And this is just such a very, like, ah, you know, we have to feel what the words mean. We can't just understand what the words mean by their plain language. So, that was a long-winded way to say, in answer to your question, I agree with Jacob.

A Anthony Sanders 40:05

Yeah, it is. Oh, I love that you gave that quote, because it's kind of an old-school approach. So, old-school meaning before the rise of modern textualism, like purposiveness about the language. The purpose of this statute is not to cover whatever's going on online, obviously. And

language. The purpose of this statute is not to cover whatever's going on online, obviously. And so we just can't read 'consumer' that way, which, you know, used to be kind of a more Warren Court era way of reading statutes. And now, it's funny, it's being brought up here, because the shoe is on the other foot. Big corporations are being sued. I think the case they quoted, this case from the Second Circuit, Salazar v. NBA- now this one from the Sixth Circuit, Salazar- I'm pretty sure it's the same guy, Michael Salazar.

J Jacob Harcar 40:54

Yeah, I haven't done a background check. I'm pretty sure they're both class actions as well. So, yeah, the Sixth Circuit is about 247 Sports Comm. Oh, by the way, anybody who's concerned about this, there are extensions you can download that will identify whether or not there's a Meta Pixel on a particular website. I can't verify whether they actually work, but I know that at least on the Google Chrome extension store, I did check both websites, and they currently don't have it, at least according to this extension.

A Anthony Sanders 41:31

Sorry, Jacob. Listeners and viewers will remember that we had a show a number of months ago, where our own Will aAronin went on a tirade about Papa John's website and how Papa John's does this with digging up your information. And we were wondering if they even see other stuff on your computer and things.

J Jacob Harcar 41:54

Oh, I remember this one, yeah.

K Kirby Thomas West 41:57

Can I offer a contrarian viewpoint here, which is, I feel like I'm the rare libertarian who kind of enjoys being spied on by these companies because they give me the ads I want to see. I don't want to see just random ads for stuff that I'm not interested in. I love that I get ads and I am like, "oh, I will actually buy that. That seems cool. It's relevant to my interests."

A Anthony Sanders 42:17

I want to make clear I am not demonizing these big corporations for doing this data mining stuff. I have mixed views on it.

J Jacob Harcar 42:26

I'll demonize them. I'm kidding. But its one of those things where my initial reaction is I don't like people knowing stuff about me without me, like wanting them to. And so even if it is to my benefit, it's just one of those kind of things.

K Kirby Thomas West 42:43

Yeah, totally fair. I think you should opt in. And I would.

A Anthony Sanders 42:48

Yeah, and who knows. One thing we talked about there is- that Will was denouncing- you said everything went wrong with the shrink wrap case in the 90s, where you started having these give up all your rights by clicking on the box or whatever. But the origin of that was the shrink wrap case because you had to open the package to even see the contract. And that case was written by Judge Easterbrook. So, look, it's all coming around again. Of course, now we have this legislation from before that time even about privacy rights. So one thing I was going to say, a little counter to this textualism here. And I don't know where I fall on this, but I was thinking, okay, textually, 'consumer' does seem to include someone who orders a Flintstones T-shirt on this website. And so they're a consumer, and they're protected from the sharing of the information. So think of a video store, right? They were actually thinking about when they passed this law. You go into a video store. I think there was one called Movie Magic in my hometown. But you go in the Movie Magic, and you buy a packet of M&M's, but you don't have an account there. You don't want to rent that night, but you're like, oh, yeah, where can I get some candy? Oh, I'll just go right in here in the video store. And then that video store shares with someone that you bought a packet of M&M's. Is that covered by the statute? It seems exactly the same logic. And yet, I'm guessing at that time, it would have seemed really odd to everyone that the video store was prohibited from saying, "I bought the candy" versus "I rented, you know, whatever the movie was." And like taking it more broadly- we all remember video stores where it's like a gas station, and they do a zillion things in there, or some corner store, and they also have video rentals. So say, I buy all kinds of stuff at that store- whether I rent a video or not- and then someone comes in and gets information that I bought whatever it is at that store. Maybe it's a cop asking if I bought guns at the store. Maybe it's something totally innocuous. Who knows? Is that under the statute? It just seems like that's odd, or is that just as odd as buying the Flintstones T-shirt? What do you guys think?

