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SPEAKERS

Anthony Sanders, Mike Greenberg, Betsy Sanz

A

Anthony Sanders 00:11

Demands to show your papers and AI-generated briefs this week here on Short Circuit, your podcast on the Federal Courts of Appeals. I'm your host, Anthony Sanders, Director of the Center for Judicial Engagement at the Institute for Justice. We're recording this on Monday, March 23rd, 2026. I have two of my Institute for Justice colleagues here to discuss two cases, one of which, actually, I'll say that again, three cases. So one is a twofer from the Sixth Circuit, same matter, but two different opinions. And then the other is actually an opinion from the Alabama Supreme Court, but it is in response to what's been going on in the Eleventh Circuit. So we have a little bit going on in the Southeast there, and then we have a little bit of what's going on in the Sixth Circuit. So we will get to those opinions in a little bit. First, I want to bring on Betsy Sanz. We'll be discussing our Sixth Circuit cases a little later, and they are going to be about, well, basically, about some behavior that if you're an attorney, it is best not to emulate. And one of various of those behaviors is to write briefs with an AI program. So Betsy, I have not really played that much with AI stuff. I mean, a little bit here and there, these LLMs. But Betsy, are you versed in these arts? And do you know your way around, you know, what you should do with LLMs, and that's fine, and maybe what you shouldn't do?

B

Betsy Sanz 01:54

I wouldn't say that I necessarily am. I think I'm trying to be because, you know, that's the way that things are going. But honestly, reading stuff like what we'll cover today is just a giant, you know, scare off of that kind of activity. I wouldn't call myself a Luddite, but I'm very, very cautious because it's important, you know, it's kind of critical stuff. So no, sorry. I haven't gotten there yet, Anthony. It's probably for the best.

A

Anthony Sanders 02:18

We're not pretending to be experts in this area on this show. But I think the general sense we're going to impart on people who are watching or listening to this is that maybe it's best to wait for the experts to figure this stuff out before you get into it, or you might end up like the attorneys that we're going to discuss later. But first, we're going to have Mike Greenberg. And Mike is going to relate this case that on just the kind of formal face of it is just a statutory interpretation case from the Alabama Supreme Court, but there's a lot going on underneath, including all this Fourth Amendment stuff that we talk about on Short Circuit all the time, about demands to have papers. And it's not in the immigration context for once. It's actually just about whatever ID you might have. And then at the same time, there's questions of the relationship between state courts and federal courts and certification, something we discussed a few weeks ago in a different context, and I'm excited that we're going to get into that again. So, Mike, tell us the story of Pastor Jennings.

M

Mike Greenberg 03:36

Yeah, the long and short of this is that I'm going to wind up in a place — I was not an overturn-the-Erie-doctrine person before this started, but that's where I think I'm going to wind up.

A

Anthony Sanders 03:47

Wow, so it's radicalized you.

M

Mike Greenberg 03:50

Yeah, I am fired up, Anthony. This case is captioned Jennings versus Smith. As Anthony alluded to, it was decided by the Alabama Supreme Court a few weeks ago on March 13th. We don't all that often do state appellate cases on Short Circuit, but this one is worthwhile because, as Anthony said, it's a certified question from the federal courts and touches on some very fascinating questions about things going on at the Eleventh Circuit, including the Erie doctrine, law of the case, the rule of orderliness, all sorts of geeky Short Circuit favorites. So with that, I'll dive in with the facts, and it's frustrating to me, at least fact-wise as well, this case. The first two sentences of the opinion that the Eleventh Circuit issued in an earlier stage of this case kind of set the tone for what you're going to get in this case. On May 22nd, 2022, a 911 caller requested that police check on her neighbor's home. She reported that her elderly white neighbors had left town, and she saw an unfamiliar vehicle and a young black male around the home. The black man is Michael Jennings. He lives down the block, and at least today, no one disputes that he was specifically asked by the out-of-town elderly folks to house-sit for them while they were gone. And so he's doing that. An officer responds to the 911 call. He asks Mr. Jennings what Mr. Jennings is up to, and Mr. Jennings truthfully and dryly and kind of hilariously answers, watering flowers, because that is what he was doing. The officer then asks him if he lives there, and Jennings says no, just dryly answering these questions. The officer explains the basis of the 911 call and why the officer is there, and Jennings calmly retorts, I'm supposed to be here, I am Pastor Jennings, I live across the street. He then points at his home, which is

