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SPEAKERS

An Altik, Christian Lansinger, Anthony Sanders



Anthony Sanders 00:11

First Amendment retaliation and social media bans. 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 are recording this on Tuesday, June 30, 2026. I have two of my Institute for Justice colleagues here to bring you some First Amendment news, which happens to all be from the Sixth Circuit. We have a Sixth Circuit case about a colorful politician in Tennessee who ran into some trouble regarding her residence and then turned it into a retaliation case. We even have some updates on the story in that matter. This is going to be a fun one, I think, for the audience, brought to you from the Sixth Circuit by my colleague Christian Lansinger. And then we're going to hear from my colleague An Altik about another Sixth Circuit case where no one could agree on how the reasoning of the case should go, but it seems that enough judges on the Sixth Circuit there don't like social media for kids, and so the law about social media for kids is going to stay, at least for now. So that's the story in that case, and we'll hear about that one a little later from An. But I want to bring An on right now. I know she has kids who are not of the age that would be using social media, even if they wanted to, I believe. I have kids at the age where this whole battle royal is going on, and I'm sure parents who have kids of my kids' age are of certain opinions about this law that we'll discuss in a little bit. But An, have you heard, when does the pressure start coming for your five-year-old to say, "Hey, mom, when am I getting on TikTok?"

A

An Altik 02:16

Well, you know they start earlier and earlier every day, and I swear I see preschool kids these days walking around with phones. So even though my kids are still on the very, very little end, aside from all the legal analysis that we'll do later, I'm very much against social media for them. And as someone who grew up in the realm of MySpace and Facebook when they first started, I definitely wasted way too much time on that. So, as a parent and as a past social media addict, I'm definitely very much going to make sure my kids do not start on that.

A

Anthony Sanders 02:50

So, did you have a a MySpace page?

A

An Altik 02:53

I did. I did.

A

Anthony Sanders 02:55

That's impressive. I don't think I ever did. I remember it was like it was a thing for like two years, and then it just fell apart, or you know, Rupert Murdoch couldn't compete with Facebook, so it went. And then it was like a music thing for a while. Anyway, we don't need to rehash all that, but we'll hear from An in a little bit about this really interesting First Amendment case. But first, another First Amendment case from Christian, and that is in Tennessee. We had this politician; she got into a little bit of trouble about where she was living, which itself is an interesting legal question, but it's not really a First Amendment thing. But then she made a federal First Amendment case out of it, and maybe opinions can differ whether that was a good idea. So, Christian, tell us the story.

C

Christian Lansinger 03:50

Yeah. So this case is *Amacher v. City of Tullahoma*. It's a Sixth Circuit case that was issued just last Thursday from the day we're recording. That's June 25, 2026, and this was written by Judge Sutton, and it's a First Amendment retaliation case, again, out of Tullahoma, Tennessee. It's a city in, I think, central southern Tennessee with 20,000-some-odd residents, and it's a messy local politics case. It involves an alderman, a Confederate flag Facebook photo, a quo warranto action, if I'm pronouncing that correctly, and a lawyer named Drew Justice. So first, in terms of the cast here, we're dealing with Jenna Amacher. She's been, or she was rather, a Tullahoma alderman since 2020, and she was politically controversial. Judge Sutton doesn't share every detail with us, but he does provide a few examples to give us at least an idea. She opposed a local redevelopment plan that most of the locals supported. She took more conservative positions than other aldermen. She criticized the other officials. And the one that really strikes in this case: she posted a photo of her family's redneck Christmas party in December 2020 with her sister-in-law, and she's standing in front of a Confederate flag with a sign reading, "We go together like cocaine and waffles," and that makes it into the opinion. I had to look up that phrase because I thought I recognized it, and I think it's from the *Ricky Bobby* movie from 2006. I think it's the *Talladega Nights* movie.

A

Anthony Sanders 05:22

And so who is it that goes together? Her and her sister, or her and the Confederate flag? And is it that they go together well, or they don't go together well? Cocaine and waffles.

C

Christian Lansinger 05:34

I presume it's some kind of a joke because they don't go together at all. Some kind of a *Talladega Knights* line that makes no sense but is supposed to be funny and suggest that they're close when they're not. I don't really know.

A

Anthony Sanders 05:49

Well, if *Talladega Knights* aficionados want to ride into *Short Circuit*, we'd love to hear from you, but we'll leave it a mystery for for the moment.