J Jacob Harcar 45:24

Two responses. First, the Bloomekatz dissent discusses back when supermarkets used to also have a little section that sold videos and in parentheses. "I actually remember this, like I was there." And so I think that that's one of those things where, at least for Bloomekatz, I think her response would be that that doesn't change the meaning. But there is a footnote in the Melbandian majority that says that for those persuaded by such evidence, the vppa's legislative history actually is on my side, because in the Senate report they say, "simply because a business is entangled in the sale or rental of video materials or services does not mean that all of its products or services are within the scope of the bill. For example, a department store that sells video tapes would be required to extend privacy protection to only those transactions involving the purchase of video tapes and not other products." So this gets into the like when can we trust my legislative history? Who wrote it? How many actually? And I know what Easterbrook would say to this, "Yeah, but that didn't go through bicameralism and presentment. That's not the law. Melbandian recognizes that too, by acknowledging the issue but still focusing on what's actually in the law.

K Kirby Thomas West 46:57

I think I'm less troubled by the first example you gave, Anthony, where it seems like, if you're a video service provider, or whatever it is in the statute, these are the rules that apply to you. Sometimes certain businesses have different rules, and this is one of the rules for you on the plain terms of the statute. I think there might be more of a textualism issue with the second example- and this is contrary to the legislative history that Jacob just gave us. But again, I don't know how much to merit that legislative history. I think there could be a genuine question about what constitutes a video service provider, right? Does it have to be most of what you do? Although then it could reach the weird result of maybe there are some people providing the service who don't have to follow up with these rules or something.

J Jacob Harcar 47:42

Would you like the definition? I'll also reread it. Because one of the things about podcasts about this is- when I am listening I always want them to just say the text again, so I can actually not have to go to my phone and look it up.

A Anthony Sanders 47:59

So I'll put the case in the show notes as well.

J Jacob Harcar 48:03

Yeah, please. So the term video tape service provider, means "any person engaged in the business in or affecting interstate or foreign commerce of rental, sale or delivery of pre-recorded video cassette tapes or similar audio visual materials, or any person or other entity to whom a disclosure is made under subparagraph D or E of Subsection B2 but only with respect to the information contained in the disclosure."

K Kirby Thomas West 48:33

Well, there goes my theory.

A Anthony Sanders 48:37

It seems like any business of any kind. Because the interstate commerce, we know that story, right? That's going to be anything.

J Jacob Harcar 48:44

Yeah, I love that they had the jurisdictional hook. Is it called that?

A Anthony Sanders 48:48

Yeah. Yeah, you can't do the Lopez challenge.

J Jacob Harcar 48:54

And again, just because I haven't said in a while, the term consumer means "any renter, purchaser or subscriber of goods or services from a video tape service provider."

A Anthony Sanders 49:04

Right. So if you have a massive supermarket, and they rent five videos a month, and you buy anything from them, you are a consumer. Under Easterbrooks reasoning.

J Jacob Harcar 49:21

Because the term goods or services doesn't say video related goods or services. It just says goods or services.

A Anthony Sanders 49:29

And because of the Sixth Circuit, we now have a definite circuit split.

J Jacob Harcar 49:34

Yeah, and there was a cert petition for the earlier Salazar case. I don't know if it's been resolved yet. Oh, by the way, we're kind of missing one of the fun things, which is the whole standing question, that I skipped over. But it's fun, hey get into TransUnion, whether or not. I agree with Nabenian on this one, that there isn't injury that's sufficient enough to a common law.