across the street, and says, I'm looking out for the house while they're gone, I'm watering their flowers. All of which is true. The officer then says, okay, that's cool, do you have like ID? And made a motion with his hands, kind of, I'm assuming, like this with his fingers, as if to request a driver's license or something like that. And Jennings says, quote, no, I'm not giving you ID. Starts walking away and trying to go about his business. He's trying to water these flowers, he's got something to do. And so let's stop there. Alabama has a statute that says that officers, when they reasonably suspect that a person is committing or about to commit some kind of public offense, quote, may demand of him his name, address, and an explanation of his actions. And this case is about whether the power to demand of someone his, quote, name and his, quote, address includes the power to demand a physical identifying document of some sort that the officer here is so demanding. Back to this encounter on the front lawn with the watering hose and everything, Mr. Jennings is just trying to walk away from the officer, move about his business, and the officer continues to approach him to ask for a physical ID of some sort and to, quote, identify yourself. Never mind that Mr. Jennings has already said, I'm Pastor Jennings, I live across the street, I'm supposed to be here. This just repeats itself for several rounds. It never turns violent. Mr. Jennings is just continually moving away from the officer, officers eventually, and eventually says things like, quote, I'm not going to show y'all anything, I'm going to continue to water these flowers. Which, again, is just hilariously accurate and a wonderful answer. And eventually they arrest him for declining to hand over some kind of physical ID. The basis for the arrest, like I said, is that Mr. Jennings, under Alabama law, obstructed a governmental function by supposedly violating this identify-yourself statute for not producing a physical identifying document. Those charges are promptly dismissed. By the way, the neighbor who initially called 911 arrived at the scene toward the end of all of this as it's happening and says, basically, whoops, my bad, that's my neighbor. I totally recognize him now. So just great work all around by everyone. Mr. Jennings, after the charges are dismissed, sues, alleging things like false arrest. And his claims hinge on whether there was probable cause to think that he had violated this identify-yourself statute, or whether a reasonable officer could have thought that there was probable cause that he violated that statute. If there was probable cause, then the arrest was lawful. And if a reasonable officer could have thought that there was probable cause, then the officer is going to get qualified immunity.

A

Anthony Sanders 09:20

And to go back to the statute, basically it's that the statute says you can demand the name and address and explanation of actions if you think that person is committing a felony or public offense. So it all comes back to probable cause for felony or public offense, I guess.

M**Mike Greenberg 09:42**

Yeah, although the basis for the arrest is that he obstructed a government function because the officer could have had probable cause to think that he violated the identify-yourself statute. I mean, at the outset, whether this 911 call should even lead to an officer doing any investigation at all is something that we can quibble over, but we're quibbling over this second-order question now also. So fortunately for Mr. Jennings, while he is suing, while his case is pending — or at least so it seemed; it's fortunate for him, we'll get into that in a second — the Eleventh Circuit decides a case called *Edgar versus McCabe*. And Edgar is — I'm not going to dive into the facts there and confuse our listeners, but it's extremely similar factually to Mr. Jennings's case. Basically just kind of a misunderstanding about what's going on. Someone doesn't want to turn over their ID, they get arrested for it. And the Eleventh Circuit holds, in a published opinion, that this Alabama identify-yourself or name-and-address statute, quote, does not permit the police to demand physical identification. The statute is totally silent on it. The court kind of points out that statutory silence on whether a physical ID can be demanded — that's one part of the court's reasoning. Second part of the court's reasoning is that the information on a driver's license or other physical ID, whether that's a school ID or something else, will reveal a lot more information than the person's name and address, which is all that the statute speaks to. It doesn't speak to date of birth or whether you're an organ donor or what school you go to. And the court says, well, if the legislature wanted to include a demand for a physical ID or for that related information —

A**Anthony Sanders 11:47**

I guess this statute must have been drawn up before photo IDs were a big thing, which is probably going back 70 plus years, I'm guessing.

M**Mike Greenberg 11:58**

Yeah, I dug into it a little bit. It looks like it was passed in the 60s, according to a great amicus brief that the ACLU and the Cato Institute and a few other groups submitted. At the time, less than half of Alabamians had a driver's license, and the state didn't start issuing non-driver's-license IDs until several years after the statute passed. And so the court doesn't really rely on that while it's interpreting the statute, but that's certainly a reasonable inference to make. But also, there's no broader requirement in Alabama law to carry a physical identification at all, and that just feels like a weird rabbit hole to go down. Like, what if I leave my house and I'm not carrying my wallet or wherever I hold my driver's license or ID? And so the Eleventh Circuit kind of doesn't want to get into that. And third, the Eleventh Circuit points out the U.S. Supreme Court has never held that the Fourth Amendment allows officers to demand identifying documents during a Terry stop. And the Eleventh Circuit didn't want to have to break that ground when the statute didn't obviously require it.

A

Anthony Sanders 13:15

And a Terry stop, just for some of the listeners' benefit, it's where it's not a full-scale arrest, but an officer can detain someone to make sure they don't have, essentially, weapons on them if the officer is near them and might be scared for their safety.

