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SPEAKERS

Anthony Sanders, Keith Neely, Joshua Fox

A Anthony Sanders 00:00

"Here is what to do if you want to get a lift from a Vogon, forget it. They are one of the most unpleasant races in the galaxy — not actually evil, but bad tempered, bureaucratic, officious and callous. They wouldn't even lift a finger to save their own grandmothers from the Ravenous Bugblatter Beast of Traal without orders signed in triplicate, sent in, sent back, queried, lost, found, subjected to public enquiry, lost again, and finally buried in soft peat for three months and recycled as fire lighters." Well, I thought of that passage, which, of course, is from The Hitchhiker's Guide to the Galaxy by Douglas Adams, when I was reading a case that we're going to be discussing this week from the Sixth Circuit about the Attorney General of Ohio. I'm wondering if he is, in fact, a Vogon. Well, we will discuss whether that even is relevant, however, to a First Amendment claim that has been filed against him. All that and more this week on Short Circuit, your podcast on the Federal Courts of Appeals. I'm your host, Anthony Sanders, Director of the Center for Judicial Engagement at the Institute for Justice. We're recording this on Tuesday, December 3, 2024. Today, I have two very intelligent and non-Vogonic Institute for Justice attorneys with me to discuss the events of the day in the federal courts of appeals. One of them is an old timer who has his own show that will be hearing from in just a moment, but first a first timer, and that is Josh Fox. So I'm very glad that Josh is joining us. He is currently working at IJ. In the past, he worked in big law for a bit, and before that, he was at the University of Chicago School of Law, where he graduated a couple years ago, and that puts him in good league with my wife, who's also a graduate of that esteemed institution. He is a graduate of Washington & Lee University for his undergrad, and also he clerked at the Federal Court of Claims for Judge Ryan Holte. I believe that's how you say it. So Federal Court of Claims: we haven't talked much about that court before, Josh, but it's an integral part of the the federal judicial system. So tell us a little bit about it.

J Joshua Fox 02:35

Yeah, well, first, I'll say I have a copy of Hitchhiker's Guide in my office down the hall. So good opening there.

A Anthony Sanders 02:41

Very good. Yeah, I don't think I do. I had to look it up online.

J Joshua Fox 02:44

Yeah, the Court of Federal Claims is a pretty unique court. So Article One, so it derives that—it's technically a part of Congress, I guess you could say, a part of the legislature, because every decade or so, the Court of Federal Claims will have a case referred to them by Congress to settle out an individual bill. What does the government owe to some person, some entity? And so because of that, it's technically a part of Congress, but its general jurisdiction is all monetary claims against the federal government, so anything from government contract disputes, intellectual property, takings, vaccine injury. It's a really unique court, it has a fully civil docket. You know, DOJ is always on one side of the 'v.' so it's a really fun place to clerk, a fun place to go learn civil litigation. And really just a unique thing that doesn't exist anywhere else in the country.

A Anthony Sanders 03:40

So, say I was a welder, and I had a contract with a local post office to do some welding for them, and I disagreed about my payment, do I have to go to the Federal Court of Claims, or can that be filed in some more local federal court? And is it like certain contracts go to the Federal Court of Claims or, you know, how does that work?

J Joshua Fox 04:02

So the jurisdiction is shared between the Court of Federal Claims and the rest of the district courts: the Court of Federal Claims jurisdiction is derived from the Tucker Act, but there also is the little Tucker Act, and that essentially allows smaller claims, I think it's below $10,000 against the federal government to go to the regional district court. Typically anything higher dollar will end up at the Court of Federal Claims. So oftentimes, the prototypical case is you know, big defense contractors, or someone doing large renovations on a military base or for the VA, or something like that.

A Anthony Sanders 04:35

And then do all appeals go to the Federal Circuit, or is it more complicated?

J Joshua Fox 04:41

That's right. So all appeals go up to the Federal Circuit, which is right upstairs. And the courthouse, I should mention, is right next to the White House on Lafayette Square Park. So it's a really nice courthouse, good place to go visit—

A Anthony Sanders 04:53

Near the old IJ office, which is down on Pennsylvania Avenue.

J Joshua Fox 04:56

That's right. And yeah, so all appeals go to the Federal Circuit. And actually, one interesting little nugget about the Court of Federal Claims is it's, I think, the only trial, district court, what have you, that sits also as an appellate court. So in vaccine injury cases, you'll first sue and go before a special master who's somewhat part of the Court of Federal Claims, but akin to a magistrate judge that only deals with vaccine injuries. And from there, if those cases get appealed, they go to single judge panels of Court of Federal Claims judges. So it's a pretty interesting, little jurisdictional thing that I don't think people know about.

A Anthony Sanders 05:30

Yeah, so as a judge, so that's called a panel, but it's not really a panel.

J Joshua Fox 05:34

Yeah, exactly right.