But either way, I do know from at least my own research that that photo did raise a bit of a stink. They had a whole city hearing on it where there was a local that asked that she resign. She did not, obviously. And there was also a statement the city put out saying she doesn't represent their values. So this did create some level of buzz. And just to give another example, I was also Googling this alderman, and she had another First Amendment challenge against Tennessee's rule that when you apply for some kind of a position, it's by default a nonpartisan election, because she wanted to make sure everyone knows that she's conservative. So this is to give an idea. This background is important because she's alleging that this background, this politically controversial background, is what is really motivating what comes next, because she runs into trouble here. And that is that she was not residing in Tullahoma for at least two years between February 2021, which is shortly after she was elected, up to at least March 2023. The record shows that she had sold her home in Tullahoma and moved outside the city, and then shortly after she bought an undeveloped lot within the city. But due to a tornado and COVID pandemic delays, she didn't actually construct any kind of a residence on that undeveloped lot. And under the charter for the city, it's required that she remain a resident of the city if she's to be an alderman. So for a while, nothing happens. But in 2022, she ran for a county election commission position, despite still already being an alderman, and she listed this house-free lot as her residence. That kind of started this chain of events. At least to my eyes, that's really what started this whole thing, because it raised the suspicion of the county election commissioner. And a few months later, a local resident ended up collecting 270 signatures to ask the district attorney to investigate her residency status. And following that investigation, the district attorney reported his findings to the city board and asked that she resign because she's not a resident of the city, or at least that's what they're alleging. So when she refused to resign, they filed what's called a quo warranto action. And that's an old legal device, an old writ, extraordinary writ, that is just Latin for "by what authority." And it's just asking, "By what authority do you hold this office?" And the remedy can be pretty harsh. It's removal from office. So this action proceeds, and in her eyes, this action is entirely baseless and based on her own views, and they're targeting her based on perhaps a Facebook photo, her views about other officials. But either way, this action proceeds in state court. And despite the fact that she is not currently physically sleeping in the city, that doesn't end up mattering because state law says that you can still be a resident of the city if you have an intent to return there at some point. And that undeveloped lot was seen as "just enough." That's the language of the state court. So she wins. She wins that case. But as Judge Sutton puts it, Amacher's victory did not bring peace. And so ultimately she sued the city, its mayor, its city administrator, and two of its residents—one being the guy that collected the signatures, and one being the surety for a \$500 bond for the quo warranto action. She sued all of them on First Amendment retaliation grounds, saying that this whole quo warranto action was baseless and rather was motivated by her politics and her controversial stances and perhaps her photo from that Christmas party. The district court granted summary judgment and said, you don't have hardly any evidence that this action really relates back to this photo in 2020 or any of your politically controversial stances. And it also mentioned that these residents, there's no evidence that they conspired with the state, or rather with the city, to actually create a cause of action under the First Amendment. They're not necessarily acting as government officials here. They're just residents that were perhaps exercising their own free speech rights.

A

Anthony Sanders 10:17

She didn't have, like, allegations that they were part of the same like group of folks who investigated her for the hearings about the Facebook photo or that kind of thing?

C

Christian Lansinger 10:26

She had bare allegations, from what it sounds like, that they were somehow involved in a conspiracy. But there's at least that the district court decision kind of goes through the the depositions where they're trying to get out this evidence that she has, that these two residents are somehow linked to this. But beyond filing the 270 signatures and being the surety for the \$500 bond, I don't see a whole lot. And that's part of the issue with this case. I'm not seeing the evidentiary link between the action that was taken by the government, the quo warranto action, and the politically controversial speech that she had since being an alderman in 2020. So ultimately, Judge Sutton agreed with all of this, but he did it for different reasons. Normally, when we deal with First Amendment retaliation claims, there's the Mt. Healthy framework, which is basically a three-step burden-shifting framework to determine if there's a First Amendment retaliation claim. The burden first falls on the plaintiff to show that they were engaged in some protected First Amendment activity, that the government took an adverse action against them—and here it would be the quo warranto action—and most importantly, that the protected activity, the speech, actually is what caused the adverse action, which is obviously, I think, the issue here. But Judge Sutton doesn't go into actually applying this framework, which is what the district court did. Instead, he asks a preliminary question, which is: Was there probable cause for the quo warranto action? And the reason he does this is, although that burden-shifting framework tends to be how First Amendment retaliation claims go, in a couple of instances the Supreme Court has said that we need to make this initial determination as to whether there's probable cause. And if there was probable cause for the government action, we don't need to actually inquire into the government's motives. That's enough for the government to win. It did that in a couple cases. There was a case called Hartman, which dealt with a retaliatory prosecution case, and then later in Nieves, which is an on-the-spot police arrest case. Here, though, we're dealing with a civil quo warranto action. So the question is whether this special probable cause bar that prevents First Amendment retaliation plaintiffs from getting their opportunity to show that the government was motivated by protected speech—you don't get to that point if they have probable cause—and Judge Sutton determines that that probable cause bar should also apply to this action. And he compares this action to a malicious prosecution action, which is a common law action that involves showing a lack of probable cause. He also kind of analogized this case to a retaliatory prosecution case, where the issue there, as the Supreme Court kind of laid out, is you have a prosecutor acting as this intermediary. So you have this causation problem where you may have some individuals—here we're talking about the residents—but you may have some people that are allegedly acting in a retaliatory manner, and they go to the prosecutor, or in this case the district attorney, and they ask them to pursue an action. And then that prosecutor or that district attorney makes their own determination. So it's hard to see whether that breaks the causal chain, whether the protected activity, the speech, is really what caused the adverse action.