M

Mike Greenberg 13:31

Yeah, it's a brief investigatory stop. And so the Eleventh Circuit in this Edgar case holds that the statutory text is so clear, it doesn't even allow the officers to claim qualified immunity. They didn't even have arguable probable cause to arrest this person for failing to turn over their ID. And so that case is decided while Mr. Jennings's case is pending, and so when his case reaches the Eleventh Circuit, Edgar controls. The arrest of Mr. Jennings for not producing his ID was unlawful because the statute doesn't allow officers to demand an ID. No qualified immunity, sent back down for trial in an unpublished opinion, because the court doesn't even need to break new ground on this point. And that's when all heck breaks loose. A few months after the Eleventh Circuit decides Mr. Jennings's case, it decides another factually similar case. And perhaps wittingly, perhaps not, the Eleventh Circuit in that case issues an unpublished opinion that appears to just flatly contradict Edgar and its earlier decision in Jennings. It's a case called Metz. The plaintiff there was arrested for filming in the security area of a government building after being told by a security officer repeatedly to not do that. They asked him to produce ID apparently six times. He declined to do that. He sues for false arrest. His case gets up to the Eleventh Circuit, and the court in that case holds that the interpretation of the statute that the court rejected in Edgar was not just reasonable enough to get qualified immunity, but actually the correct interpretation of the statute now. And it says once the officer had validly stopped Metz, he was allowed to ask Metz for ID and to arrest him when he said no. The opinion doesn't cite or even mention Edgar or Mr. Jennings's case at all. It's just free-floating out there in a world where these two prior decisions on the exact same statute don't exist. And so what's going on? I looked at the briefing in this third case. The plaintiff in this third case just kind of once cited the Edgar case and kind of got the holding wrong. It really downplayed it.

A

Anthony Sanders 16:09

Was it pro se? I have to ask.

M

Mike Greenberg 16:11

It was not. The person had representation. So I'm not quite sure what the lawyers or the advocates and what the court was doing in this case. One fascinating thing is that one judge of the Eleventh Circuit, Judge Wilson, shows up in all three cases. He wrote the opinion, the published opinion in Edgar, and then was on the per curiam panels in the latter two cases. So I have no idea what is going on in the Eleventh Circuit. All this transpires over the course of about a year and a half. Whatever is going on, it sets off a chain reaction with really bad implications for Mr. Jennings that probably shouldn't have happened anyway, even assuming that all this is totally fine and normal. When the district court gets Mr. Jennings's case back, the district judge throws his hands up and says, well, now I'm confused about what the Eleventh Circuit thinks, and says, well, I'm just going to certify the question to the Alabama Supreme Court about what it thinks the right interpretation of the statute is. One might think that a published decision from the Circuit Court of Appeals that binds you trumps a subsequent unpublished opinion. The district court even drops a footnote acknowledging that before deciding to just bulldoze right through it. One might also think that the law of the case in this case might trump a subsequent unpublished opinion in another case. The district court doesn't even acknowledge that roadblock. So question certified to the Alabama Supreme Court to see if we get a different answer on this question. And the Alabama Supreme Court gives a different answer. In an analysis that I personally found a little wanting, the court starts by running through the U.S. Supreme Court's case law on this point, and the court points out that in a case called *Hiibel* from about 20 years ago or so, the U.S. Supreme Court held that it doesn't violate the Fourth Amendment if there's a state statute that allows an officer to demand a person's name during a brief investigatory stop. And then the Alabama Supreme Court takes that data point and says, well, if it doesn't violate the Fourth Amendment to demand someone's name, demanding it in this way that I can confirm it with documentary evidence via a physical ID — well, that wouldn't violate the Fourth Amendment either, I suppose. It's just belt and suspenders, why not? But that's not the question. The question is whether the Alabama statute that we're dealing with in fact does allow for a demand of physical ID, not whether that, if that statute existed, would violate the Fourth Amendment. The Alabama Supreme Court eventually acknowledges that kind of tension and says, well, yeah, but it would make the purpose of the statute more effective if we construed it that way. The court also points to a Montana Supreme Court case holding that a similarly worded statute allowed officers to demand physical ID. Good enough for us, the court says, and that's all. Mr. Jennings is going to lose, sorry. There are two concurrences trying to add a little more textual gloss onto that, and then there's a dissent that points out how ridiculous procedurally all of this is. Like, we are not the court that takes certiorari jurisdiction from the Eleventh Circuit when they give an answer that we don't like. And that's basically what the Alabama Supreme Court just did. The dissent points out, we don't have to accept certified questions if we don't want to, doesn't feel appropriate in this case. And that stance lost out in a 4-3 opinion.

A

Anthony Sanders 20:13

Actually, I think it was 6-3, because it's nine members on the Alabama Supreme Court.

M

Mike Greenberg 20:20

Yeah, 6-3, you are totally right. I went to law school because I didn't want to do math.

A

Anthony Sanders 20:25

Well, most states have seven or even five, but yeah, Alabama has nine.

M

Mike Greenberg 20:29

Yeah. But that's where the case is. Where it goes from here, I guess under Erie, which is the doctrine that says that federal courts defer to state courts' interpretation of state law, there's nothing for Mr. Jennings to do here. The Alabama Supreme Court has spoken. You can't get the U.S. Supreme Court to overturn the Alabama Supreme Court's interpretation of state law. The Eleventh Circuit can't do it either. And so he won in federal court, and yet the state court says, no, sorry, too bad.

A

Anthony Sanders 21:06

This is a weird, winding road that Mr. Jennings has been on. Pastor Jennings. Betsy, do you make sense of it?