A Anthony Sanders 05:35

And then—I feel bad about the Federal Circuit. We have done a couple cases on the show in the Federal Circuit before, and we put them in the newsletter every now and then, but we kind of give them short shrift, and that's mostly because I and John Ross and others at Short Circuit, we don't really understand what they're talking about. Usually it's intellectual property and that kind of thing, but we do occasionally cover it. And we did an international trade case, I remember, a couple years ago, I think at the Federal Circuit, when Scott Lindsay came on, and we've dabbled with him a couple times. So for Federal Circuit fans out there, I'm sorry, especially cases from the Court of Federal Claims. Maybe we'll try and do better in the future, covering your courts, but at least we have a clerk from the Court of Federal Claims, former clerk, here today, so we'll get to the case. It's not from the Federal Circuit, it's from the Second Circuit that Josh is going to do in a little bit. But first we're going to go to Keith Neely. So Keith, we had you on a few months ago when you were just starting this other show out. And since then, has that show been canceled?

K Keith Neely 06:42

Fortunately, not. No, it's going live.

A Anthony Sanders 06:44

The network's putting it through, huh?

K Keith Neely 06:46

So far. I mean, I think we're getting just enough views to scrape by. It's been pretty successful so far, I think.

A Anthony Sanders 06:53

And the network being the boss that Keith and I have, basically. So the show is "Beyond the Brief" and every couple weeks, you dive into another issue that that IJ deals with.

K Keith Neely 07:07

Basically, yeah. So you know, if listeners to Short Circuit ever hear one of our podcasts and think, oh, you know, I wish they would talk only about IJ cases, and I wish that sometimes they would even interview IJ clients, because I really want to understand not just the legal theories that IJ brings, but also the human stories behind our cases and why we do what we do. Well, then Beyond the Briefs is exactly the show for you. It's a regular, long form podcast that we release on YouTube and other podcast platforms. It's co-hosted by Kim Norberg, who is one of our great development folks, and myself, and each episode, we interview a combination of attorneys and clients, and we really just try to give an inside view of what litigating an IJ case is like, and what we're thinking about when we bring these new sorts of challenges to change the law.

A Anthony Sanders 07:58

Well, look it up: Beyond the Briefs. We'll also put a link in the show notes. So if you're watching us on YouTube right now, you can just look down at Beyond the Brief. Click on that. Stay on YouTube. You don't have to ever leave. I will also say that our other podcast here at the the Center for Judicial Engagement, Unpublished Opinions. We've had a recent episode out. We do one about once a month. We're having another one soon, so I'll put a link in the show notes to that as well. But two Short Circuits, so the Sixth Circuit had a lot to say about well, in the end, nothing at the en banc stage about this deal I was referring to earlier with the Attorney General. So, Keith, you clerked in the Sixth Circuit. Do you get what's going on here?

K Keith Neely 08:50

I do a little bit. You know, unfortunately, so I clerked for Judge Boggs from 2016 to 2017 he took senior status halfway through my clerkship. So one of the quirks of an en banc court is that only active judges get to participate. So I unfortunately did not have an opportunity to work on an en banc case while I was there, but I did get to watch an en banc argument. I know what goes

on behind the scenes. Generally, I recognize quite a few of the judges here and what they're fighting over. And I think it's a really fascinating case, and it's one that I think will make its way back to the Sixth Circuit again fairly soon.

A Anthony Sanders 09:31

Yeah, we talked on en banc itself. We talked with Joe Diedrich, who's a Wisconsin appellate practitioner, who had talked about his en banc argument recently at the Seventh Circuit a few weeks ago. And this is another example of that, it looks like they had arguments six days before the election. You said you saw an en banc argument—I just want to ask about this before we dig in the meat potatoes of the case—you said you saw an en banc argument when you were clerking. Is it like—I've never actually been there in person—is it pretty intense with that many judges, and the one practitioner there, and you're getting fired from, like, all different corners of the courtroom, you know, even more than you would at the Supreme Court?

K Keith Neely 10:17

Right, right. I mean, you have a bunch of judges. I mean, in this this case, for example, 16 active judges on the circuit. They hold it in the main courtroom in Cincinnati. It's this beautiful, massive wood paneled room where portraits are hung all around with the previous chief judges of the Sixth Circuit, including former President and Supreme Court Justice, Mr. Taft, who famously was a Sixth Circuit Judge before he made his way up to the US Supreme Court. So it's a very austere place, and you combine that with the pressure of being, frankly, interrogated, sometimes cross examined by some of the most talented judges in the country, and...it's definitely fun to watch. I'll put it that way. I haven't had the chance to argue at an en banc court yet, but I can probably tell you, it's a lot more fun to watch than it is to actually participate, I'm sure.

A Anthony Sanders 11:14

Well, the important thing is, was this a fun opinion to read?

K Keith Neely 11:18

It was, I think it was, it was a fun opinion the more you dug into it. There's a lot of stuff going on here in the background that you really don't get a chance to appreciate until you start looking at the original panel decision and the district court decision, and in this case, actually some of the en banc briefing, because that's where the real interesting story here starts to unfold. So let's just start by digging into it. You know this, this is a case about a First Amendment challenge to Ohio's ballot initiative procedure. So a little bit of background: Ohio, like many other states, provides a mechanism through which voters can propose a constitutional amendment. You put it on the ballot. If enough voters say, Yes, I like this, then you can amend the Ohio constitution. Now, Ohio also says that the state can regulate the manner of those ballot initiatives, which makes perfect sense. You have to have some sort of a threshold to get on the ballot in the first place. And so the way that it works in Ohio is you got to create a