A

Anthony Sanders 13:45

Right, so here, that writ didn't have to be filed after those petitions were were put in. It just made gave then that that government lawyer the option, or put the wheels in motion to then perhaps file that, right? It's not like 270 signatures, then you will have the quo warranto filed.

C

Christian Lansinger 14:07

Right. The signatures I think were more of just to show that this was important to the citizenry, and I don't know if there was actually a signature requirement at all. But regardless, the district attorney did their own investigation under the record, and they determined, okay, this residency thing is a real problem here, you've been living in this other place. And the state court record goes into more detail about all these mail parcels were delivered to that address. I mean, it was obvious she was living outside the city. So ultimately, once it's determined that the probable cause bar applies here, the case is basically over, because the state court said there was "just enough" evidence that the alderman actually had an intent to return to the city. And so he referenced that "just enough" language. And ultimately, the evidence showed that the defendants, for probable cause—there was kind of a light probable cause standard that I thought Judge Sutton applied here, where he said that the evidence shows the defendants had a reasonable belief that the petition had at least a chance of succeeding. It seemed like kind of a light probable cause standard. But either way, under that standard, the case ends. There's no looking into whether these individuals were actually motivated by her speech, by the redneck Christmas party. It doesn't matter, because ultimately they had probable cause that she was at least outside the city, because a reasonable person could believe that she didn't have intent to return. So that's where the case ends. And this kind of shows an issue that we deal with here at IJ, where you have this probable cause bar preventing First Amendment retaliation plaintiffs from really having an opportunity to dig into the government's subjective motivations, which we do in other contexts. We do in our economic liberty cases; when we deal with rational basis review and other tiers of scrutiny, we ask, what is the government's interest here? But we're not really concerned here, because we just say there's probable cause, end of story. For these facts, it doesn't really bother at least me too much, because it doesn't seem like she had too much evidence in the first place. But for our plaintiffs in our IJ cases, this bar presents a real problem. And the farther that this probable cause bar creeps into actions that are not just retaliatory prosecutions or on-the-spot police arrests—these limited situations where the Supreme Court has applied it—but when it starts applying that bar to these other instances, we start seeing where First Amendment retaliation plaintiffs may not actually get their day in court. So ultimately, she lost at the circuit level. I guess she can appeal if she chooses to, but that's kind of at least where the case seems to be ending right now.

A

Anthony Sanders 16:58

Yeah, this is classic case, perhaps, of not-so-great facts making not-so-great law. An, your thoughts?

A

An Altik 17:05

Yeah. So first, based off the facts, you know, she is a government official. She is acting as an alderman, you know, to for all intents and purposes, to the citizens. She is sort of a government official. And so I wonder if there should be a slightly different standard or inquiry, just because in a way, you are judged on your political opinions and what you do. You are living your life out in the public. And so if citizens aren't actually happy with what they're seeing, then they should be free to speak up about it. Of course, I'm not condoning retaliation of any kind. But in this instance, the lawsuit seemed like, no matter what motivations the citizens might have had, it was totally supported by evidence. If you looked up this address and it was just an empty lot, then she can't really plausibly say that she's been living on this empty lot. But yeah, just to follow up on what you said, Anthony, and what you were bringing up, Christian, with the Nieves bar: we always ask, is there any way that if a case that we take goes the wrong way, we create bad precedent? And it really, obviously, this is not something she was worried about when she filed the case. But this really just seemed like there was no way that it was going to make any good law. And now, instead, in the Sixth Circuit we do have something that's equivalent to the Nieves bar, and it will ultimately just make it harder for anyone to bring a retaliation claim, which is unfortunate.