B

Betsy Sanz 21:16

I don't, and I read through the opinion and then I've been listening to Mike, and I'm awfully baffled by it. And I kept thinking, surely there's a next step here because this seems like a morass. But is this the end of the road, then, really?

A

Anthony Sanders 21:32

I mean, there's still a binding Eleventh Circuit case on point on this matter of state law. I guess you would just say it's kind of like when the U.S. Supreme Court has ruled on the same question but a different case — you just say that the circuit case law is abrogated. I guess you'd have to say that, right? Because it's the state Supreme Court.

M

Mike Greenberg 21:57

I get it. It feels like there should be a way for the Eleventh Circuit to say no, the district court abused its discretion in deciding to certify this question of state law. But then under the Erie doctrine, the Eleventh Circuit has to defer to the Alabama Supreme Court on state law interpretation anyway. So I don't know. Perhaps Pastor Jennings could have sought a writ of mandamus from the Eleventh Circuit, stopping this whole rigmarole before the question got certified. I'm so perplexed about what the district court thought it was doing here, other than just perhaps trying to get an answer different from the one that it got, because it preferred the answer that it thought a different court might give it.

A

Anthony Sanders 22:46

And the fact that the court responded — so there's this three-judge dissent where they say, we really shouldn't be responding to this request. But the fact that they responded makes me think that the state Supreme Court may have just been seeing all these cases in the Eleventh Circuit and said, well, maybe it's not proper, but we need to step in here because it keeps coming up. It probably doesn't come up that much in state court, because those issues come up in different ways. When this statute is actually enforced, it's more likely to come up in something like Pastor Jennings's case, where someone is legitimately mad about having had their ID demanded when they weren't doing anything wrong, and so they make a federal case out of it with a 1983 claim. I'm guessing that's how you have all this stuff at the Eleventh Circuit.

M

Mike Greenberg 23:39

Yeah, because if Pastor Jennings and the other people filing suit about this are our sample size, no one's actually getting prosecuted for this under state law, and that's how it would come up under state law. I also think there are two other points that statutorily this might just be wrong. One is that there are other statutes under Alabama law that are very explicit about you must produce a physical ID. The legislature knows how to do that when it wants to. It requires that for voting, for example. And then secondly, I can understand the argument that demanding name and address — what Mr. Jennings said was, I am Pastor Jennings, and I live across the street. That's not necessarily exactly his name or his address, although it's kind of getting you there. But the officer never actually demanded, no, no, I need your first name and last name, and I need your address. The officer's just saying, identify yourself, or give me your identification. And so even if this interpretation of the statute is correct, the officer should have to exhaust his more reasonable options, I think, before getting to this kind of paper version of it first. But the Alabama Supreme Court kind of just said that's totally fine.

A

Anthony Sanders 25:10

It seems like, you know, there is something magical in some people's minds about physical ID, which is weird. And I'm glad you brought that up, Mike, that it was passed in the 60s. It's only in our lifetimes really that physical ID with a picture on it has become pretty standard, even in other places. So in the UK, they only got driver's licenses with picture IDs — I can't remember — it's only in the last couple decades. The driver's license was just a piece of paper, and people had passports and stuff, but you don't walk around with your passport. And so anyway, I think that now that they are ubiquitous, right, IDs, there's just something talismanic about it. Like, I used to go — so when I was in practice in Chicago, I would almost every day go to the federal courthouse. And every day, you know, you go through the security line, just normal stuff. Every day these old guards, they were retired cops of some kind, these federal agents, they'd say, IDs, everyone needs IDs. So we'd all pull out our IDs, put your bag on the security machine and put your coat there, and then you'd show your ID. And they wouldn't write them down. They wouldn't compare them to a list. I mean, I guess they were comparing our faces maybe to what's on the ID. I was like, why are they checking IDs? What possible purpose is this serving? Like, I guess if I had an ID that was obviously a woman, they'd be like, wait a minute, where'd you get that ID? But what was that serving? I don't know if it was serving any public safety reason. And yet demanding an ID on the street is, I guess, kind of the same thing — that if you actually have a real ID, well, then you have to be a good person.

B

Betsy Sanz 27:06

Well, Anthony, now in Alabama, carrying an ID means that —

A

Anthony Sanders 27:11

I guess, although the thing is, if he had said, I don't have my ID on me, there's no requirement that he had it. So he could have just said that. That "I don't want to give it to you" was the bad response.

M

Mike Greenberg 27:24

Yeah. So one of his other claims also was retaliatory arrest. And it seemed like the less friendly you are to an officer trying to enforce this statute, perhaps that might be part of the trigger to arrest. Yeah, I can totally envision walking outside across the street without my wallet or a physical ID all the time.

B

Betsy Sanz 27:50

Especially to go help your neighbor water their flowers, Mike.

M

Mike Greenberg 27:54

Well, no one would ever trust me to be in a garden or anything like that. I would kill the flowers accidentally, probably, but that's beside the point.

A

Anthony Sanders 28:02

We're not going to dig into Mike's gardening practices. So that's okay, but we are going to dig into someone who is a little less neighborly, I would say. And that is a fella in Tennessee who was angry. He was just so angry about what his city was doing that he just started suing them a lot, all the time. Why not? I'm just going to sue you again. And Betsy, is that a good strategy?