committee, then you got to put together a proposed amendment, a proposed summary of that amendment, and then you have to send it to the Ohio Attorney General, who is supposed to review it for and I'm quoting here "fair and truthful description of the proposed amendment." And then once the AG certifies that he sends the proposed amendment language to the Ohio ballot board, they review it, they sign off on it. It goes to the Secretary of State. Then you get to have the process of collecting the big amount of signatures, right? So we start with 1000, after you go through this process, you got to collect—I think in this case, based on the way that the system works—it would be approximately 400,000 signatures. And once you do that, and everything goes through a second review with the ballot board and with the Secretary of State, then it finally goes on in the next general election, and all of this has to happen at least 125 days prior to the next general election, or else it just doesn't get on the ballot. So what happened here? What's the issue that's going on? So there was a group of Ohioans who, and I think many IJ listeners will empathize with this, they were frustrated by government immunities, and they had this phenomenal idea: we're going to amend the Ohio constitution to explicitly provide that with certain state law tort causes of action against the state of Ohio, its officers, its departments, its instrumentalities, we are going to amend the Constitution to say no immunities or defenses. Now, as you might imagine, government officials probably are not all that thrilled about that proposal. Why are you holding me accountable? And in this case, they filed one of these, 1000 signatures, the proposed language, and the proposed summary with Ohio Attorney General David Yost, first in February of 2023 and he reviewed it for fairness and truthfulness, and he rejected it. So they said, Okay, he explained a few reasons why he thought it wasn't a fair and truthful description. And so they took those into account, submitted it a second time, and he rejected it a second time. And this happens a total of seven times that he gets this and says not fair and truthful.

A Anthony Sanders 14:51

And there's nothing in the law saying he has to put everything the first time, that like it's waived if he doesn't approve it. It's like, he can just keep doing this over and over again.

K Keith Neely 15:00

Well, and you know, the the opinion here talks about some of those reasons. And there's a laundry list that he gives at various points. I want to cover just a few of them, because I think they get more and more ridiculous with time. So the first issue when they submitted it in February 2023 was that he said, look the summary provides a list of venues where you can file a suit. That seems not problematic to me, but he said that the summary made it sound like that list of venues was exhaustive, and when you look at the text of the amendment, the text of the amendment doesn't cover venue in a situation where you're suing multiple defendants who may live and work in different places. So he dinged it on the ground that the summary implied that the venue list was exhaustive, but the text didn't cover this very hyper specific instance of venue. Another one was he dinged it because the text of the amendment defined the state of Ohio to include elected state officers. The summary of the amendment lists state officers and departments and instrumentalities, but doesn't specify elected state officers. That was another reason that he dinged a second attempt to get this through. On November 23 of 2023 he denied it because the summary did not include "or any subset of immunities and defenses," because the scope of the amendment, according to the AG, was to eliminate not just your qualified immunity, but also other immunities. So they turned around and they included "or any

subset of immunities." Lo and behold, March 2024, he dinged them because they included the language "any subset of immunities." And my personal favorite: all the while they've been submitting this proposed summary with a title, the title is not required under Ohio law. It's perfectly optional, and the title of the summary of the proposed amendment was Protecting Ohioans Constitutional Rights. That title had been included in every one of these submissions in March 2024 he'd never dinged them for it before. He dinged them for it and rejected it this time. Why? Well, because protecting Ohioans constitutional rights, that's a subjective, hypothetical determination when this amendment is really about removing government immunities from certain causes of action. So I think at this point, you know, IJ always litigates under the presumption to never attribute to malice what can be attributed to incompetence. Well, at some point you run out of stupid. And I think this is the problem that that Dave Yost is dealing with in Ohio right now. And so after this denial in March of 2024 the petitioners filed an original action in the Ohio Supreme Court. So for some background, when the AG either certifies or refuses to certify one of these petitions, that decision is reviewable. It's a matter of original jurisdiction at the Ohio Supreme Court. So they turn around and file this because, look, if they want to get this on the ballot for the 2024 election, you got to get it 125 days in advance. They finally got to the point where they realized the AG is not going to approve this no matter what we do, so we have to get this to the Ohio Supreme Court. Now, under the law, the Ohio Supreme Court is required to give expedited review to these sorts of election questions if they're filed within 90 days of an election. In excess of that amount, though, it's purely discretionary, and of course, because they have to get it on the ballot at least 125 days in advance, they're not within that mandatory expedited window, so they requested discretion: Ohio Supreme Court, please, please rule on this quickly. The AG opposes it, and the Ohio Supreme Court turns around and does not agree to hear it on an expedited basis, which means, in effect, that they're not going to hear this issue in time. Exactly, it would take far too long. So at this point, finally fed up with all of this...chicanery, is the only way I know how to describe it —at this point, they turn around and they file in federal court a First Amendment complaint alleging that the AG, that this whole process, and specifically, in addition to what the AG has been doing, the fact that there isn't an effective mechanism for review that will permit a timely ballot initiative to appear in time for the election because of that 90 day-125 day gap. And so they file a complaint in federal district court. Of note, before they do so, they voluntarily dismiss their appeal at the Ohio Supreme Court. This is to get around Colorado River abstention, which, if they had kept this Ohio Supreme Court action going and then filed this federal case, the court would have said, Look, we don't have jurisdiction. There's an active federal suit going or an active state suit going on involving the same parties and the same issues. We can't touch this. So they withdraw their Ohio Supreme Court appeal. They file this case in federal district court. They seek a preliminary injunction. District court says no, so they go up to the Sixth Circuit, and the panel, a divided panel, says, Well, of course, this is a First Amendment problem. You can't do this. I mean, it's so obviously pretextual, what's going on? And they reverse the district court and grant the injunction. And then the Sixth Circuit decides that they want to take up this case en banc. Now when the Sixth Circuit made this decision, this is June of this year, June of 2024 in taking it en banc, you all but ensure that there's no opportunity for this ballot initiative to appear in time for the 2024 election. You have to give time for briefing. They set the argument date for October 30, just six days before the election, as you pointed out. And so in taking up the case en banc, the writing was on the wall. They knew it's just not going to happen this time around. So while the briefing is going on for this en banc case, the petitioners turn around and they file yet another petition with the Ohio AG, saying hey, here's a new summary. I know you didn't like the title, but we're not required to submit one, so we're going to remove the title. You can't ding us for that, right? He did. He denied them because they didn't include a title. [Laughter]. I mean, it can't get any more comical at this point, especially considering, by the way, that the Ohio AG's scope of review is