A Anthony Sanders 50:00

And he's actually going online and doing it's not like the hotel case we talked about a while ago. The Supreme Court case, where the woman who was disabled-

J Jacob Harcar 50:13

Lochner

A Anthony Sanders 50:14

What's it called?

J Jacob Harcar 50:16

It was Lochner

A Anthony Sanders 50:20

Right and there was really no indication she was actually going to try to access the hotel. I mean, this guy's going on the websites.

J Jacob Harcar 50:27

Well, and for here, the injury is that there's this disclosure to somebody else of this information. And so that's analogous. And this was actually brought up in TransUnion, in which the Supreme Court was like, well, there's this wrong information, but it wasn't given to anybody. And so if it wasn't given to anybody, it's just not like all these other common law harms, in which some type of information about you was made public or sent to somebody else, it just doesn't fit. And so at least a lot of the cert petition, talked about the standing issue. And so that'd be fun if there's another standing argument that gives a little more clarity on TransUnion.

A Anthony Sanders 51:13

Yeah or maybe a little retreat from TransUnion, because I know all that the standing scholars are here on fire, rightfully so about some of the things it says about traditional notions of standing, but that'll be another show. So, there's been a great discussion with these two cases. Before we wrap up, though, I promised a little "Where Are They Now?" So, we're going to go back and just update people on a couple of cases we talked about a while ago. It takes a while for these things to percolate from an appellate court decision, but a little bit of news, and then we will close. So, one case we talked about almost a year ago now from when this is being recorded- we talked about with Michel Paradis, who is a professor at Columbia Law, and he discussed an oral argument. And then later there was the opinion in Connell v. CIA, which was about the relationship between FOIA and the CIA. So, the CIA won, maybe unsurprisingly, in the D.C. Circuit. That went up there; there was a cert petition, and the CIA, with the SG's office, has asked for and received six motions for an extension to file their response brief in that case. So, it doesn't mean the court's going to take it at all, right? But they've asked six times for it. I can't imagine asking a court that many times and like actually being granted, right? It's impossible, right?

J Jacob Harcar 52:51

Do they have a good reason?

A Anthony Sanders 52:52

Well, I think the reason is the change in administration. I am trying to figure out what the heck people at the CIA think about this. I'm sure they're just as anti-FOIA at the CIA now as they were before. I mean, it's the CIA, but anyway, and they got the new SG's people in the SG's office. So, anyway, they've had six motions for extension. And so, finally, the response is due May 21. We'll see if there's a seventh. Yeah, I don't know. We'll see. But that's the update on that one. That's a case that just keeps on going, kind of like a case we talked about a little earlier. Then another case... this is at the end of the road. Rob Frommer from IJ discussed the case a few months ago, US v. Rogers, which was about whether someone had standing to object to a search on Fourth Amendment grounds when they were in the passenger seat of a car and claimed it wasn't their car. At first, that went to the Supreme Court, and it did get reconferenced, I believe, but it was denied just recently, so that case is over. And a case that Kirby talked about a few months ago, McRae v. Metos, I think I might be getting that right. We talked about in Short Circuit 333, that was last July, and it went up to the Supreme Court. I'm sure Kirby remembers better than me, but basically it's about a woman who was hired as a teacher, but then they found out stuff she said on social media before she was hired and fired her. And it's whether that speech is covered by the Pickering test about public employees' speech. And did I get that right, Kirby?

K Kirby Thomas West 54:41

Yes, you did.

A Anthony Sanders 54:43

And that has been rescheduled at the Supreme Court, so they're still looking at it, and perhaps they're going to take it. I don't have the red docketed date yet, but that's also percolating. So, those are the updates. "Where Are They Now?" We'll do a similar segment soon, but for now, I'd like to thank both Kirby and Jacob for coming on and having this conversation. And for the rest of you, please be sure to follow Short Circuit on YouTube, Apple Podcasts, Spotify, and all other podcast platforms, and remember to get engaged.