B

Betsy Sanz 28:32

I mean, probably not. But keep in mind, Anthony, this all started from being excluded from a fireworks display.

A

Anthony Sanders 28:38

That sounded pretty fishy.

B

Betsy Sanz 28:38

And if that doesn't make somebody angry — I know, yeah, and cruel, honestly. This is a case out of the Sixth Circuit. The caption is *Whiting versus the City of Athens, Tennessee*. And our plaintiff is part of the story, but his lawyer is probably a bigger part of the story. This was filed on March 13th, 2026, and I'll just give you a little bit of the facts. This is indeed a twofer. So there's a whole series of lawsuits by this guy that gets discussed, but then in a separate opinion, we get some discussion about the AI component of all of this, which is actually pretty awful and scary and slightly amusing, but not as amusing as the fireworks show. So starting there — I mean, obviously the pandemic drove everyone crazy, and of course, this is where it starts. So it's the pandemic, there's a fireworks show, but the city decides that nobody can come to the fireworks show except for the employees of the city.

A

Anthony Sanders 29:44

Like, why did they blow off the fireworks? They could have just saved them for next year, all that money.

B

Betsy Sanz 29:49

And what did they expect? Did they expect not to get sued over that? I don't know, but that's probably their only mistake. Because the plaintiff, Whiting, shows up to the fireworks display anyway, because he doesn't think that the public should be excluded with the employees being able to be included. And so he goes, and of course he starts recording the circumstance, right, as everybody does, which he has a First Amendment right to do. But he gets told to leave because he's upset, and then he also starts recording children for some reason. And the employees of the city are upset about that. The parents are upset about that. They tell him to stop. The officer eventually tells him to leave. And then Whiting sues for some torts, but also defamation and First Amendment retaliation. For what? Well, maybe find out. Maybe. Then, so he sues, and that's in 2022. And then 2023, there's more stuff that the city does. They talk on Facebook about the ongoing litigation and how that is basically the reason why in 2023 they're not even going to do a fireworks display. So Mr. Whiting sues them again for defamation and retaliation over their Facebook comments. And then later that year there's a city council meeting where Mr. Whiting shows up to complain about how settlement negotiations are going, and the city officials respond to his complaints, and then he sues them again for defamation and retaliation over the city council meeting and the statements that the officials make publicly there. So he's really mad, and he's suing them and suing them. So the appeal that gets up to the Sixth Circuit is about sanctions that were awarded on the motion of the city, and Mr. Whiting and his lawyer have appealed the sanctions award. Some context that we discover is that these suits over the fireworks stuff — it was not the first time that Mr. Whiting had sued the city. He had sued the city 14 times in five years, actually. And as an example of one of those lawsuits before the fireworks issue came up, he had sued the city over the condemnation of a building that he did not own.

A

Anthony Sanders 32:15

Yeah, I would love to hear more about that.

B

Betsy Sanz 32:17

Which is pretty — this sounds, I mean, it sounds interesting. It sounds like harassment, like harassment by lawsuit, which is basically what the court finds that it is. So the court has to determine, in determining whether the sanctions were appropriate, the court has to determine whether this was frivolous, lawfare, basically, if these were frivolous suits. And so I'm going to just talk about when sanctions are appropriate, because it kind of gets into the later AI issues. So in the Sixth Circuit, sanctions are appropriate if an attorney knows or reasonably knows that the claim is frivolous, or if his litigation tactics will needlessly obstruct the litigation, or if the attorney's conduct fell short of the obligations owed by a member of the bar. And so for any of those reasons, it can be frivolous. And so he does bring defamation claims, which I won't really talk about, but just know that the court finds that there's no defamation here. When you're making comments, statements that are opinion, as the city council did in those meetings, then that's not defamation. Just as a reminder to everybody, opinion is not defamatory. Neither are statements of fact. Those aren't defamatory. Also, when you're showing up to complain about something at a city council meeting and they respond to you, well, their responses are not defamatory either. Just so that everybody knows. But in deciding the defamation issue, the