limited to the summary. The title is not only not required, he doesn't have the authority to review the title. So the fact that he's dinging them for missing a title is just again, it's just beyond comprehension.

A Anthony Sanders 18:48

Not expedited could be a month a year plus. I mean, whatever a normal appeal is, right?

J Joshua Fox 21:59

And Keith, these summaries are not even appearing on the ballot were this to get there, right? This is just a summary going to the AG, to then turn around and eventually have this put on the ballot.

K Keith Neely 22:09

That's a really great question, and I'm glad you asked that, because, again, it's important to remember where we are in this process. This is just so they can put together a petition to go to Ohio voters and try to collect 400,000 signatures to put this on the ballot. We're not talking about the language of the amendment itself. We're not talking about, you know, putting this on the books. We're talking about, hey, we just want to have the opportunity to petition people with our summary of the amendment so that we might, if we're successful, get a chance to put this on the ballot. So this is very, very early on in the ballot initiative process. So the case goes up en banc. Argument happens October 30. The court has to know, hey, there's no way we're going to be able to decide this in time for the November election. But they nonetheless hold argument, and then they release this opinion. And it's a really fascinating opinion on a few different levels. Top line holding, there's a per curiam majority opinion. Doing the math, it's not listed, but I think it's 10 judges join this per curiam opinion effectively. By the way, this was an opinion that was handed down November 21, so after the election. The opinion says, I mean, look, the election's passed, you no longer have standing to seek a preliminary injunction about appearing on a ballot in a 2024 election that has already happened. Now there's quite a few dissents here. There's one primary dissent, and there's another dissent filed by Judge Kethledge, and they make, I think, a really important point, which is that in Ohio, once you get the certification to start collecting signatures to go on the ballot, that's good for any future election. So this idea that plaintiffs were somehow limited to the 2024 election alone is actually based solely on the language in the last submission that they made to the Ohio AG. In March 2024 in the summary, they had to list that the effective date for this would be January 1, 2025 and so the per curiam opinion infers from this, ah, they're only looking for a preliminary injunction with respect to the 2024 election, look at the effective date. Therefore we don't have the authority, because there's no standing, to issue an injunction beyond that. And I think Judge Kethledge makes a good point, which is courts are free to craft injunctions as they see fit, and the simple thing to do here is simply to craft an injunction that says, Look, Attorney General Yost, you have to certify this, and we're just going to excise this last line about the effective date. At least let them get this process started.

A Anthony Sanders 24:52

And they also point out, right, the per curiam opinion even points out that putting the preliminary injunction aside, as far as their ultimate relief, the permanent injunction at the end of the case, that they were explicit that it would go beyond just 2024. Just like a quirk of how they filed their PI documents, that it was only for 2024.