court pointed to the attorneys' frivolous actions here — the attorney should have known that none of that is defamatory. So the court decides on the defamation issue that sanctions are appropriate. But really what we want to get to is the First Amendment retaliation claims, because IJ litigates in this area. And I thought, when I was reading this opinion, gosh, it was so bad, and the claims were so bad, and the behavior was so bad on the plaintiff's side, that you worry that the court will make statements that will hurt other legitimate, not frivolous claims coming after. So I thought overall the court didn't, in deciding this, make it worse for other legitimate retaliation claims. Now, just as a reminder to everybody, First Amendment retaliation is when government officials wield their power to penalize speech that they don't like. So think about if the government would not have acted toward you in whatever way that's punitive but for your speech, then they've retaliated against you for your speech. So Whiting claimed that — and I'll give you the details here, just to talk about a claim of retaliation that is not legitimate, right, it's not the kind of thing that IJ would bring — he claimed that confronting him at the 2022 fireworks show while he was recording children was retaliatory. Or citing his litigation in an announcement purporting to cancel the next fireworks show — that was retaliation, that's what he claimed. And also blaming him for failed negotiations on a settlement — that was retaliation. You can probably see why none of that is retaliation, and for obvious reasons that we probably won't go into. But I will just point out that the standards for retaliation at the Supreme Court include, you've engaged in First Amendment protected conduct, and then the government takes retaliatory action because of that speech, and that violates the Constitution. But that's what the Supreme Court has essentially said is what you have to show for a retaliation claim. But as we're seeing, the circuit courts are adding other requirements in order to bring these cases, and the Sixth Circuit is one of those circuits. So when they're analyzing this retaliation claim, they say that, yeah, you need to be engaged in protected conduct, but also you have to show that the adverse action was taken against you that would deter a person of ordinary firmness from continuing to engage in that conduct. And then, of course, it has to be because of the speech that the adverse action happened. So this extra element — the adverse action taken would deter a person of ordinary firmness from continuing to engage — is something that the Supreme Court has never actually required. And it's something of a what-we're-calling "the adverse action was not adverse enough." These are rules that the circuit courts are adding to the analysis. And the court here does talk about that, but in a way that I think — we're still okay in the Sixth Circuit. Things haven't gotten worse in the Sixth Circuit because the court says that the retaliatory government action must reach a threshold of being adverse enough to support a retaliation claim. In other words, they have effectively given government officials a free pass to intentionally wield their power to punish protected speech just so long as they don't do it too much. That's how we would describe what the Sixth Circuit's ordinary-firmness element amounts to. So, going to that issue in the analysis, the court said that he sued a lot, but he continued to sue a lot, so he wasn't deterred.

M

Mike Greenberg 38:46

He seems like a terrible person to be analyzing what is ordinary. Because there are ordinary people engaging in all sorts of First Amendment protected speech, but the ordinary person is not filing 13 lawsuits against the city in a couple of years. So, what scale even is this?

B

Betsy Sanz 39:06

So the court does — I think what we appreciated was that the court says, yeah, this factors into the analysis. But the court does say that although we've held that the plaintiff need not actually have been deterred from engaging in the challenged conduct, it still bears on the analysis. So it's not letting him get away with it, but at least the court said this isn't a requirement — it's not like you have to shut up. And not just in retaliation cases, but just broadly speaking, you always get a little concerned when the court requires a person to shut up before the court will consider the government's action as being chilling to speech. And so we're appreciative that the court recognized that it's not a matter of you having to shut up, but also, if you're suing 14 times in five years, then maybe you might not be deterred.

M

Mike Greenberg 39:58

Someone else might have stopped at 10.

B

Betsy Sanz 40:00

Yeah, right. Or maybe even five, Mike. Anyway, so we wanted to point that out as an appreciation for, in this case of very bad facts, that the court didn't make it worse for legitimate retaliation claims.

A

Anthony Sanders 40:16

That often happens, bad facts making bad law.

B

Betsy Sanz 40:19

Yes, that's right. And so the last point on the retaliation claim: the court stated the principle that the First Amendment is a shield protecting the public against government officials that want to stifle speech they do not like. But this plaintiff, by contrast, wants to use it as a sword to stifle speech he does not like, that of the city officials in particular. And I think IJ, we agree with that, right? So we think that people don't just get special protection just because they criticize the government, but the point is that they can't be put in a worse position because they speak out. So anyway, those are not the kinds of cases that IJ brings, and we think they're probably right that he didn't suffer retaliatory action. Anyway, the broad picture on this is that this is a harassing litigant. The sanctions were upheld. But then the court does something more, and this is your twofer. The court issues a separate opinion on the same day because of what they discovered — the Sixth Circuit discovered it. And interestingly, side note, the Sixth Circuit doesn't say that the city's attorneys pointed it out. So I didn't dig in, but I'd be curious to see if it's just the court.

A

Anthony Sanders 41:46

Yeah, I could see either. I could see one of the clerks noting it if it's pretty obvious, which it is, as you'll explain in a minute.

B

Betsy Sanz 41:55

And also, it just puts me on notice as an attorney. We should — the opposing side should be detecting this. It shouldn't be up to the court necessarily to recognize that people are citing fake cases, which is what happened here. So the court noticed it, and apparently in the course of this appeal of the sanctions order, Whiting's — the plaintiff's — lawyers cited two dozen fake — there were two dozen fake citations and misrepresentations of facts. And the Sixth Circuit ordered the lawyers to show cause about why they shouldn't be sanctioned for these fake citations. And I'll just tell you what the court instructed them to do. They instructed them to explain why they shouldn't be sanctioned. Provide a copy from Westlaw or such of all the cases. Highlight the material they quoted from the cases — show their work, right? Tell us who wrote the briefs in each of their cases. Tell us whether the briefs were ghostwritten. Tell us whether they used generative AI to write the briefs, and explain how they cite-checked the briefs. And instead of doing all of that, these lawyers responded to the court saying that their order to show cause was void for failing to include a signature from an Article III judge. And in my notes, I put an exclamation on that.

M

Mike Greenberg 43:26

My jaw hit the floor when I read that, Betsy.

B

Betsy Sanz 43:30

And which actually we'll get to, because there are some aggravating factors that they ultimately identified and that might have factored into it. The lawyers also responded that the order was motivated by harassment of the lawyers by, I guess, the Sixth Circuit. And it was also an illegal ex parte communication within the court, whatever that means. So I almost feel silly discussing this case, because who would behave like this, right?

A

Anthony Sanders 44:05

I mean, you expect this from a sovereign citizen pro se type plaintiff, right? Where the person knows nothing of the legal system. They're getting into it. They're kind of like maybe the underlying plaintiff in this case. It's not excusable, but you expect that. But then these are licensed attorneys.

B

Betsy Sanz 44:25

Yeah, two of them. There's two licensed attorneys here doing this stuff. So the court decides that they have to do something about this, right? So they issue the separate opinion. But they also discuss some of the problems, and I'll go into that, but we also get into where they have authority to really come down on these guys and stop this kind of behavior. So just an idea of the kinds of things that the court says. It's a pretty lengthy opinion. It's the longest that I've seen about AI hallucination-type discipline, but I haven't read all of them. It's pretty in-depth. And the court just goes out of its way to say that just because some things in the brief were not fake does not mean that you don't get sanctioned for your fake quotes. That doesn't relieve you if you do something right. Even one fake case is sanctionable in the Sixth Circuit — take note. Sanctions are necessary in these kinds of situations for the court to function as an institution, is what the court says. And that this kind of conduct amounts to bad faith because any reasonable attorney should know that a case is meritless if the only authority on which he can rely is a figment of the imagination. So the court decides it needs to do something significant, and it goes to its rules and finds that the Federal Rules of Appellate Procedure, Rule 38, does allow the imposition of costs and attorneys' fees, but that's all, and felt like it needed to do more. Unlike a district court, which can reach for Rule 11 — there's some freedom to structure sanctions under Rule 11 — so the Sixth Circuit reaches for its inherent authority, which generally speaking protects the legitimacy of its proceedings. And so under Rule 38 they could award the costs at double, but under their inherent authority —

A

Anthony Sanders 46:45

You can do whatever you want, apparently, under inherent authority.

B**Betsy Sanz 46:48**

You can do whatever you want. And Anthony, I was thinking, I should really reach for my inherent authority more often, just in my life and certainly in my marriage, because this seems pretty powerful to me. In court, anyway, the inherent power sanctions available include fines, award of attorneys' fees and expenses, contempt citations, disqualifications or suspensions of counsel, and drawing adverse evidentiary inferences and such. So the court found that these attorneys violated the duty of candor, both under the court rules in Tennessee and under the ABA model rules. They brought the profession into disrepute. And so their sanctions include this — and I'll give you the aggravating factors first, because the court did point to them, and I think this should give us all a little bit of comfort, because I really do think this is an extreme case. But in case you're wondering what not to do to get extra bad sanctions: you don't want to be doing this kind of sloppy AI misconduct when you are appealing a sanctions order. So that's one thing that you cannot do. You also cannot have previously lied and gotten sanctioned by your Supreme Court. The Supreme Court of Tennessee had previously publicly censured one of these attorneys for lack of candor. And also the other attorney had been suspended from the Eastern District of Tennessee for lying to the court, and then still submitted fake citations in this case. They also defied that show cause order, which seems obviously a bad thing to do. And then the court just said there's just a stunning lack of respect here. Mostly, and I think this is true, right, we're seeing people — if they participate or they accidentally include hallucinations — people are chagrined and they're generally apologizing. But these fellows didn't. And so I think we should not do that. It's a pretty extreme case, but it might on the periphery give us some guidance on what not to do and how not to be.

A**Anthony Sanders 49:07**

Mike, does it give you guidance?

M**Mike Greenberg 49:10**

You know, I don't think I needed guidance to not engage in this particular behavior, but I feel confident now that I certainly will not be doing that in the future. Yeah, I mean, like I said earlier, my jaw hit the floor when I read their response to the show cause order. I think Betsy didn't even touch on everything going crazy in here. They also sought a writ of mandamus from the U.S. Supreme Court to stop the Sixth Circuit from making them show cause, right? This is outlandish. You know, generative AI is great for some things. I don't think people should be using it to write briefs, but it actually is pretty good, especially the Westlaw version of AI, for actually getting you started on research. Just use it for that and not for actually composing briefs for you, because we're seeing over and over and over again, people don't get away with it. Just check the citations.

B

Betsy Sanz 50:21

I refuse to copy and paste things too. What if it's three sentences from a case and you need it in a pull quote? You're not going to copy and paste that? Oh, I beg your pardon. I beg your pardon. So if I do some research, I'm not having AI generate actually original content. But if I'm doing AI research, I won't copy and paste from any results from that either, because it's just not dependable, is what we've seen. So I will say that I was, you know, I don't know if the tech was listening to me as I'm bursting forth with exclamations over this reading, and I was talking about AI, and Alexa heard me or something like that, because I started getting in my feeds a lot of stories about AI hallucinations. Or maybe it's just happening. Maybe it's just happening that much.