K Keith Neely 25:14

That's right, and again, the per curiam opinion, I think rightly, holds open the possibility that they could be entitled to a permanent injunction once this case is fully resolved. The per curiam opinion does go out of its way not to touch the merits of this First Amendment issue, and then you have this really interesting set of dueling concurrence and dissent going on. So Judge Thapar files a lone concurrence in which he explains his own rationale for the lack of standing. And then he goes a step further, and he says, on the merits, I don't think there's a First Amendment violation here at all. Why? Well, because ballot initiatives aren't First Amendment protected speech. You have a right to speak. You don't have a right to legislate. And so he characterized this whole dispute over ballot initiatives as not protected speech, but instead as just a perfectly permissible form of state regulation of the ballot initiative process. And in fairness to him, there is some case law that suggests that there is an important distinction there, that it's not as straightforward as you might imagine in other First Amendment type cases. There's a balancing framework, you have to consider these things. But what I think the dissent does really well, and this is a dissent written by Judge Moore, who, by the way, was the author of the divided panel opinion below, finding a First Amendment violation. She comes in, she's joined by, I think, four other judges, and she makes the point saying, I think we have to divide this out a little bit. There's a permissible sort of regulations of the ballot initiative process, but we're not even to the ballot initiative yet. We're just talking about this petition. And what's effectively happening is the state saying, Hey, we have opened up the opportunity for Ohioans to modify the state constitution by way of a ballot initiative. Any subject is perfectly permissible. The Thapar concurrence talks about how in some states, they outlaw certain initiatives on certain sorts of things. I think in Maine, for example, you can't pass a ballot initiative abolishing the courts. That's one of the examples that he gives. In Ohio, all subjects, more or less, are fair game. But what the state's doing here in Judge Moore's dissent, as she points out, is they're saying you can't proceed with that ballot initiative because we don't like the way that you're describing as a summary this amendment. And keep in mind, this is not about the language of the amendment itself. This is about the summary of the amendment and the opportunity to collect signatures from voters. And so she talks a lot about this, I think notably, both dissents kind of go out of their way to comment on just how ridiculous the Attorney General's changing reasons for denying this petition are—I think Judge Moore calls it petty. I think Judge Kethledge—I forget the exact term he used, but he very clearly casts doubt and skepticism on what was really going on here. So I think that it's fairly obvious that...I don't want to say something fishy is going on. But this is not how ballot initiatives should be proceeding. He says, "grounds increasingly dubious." That's right, "grounds increasingly dubious," which is judge-speak for "what the hell is going on?" I mean, that's as close to a bench slap as you're going to get, especially in a Kethledge opinion. I think Kethledge is, he's a very smart judge, and he's really good at writing these sorts of understated opinions. So for him to go so far as to say "increasingly dubious," I think that's notable to me. So in any event, the bottom line holding maybe not as interesting standing over whether or not you can seek a preliminary injunction, a permanent injunction, the timing of the election, all these sorts of issues. But I think the real meat and potatoes here is where Thapar and Moore are fighting over the merits, and they're trying to signal to the district court, here's what you should do when

this case goes back, and I'll be really curious to see how the district court handles it. And I think we all know it's going to come back up on the merits, it's going to go back to that same original panel. So in the Sixth Circuit, it is discretionary. I think judges are encouraged to take cases that they've previously heard. I would imagine that Judge Moore would want the panel to exercise that discretion because she had a majority. I would note, Judge Bush dissented in the original panel decision for a variety of different reasons, but I think it's going to come back to that same panel, and then I wouldn't be surprised if the merits eventually make their way up to another en banc. The other weird quirk—I know we've dragged on for a while, this is one of those complex cases that I could just go on about, just ad infinitum—but it's the weird overlay here of the Ohio Supreme Court review. And you know, the fact that they denied the expedited request here, I guess arguably, if you go back in time, maybe petitioners should have sought review at the Ohio Supreme Court sooner. Maybe they were operating in good faith. These are legitimate objections. Let's just work with the Attorney General. We'll eventually get this on the ballot. We'll start collecting signatures. Maybe they should have recognized what was going on after the third or fourth time, and maybe they wouldn't have been in this mess, but it's a fascinating opinion. It deals with a really important issue, and I'll be really curious to see how this case ends up.

A Anthony Sanders 30:51

Josh, how would you have approached this standing in counsel shoes?

J Joshua Fox 30:55

Oh, man, that's a good question. I don't know quite off the top of my head, but I will say, looking at the Thapar opinion when he makes a note that what's going on is a regulation of what sort of laws the citizens can enact, rather than their expression. I think when, as Keith was saying, you're so early in the ballot initiative process, and it's really just about the summary that's going to become part of the petition, that's going to become part of this and that, and maybe eventually it'll become something that ends up on a ballot—that felt a little bit tenuous to me as I read his concurrence, but I do think it's a very interesting opinion, and I'll be interested to see come November 25 if this initiative is on an Ohio ballot somewhere, or 2026 or 27 or maybe next time there's a presidential election, it'll be on there.

A Anthony Sanders 31:42

Yeah, it seems like it might take that long. I should note that our friend Kelsi Brown Corkran, who has been on this show before, at the Institute for Constitutional Advocacy and Protection at Georgetown, she argued the case en banc, and I'm not surprised to see them involved, given the underlying issue about eliminating qualified immunity under the Ohio Constitution. The thing I didn't really get, Keith, maybe you can enlighten me here, is maybe it's just because the judges didn't want to get too into the merits at this point. But I guess Thapar's argument that there are some parts of lawmaking where the speech is kind of like government speech in a way. It's just not First Amendment protected. So you don't have a constitutional right to put whatever you want on a ballot initiative, because the state can regulate how that initiative works, and you can have certain areas off limits. I get how you wouldn't think the First Amendment applies here, but what's really going on? And I didn't read the brief, so maybe they

do it the way I'm now Monday morning quarterbacking what they're doing. But it seems like the argument isn't exactly that. They said you should put this as the title, and not this right? And that's regulating your speech. It's that the viewpoint discrimination of the Attorney General, with all this evidence that he just doesn't like what's in the bill is a First Amendment violation. So if I had an initiative called Protect Our Cops Today that turned qualified immunity into absolute immunity for the Ohio Constitution, and I want to put that on the ballot, I'm guessing he wouldn't have been as picky about what I'm doing, even setting the words themselves aside. It's just that would be a protected right,. viewpoint discrimination, that he's engaging in. And that's really what's going on when you look at everything together, and neither Thapar nor the dissent—the dissent gets a little closer to it, I think—really dealt with that, that underlying First Amendment problem. Sometimes the First Amendment is just about speaking. Sometimes, really it's kind of an equal protection thing about speech. And this seems to be a case like that.

K Keith Neely 34:12

Yeah, you know, I was, I think, as surprised as you were. Part of the issue, I think, is just by virtue of the fact that the Ohio Supreme Court has exclusive jurisdiction to review specifically the substance of the AG's denial of these sorts of things meant that, in a way, the substantive decisions themselves, they provide really bad optics. They're not necessarily the subject of the suit. They're trying to find a way, obviously, to talk about that in the context of the First Amendment. But I think part of the issue here is that this is a really interesting, touchy area of First Amendment doctrine where it's not always simple to find in an equal protection challenge, for example what would a similarly situated ballot initiative look like? Would it be an amendment that also seeks to remove government immunities, but describes it in such an openly negative way, and the AG signs off on it? Sure you can circulate this petition that says we're trying to punish government officers for doing their job. It's really difficult to frame the argument that way, given how unique ballot initiatives are. So I wonder if that wasn't playing a role. But I noticed the same thing.

A Anthony Sanders 35:39

Well, we will, as we say, see where that goes. And this really is a case that we can watch and see how it progresses. But a case that I don't think is going to progress any further unless it goes further up is the one Josh is talking about from the Second Circuit, where a prisoner thought he had a win against a prison guard, which is pretty hard to do, as regular listeners will know, and then he had that taken away on appeal. So Josh, tell us this sorry story,

J Joshua Fox 36:14

That's right, and Keith, I'm glad you used the phrase similarly situated, because that is a key phrase here in Moore v. Booth out of the Second Circuit.

K Keith Neely 36:22

Teed that up for you.

J Joshua Fox 36:23

Yeah, I appreciate it. So what we have going on in Moore v. Booth out of the Second Circuit on appeal from the Southern District, is a case all about default judgments: when courts can enter them, when they shouldn't, why, how, and sort of all the intricacies of the default judgment rule. And for those who may not know, default judgment is a tool that courts use when, typically, a defendant just isn't answering. You know, they've gone radio silent. Maybe they never answered in the first place. A court will occasionally say, well, we can't litigate the case. Plaintiff, you brought a pretty good case, so by default, you win. It's exactly what it sounds like. And so what we have going on in Moore v. Booth is a prisoner out in Fishkill, New York, in the Fishkill correctional facility. I did Google it: Fishkill is not just a place where they slaughter animals, slaughter marine life. It is kill from, I think, a Dutch word, meaning creek. So it's like Fish Creek, like the Catskills or something like that.

A Anthony Sanders 37:18

I thought of Fishtown, you know that the famous place that's in Philly or something, Fishtown. But I imagine it's kind of a hardscrabble type of place where the fish used to come in. But you're saying it's not like that at all—

J Joshua Fox 37:31

Not like that at all. I think just some good old New Amsterdam settler type stuff going on up there. But anyway, so we have Fishkill, New York and the Fishkill Correctional Facility and housed there is our plaintiff, James Moore. About a decade ago, in 2014 Mr. Moore had a seizure while coming out of the bathroom, and he alleges that five corrections officers took advantage of this seizure to just savagely beat him. They hit him, they kicked him, they knocked his teeth out. He lost hearing in one of his ears. He injured his neck, he injured his hands. And so he brings a 1983 action against these five corrections officers. And he says, you know, use of excessive force, inadequate medical treatment after both the seizure and the beating. And so he brings his 1983 action in about 2016 come, three years later, finally, all five corrections officers filed their answers, and they all raised the same affirmative defense, and that's that the Prison Litigation Reform Act says that he had to bring an administrative action, first through the administrative grievance processes of the Fishkill Correctional Facility in the state of New York. And to touch back on the Prison Litigation Reform Act. That's something that was enacted in the 90s, in part, to really lessen the load of federal courts' prisoner litigation. And so one thing it did was it required states to enact sort of grievance processes that prisoners who were aggrieved in some way, like Mr. Moore, or maybe hopefully in less gruesome ways, could bring administrative actions and have their grievances heard without bringing a burden onto the federal courts. And so that statute, as interpreted by the Supreme Court has an exhaustion requirement. Before bringing a 1983 action, you have to go through that process and show that you've exhausted your administrative remedies. And so these five defendants come in and say, well, he didn't do that. He didn't go through whatever process available to him in the correctional facility and through the state of New York, so the case should be dismissed. And unfortunately for Moore, the Court agrees, and after an evidentiary hearing, the court says, well, at least as to four defendants, this case is gone. And so what we have left is one on one Moore versus defendant Booth, and that's where the case comes up to the Second Circuit. But it's an interesting reason why Booth is left in this case. So going back to