A

Anthony Sanders 51:14

I think it is.

B

Betsy Sanz 51:15

I think it is. But yeah, just in the few days since I was looking at this case, there was a case out of the Georgia Supreme Court — have you guys seen this? You're nodding.

A

Anthony Sanders 51:31

Yeah, I think our friend Andrew Fleischman was on the other side of the argument.

B

Betsy Sanz 51:35

He was, yes. Where the prosecutor — I think there was a motion for a new trial and the prosecutor had prepared a brief. And it was denied, right? It was a motion for new trial that was denied, and in the denial order, the court just adopted whatever the prosecutor had written. And so she's standing there in the Georgia Supreme Court and one of the justices asks her about the order having a bunch of fake citations. And she was like, oh no, that order was changed. And he's like, actually, I looked at your brief and it's all in there. And she's like, what? And what a moment to discover that, right, that you had no idea that that was happening in your work, and then to be called out like that. It's everybody's nightmare. So, you know, exercise caution and be responsible.

M

Mike Greenberg 52:37

It's impossible to not have seen one of these horror stories at this point. I just don't understand how this keeps happening.

A

Anthony Sanders 52:43

I think it's a reminder of how, even AI aside, how much there is copying and pasting and boilerplating in legal practice. And there always has been. And so you might get your brief that has a citation to some case about the summary judgment standard, right, which for non-lawyer listeners, that is an incredibly normal, repetitive thing you'd have in all kinds of briefs. And so are you going to cite-check that case? Oh, I've seen that a million times, I'm going to include that. And so you can see how there might be an accretion if something gets in there that's wrong — it's not that case, or it's a made-up case — and then you paste it in this brief, paste it in this brief. No one ever checks that, right? Because I'm not going to — I know that standard, I'm not going to check my opponent's use of that case. And we at IJ, we're very proud that we cite-check our briefs. That's actually pretty unusual in a lot of practice. And this case really — I mean, this case was absolutely extreme behavior — but it really brought home to me how, if you are a busy attorney, especially in a smaller firm, maybe solo practice, and you are a really busy attorney and you have a case like this, and maybe it's a client who's kind of paying the bills, kind of — God knows what the financial relationship was with this underlying plaintiff, right? And you're just trying to turn out yet another of these doomed appeals for this guy. Are you really going to want to spend that much time on it? No. But you need a brief. You need something that looks like a brief. And so LLMs are just so seductive, right, in that circumstance. If you have a big corporate client and you're doing an important brief, an important case, those lawyers, they're not going to use AI because, hell, I can do 100 hours and make all this billing. But if it's someone who's maybe not even going to pay the bill for a couple thousand bucks, and you're that type of attorney who's maybe not doing that well anyway, I think they're so tempted. And you almost feel for them, right? They're so tempted to use it. And, yeah, I'll cite-check the — I know they go — or they whatever, they make up citations sometimes. I'll check all that. And then filing deadline's coming up and I don't have time to check it. I'll just file it, right? I bet that happens all the time.

B

Betsy Sanz 55:19

All the time. And especially — I mean, this is how things work, right? Innovations happen, and then people have to internalize the cost of that. And right now, that's what's happening. I mean, here the sanctions were — each of the lawyers had to pay 15 grand. They had to reimburse all of the city's fees on all three appeals from all those lawsuits. They had to pay double the cost to the city because the court awarded the stiffest penalty possible. I mean, these mistakes can be very costly, and I think maybe the courts are imposing those costs in order to stem — they make it less tempting, probably.

M**Mike Greenberg 56:04**

Speaking of Anthony's comment on doomed appeals and paying the bills, I have one last comment on the underlying sanctions order, not the attorneys. Because the funny thing that happens as you're reading the first opinion, you're reading it and you're like, okay, this is one kind of loco guy in a small town out there being a vexatious litigant. Surely he doesn't speak for some broader American zeitgeist or our over-litigiousness or anything like that. And then on page six, getting into page seven, the court is laying out some basic principles of sanctions and how being a serial vexatious litigant impacts that. And two of the cases the court cites for those propositions of law are both called Trump versus Clinton. And I just had to stop and put my head down and sigh for a second before continuing on to read the opinion, because it does speak to some broader zeitgeist about our American practices.

A**Anthony Sanders 57:02**

Well, we'll leave it to our listeners to check out those cases, which luckily we're not going to dig into today. But thank you guys both for illuminating our listeners with these matters. We know a little bit more about the oddness of certification and the oddness of AI writing. And Mike said to me in the green room that he's been radicalized against the Erie doctrine now because of his case. So I think we'll leave the next time we have him on to maybe flesh that out a little bit more. But thank you for joining us, and thank you everyone for watching and listening to Short Circuit. Please be sure to follow Short Circuit on YouTube, Apple Podcasts, Spotify, and all other podcast platforms. And remember to get engaged.