default judgment: Booth around 2019, 2020, just went radio silent and disappeared off the face of the earth. He stopped communicating with his attorneys at the New York Attorney General's office. He stopped showing up to court hearings. He didn't show up to a deposition. And so two things happen out of this. One, the New York Attorney General's office says, all right, well, we can't represent him. We don't know where he is, what he's doing, so they withdraw. And second, Moore, our plaintiff files for sanctions, and he says, Look, he's not litigating this case, what am I to do? What is the court to do? And he asked the court to strike Booth's answer. And in that answer, you'll remember, was the affirmative defense under the Prison Litigation Reform Act. So come time to dismiss this case, the court says, well, he doesn't have that affirmative defense on file. This last defendant, maybe I can dismiss it, but plaintiff, hey, if you want to ask for default judgment, go for it. But when you do that, explain to me why I should grant that and not just dismiss the case. Because it is pretty obvious this Prison Litigation Reform Act affirmative defense applies to him. He's in the same situation—similarly situated, as Keith said—to all the other defendants. Well, when plaintiff Moore files his motion for default judgment, He says, well, actually he waived that affirmative defense. When you struck that answer, that defense is gone, and so you should grant me my default judgment. And the court does. The court grants a default judgment against Booth, and it also awards him $50,000. Now, while this is going on, Booth does resurface. He doesn't actually file anything formally with the court, but he starts sending letters. And he sends, I think it's five letters to the court. So it's a little weird. The court seems to suggest he was not pro se, but he also didn't have counsel, because he never formally requested pro se. So the actual, what he is, is up for grabs, I guess. But he sends these letters, and he essentially says, Hey, court, I don't know what's going on. I thought my union was representing me. Apparently they're not. Something must have happened. But regardless, I haven't been getting your letters because I've had trouble with addiction. I've been homeless. I don't know really what's happening, but I think you should kind of help me out, and I should get the same dismissal as everybody else. The Southern District of New York kind of says no, effectively says no. And so the case goes up on appeal, with the question being, hey, you have these five very similarly situated defendants, right? You have four who won on the merits, one who lost by default judgment, but they all had the same claims against them arising out of the same incident, and all had available to them this same affirmative defense. So the question to the Second Circuit is like, is that okay? Is that something that the courts can do? And the Second Circuit says, actually, the Southern District of New York in coming to this ultimate outcome abused its discretion, you can't have a situation where one defendant loses by default judgment but all of the similarly situated defendants win on the merits. That really, to quote the Second Circuit, is absurd. It's an absurdity that really can't be an outcome, and they predicate this holding, like I said, really, on logic and a desire to avoid absurdity. And to do so they go back to an 1872 Supreme Court case, which, like all 1872 Supreme Court cases, is about a half a page and doesn't really say much, but what it does say is there was a guy who thought he was being defrauded by a bunch of other people, and he brought a lawsuit, and he actually alleged what we now talk about as joint and severable liability. You may remember Summers v. Tice, from law school where you had the one guy who was out hunting with his buddies, and they both may have shot him, and you don't know who it was, but somebody did it. We all know they somebody did it. So maybe you know, they're both liable to some extent, or to full extent, maybe. So he alleges his joint and severable liability in this 1872 Supreme Court case, and what ultimately happens is the court grants default judgment for not answering so, very similar to the Moore v. Booth situation against one defendant, but then finds all the other defendants win on the merits. And when this case gets up to the Supreme Court in classic old day Supreme Court fashion, they just say, well, this is illogical and this is illegal. You can't do that. So then looking at the Moore v. Booth situation, the Second Circuit says, Yeah, illogical and unlawful. It doesn't make any sense. So they kind of really try to heavily track that 1872 Supreme Court case by the name of, I think it's Frow

spelled like eyebrow, because there's really not much else to hinge on to. So they track the Frow case and they say, this is illogical, this is unlawful. And so case dismissed. Go back down to the SDNY and dismiss Mr. Booth from the case. And now, as I was reading this, they seem to sort of try to hinge on the fact that default judgment should only be granted, in their opinion, when the plaintiff would otherwise win legally on the face of the case, right, they would otherwise win. And here the plaintiff can't win. His claims are barred by the Prison Litigation Reform Act. So there's really no opportunity for him to win, so default judgment is improper. And to me, I think one of the oddest things about this is possibly a weird incentive the case raises: you have a bunch of co-defendants, that are all thinking, well, if I don't litigate, worse comes worst I lose, and I would have lost anyway, but maybe I'll lose and my co-defendants will win, and then no harm, no foul, I'll win too. So it kind of creates a weird incentive structure, you know, you think it may be also a little collective action problem where, say, nobody litigates because everyone's like, well, that guy will litigate so I don't have to. And so it's a little bit of an interesting outcome that I think will be interesting to see what happens going forward.

A Anthony Sanders 45:36

Well, especially in a case where they didn't have an attorney for free, like I'm sure this guy had from the New York Attorneys General, he still would not return their phone calls. That's right. So Keith, what would you have done?

K Keith Neely 45:55

I fortunately have never had to deal with an obstreperous client like this guy. You know, one of the perks of working at IJ is we have folks that really want to be a part of our cases, so they don't go disappearing. They don't go radio silent on us.

A Anthony Sanders 46:10

Well, and it's a defendant too. So that's true. Whole nother, like layer of jeopardy for them, right?

K Keith Neely 46:16

And I think to me, my reaction to reading the opinion, I had two strong reactions. First, it's odd to me that, you know, it's black letter law that administrative exhaustion is an affirmative, waivable defense. And what the court seems to be saying here is, you can't waive it in every circumstance—if one person waives it, and four people don't, like here, then the person who waived it still can't really lose. And I wonder how much work the just the, I don't want to call it a presumption against default judgments, is, but I think that's driving a lot of the court's analysis in the background, because I wonder if this case would have turned out differently if, instead of not showing up to the case and ultimately getting his answers stricken, he just affirmatively waived the defense said, I don't need administrative exhaustion. I'll litigate the case on the merits without it, if the court still would have reached the same holding, and maybe it would, but that was the first thing that stood out. And then the second thing, and this goes back to the reason behind the Prison Litigation Reform Act. So when Congress enacted the PLRA, it was

over this concern that prisoners who have a lot of time on their hands often choose to spend that time by wasting the federal judiciary's time and filing all of these frivolous suits. But here you have essentially this exhaustion requirement that was designed to increase the efficiency of these sorts of cases now being used to excuse a government defendant's absolute lack of interest and involvement in the case that resulted in this case dragging on for, I think, six years they talk about in the decision. So, I think it's fundamentally unfair that this exhaustion requirement essentially cuts against the prisoner either way, and seems to undermine the alleged intent behind enacting the PLRA in the first place.

A Anthony Sanders 48:24

Yeah, and that inconsistent judgments thing, they called it an absurdity. But there's plenty of absurdities in the law, and we still—not that you should affirmatively have absurdities, but I don't think it's that absurd. You're right, just someone didn't raise this defense. They talk about statute of limitations defense, how that's something that if you just have a bad lawyer for defense counsel, and you don't waive, you don't raise statute of limitations, you can have a judgment against you, even though it was outside of the statute of limitations. Now, it's because they have these other people involved that, I guess, they think that's what makes it absurd. Anyway. It doesn't add up to me. And I come at it from a standpoint different than a lot of attorneys, where I at one time in my career, in my practice before IJ, actually have gone through getting a lot of default judgments. And so I know a little bit about like, how this usually works and it's kind of two step. The court kind of gets at this, but doesn't really dig in that much. So there's default, and default is where the other side has not filed an answer in time. And so then they are in default. Now, in theory, at that point they're not entitled to notice; all kinds of bad things can happen to you if you're in default. But default does not necessarily mean you then get a default judgment that you lose and have liability to you. So we often in these collections cases, for lack of a better word—they're under ERISA, but they're basically glorified collections cases—you would get a motion for default, and the other side wouldn't show up. So you get a default but then to get a default judgment, you'd actually need an affidavit with like, how much the other side owed, and it was this much, and we get this much interest under this statute, or under this contract or whatever, and then you prove that up. And so the judge then says, oh, okay, you actually have a signed, notarized affidavit here with these damages. And it doesn't look off the wall. And so there is an evidentiary check on the default judgment. And so if you don't have an answer, and the attorneys have withdrawn from the case, they've been totally negligent about it. The other side, I'm guessing, this prisoner, right, had evidence that he got beat up and this thing happened and that, and also the other side was being sanctioned for not showing up to court. Then, I don't see why you can't get this judgment. I don't think that's absurd, just because you didn't raise this one defense that everyone else raised, and so I see it as like a short cutting of the whole default judgment procedure, which the court seems to think is like a technicality, but it's actually something that a judge signs off on. And you need something real in order to get it. This wouldn't have happened if this guy hadn't actually done something bad. So, that's my rant, anyway.

J Joshua Fox 51:33

One thing that stood out is, if you get rid of the other four defendants, and you imagine this was only Moore v. Booth from the very start, I think the default judgment would have stood.

A Anthony Sanders 51:42

Yeah, I think it would've.

J Joshua Fox 51:43

It's a little bit odd that it's really just saving the one defendant from himself by virtue of the litigation strategy of the plaintiff when he first filed. So it's a very interesting situation.

A Anthony Sanders 51:56

It seems like it's a little bit like they're trying to make it jurisdictional, that even though it's an affirmative defense, and so I think that's another thing going on, but I think you're right. I don't think they would have been able to make that argument if it was just one defendant the whole time.

K Keith Neely 52:13

Yes, and I think of other sorts of affirmative defenses. Qualified immunity is an affirmative defense. Oftentimes you have cases against multiple defendants, and I've come across instances where some defendants raise qualified immunity and some don't, for whatever reason. And what happens in those cases? Are you saying then that the defendant who doesn't raise this affirmative defense nonetheless gets the benefit of qualified immunity because we can't have these so called inconsistent judgments? I think for me, I reject the idea that these are inconsistent at all, because I don't think it's inconsistent for litigants who choose different litigation strategies to get different results in the same action. That's just, in my mind that's perfectly consistent. I was puzzled by the Second Circuit's insistence on calling it an inconsistent decision.

A Anthony Sanders 53:08

Well, thanks, Josh, that was the most non-inconsistent, which I guess is called consistent by English speakers, presentation of that case. So thank you for for coming on. Thank you, Keith, too. Good luck to Keith and his other show on that other network. So please stay tuned for that, and you can find a link right below you in the show notes. And please be sure to follow Short Circuit on YouTube, Apple Podcast, Spotify, and on all other podcast platforms, and remember to get engaged.