C

Christian Lansinger 18:26

And that's kind of what strikes me as odd about this opinion is that it didn't seem like because the district court didn't actually go into the probable cause bar at all. They just applied the standard Mt. Healthy framework, or however it's exactly articulated in the Sixth Circuit, said no causation here, can't show that this action was actually related to this Christmas party photo or anything else, and that's the end. And I'm not sure why the court really felt the need to actually reach this probable cause bar issue. I thought it would have been a lot simpler just to say the district court was right. And it seems like there was a discovery problem. Judge Sutton, at the end of the opinion, kind of goes into the fact that the plaintiff was complaining that she was unable to depose three witnesses because she ran out of time. But the court faulted her for that. And so there's not really any evidence here. And I think we can just end it with that without really reaching or extending the Nieves bar to other contexts. That seemed like an unnecessary move.

A

Anthony Sanders 19:29

One silver lining does seem that there's this Nieves exception, which we at IJ litigated with the Gonzalez case a couple years ago at the Supreme Court, where even if there is probable cause, if you can show that lots of people are breaking this law and none of them are prosecuted—like jaywalking. I think actually Nieves maybe names that as an example. And he says at some point, there's just no evidence that she would have that exception. I don't even know if she argued for that exception. And so that's still out there as something that a more maybe sympathetic person could use, but it wasn't any use to her. Do I have that right?

C

Christian Lansinger 20:15

That's right. To give Judge Sutton some credit, he listed out several reservations at the end of the opinion, as he called them, of situations that could be different. So there is that limiting factor here that maybe makes this a one-off, which is at least beneficial. But I should mention, and we talked about this before we started recording, that this saga may not be over. She was indicted just, I think it's about three weeks ago, because she applied for another position, political position, this time for the Coffee County Clerk position, and she listed the same lot that is still undeveloped to date, or at least doesn't have a primary residence on it, as her address for that election. And she also used that address for her voter registration, her driver's license. And so she was indicted on felony counts by the same, involving the same district attorney in this case. So the saga may not be over. Maybe she's going to have to file another First Amendment retaliation case based on that additional adverse action. I don't know. But it seems like there's still some stuff to be figured out here. And I should also mention one more thing that I found interesting, which is her lawyer. His name is Drew Justice. I had to look him up just purely based on the last name, and I found something that was interesting. He made headlines. It's been over a decade now, but he was in a criminal defense action, and the prosecutors filed a motion asking that he stop referring to them, at least for the trial, as "the government," because it was seen as being used in a derogatory way. And I'm reading from the government's motion here: that it would make the state's attorneys seem oppressive, and it would inflame the jury to call them the government. And so perhaps that's some Tennessee state politics at play, or culture at play. He responded, and he basically said this motion should be denied. Understandably. But he said if you're not going to deny the motion, he asked that the defendant be called "the citizen accused." He asked that he be called "defender of the innocent" or "guardian of the realm" or "Captain Justice," whatever the court feels appropriate. And he signed off this response with, "Wherefore, Captain Justice, guardian of the realm and leader of the Renaissance, primarily asks the court to deny the state's motion. But if the citizen accused, alternatively, moves for an order in limine modifying the speech code, as aforementioned."

A

Anthony Sanders 22:42

Well, I thought that was just kind of—

C

Christian Lansinger 22:45

The ruling: he won. They denied the motion. Unfortunately, I don't think the ruling was that he gets to be called Captain Justice. But at the same time, Drew Justice is at least living up to his name.

A

Anthony Sanders 22:59

But he got to call the government the government.

C

Christian Lansinger 23:02

He got to call the government the government, as derogatory as that may be in Tennessee.

A

Anthony Sanders 23:08

I love it. Okay, great. I think I've heard of him in in other cases, Drew Justice. So we'll leave it there. But thanks so much for that story from the Sixth Circuit in Tennessee. Now we have a story from the Sixth Circuit in Ohio. And you know, Captain of the Realm, or was it Guardian of the Realm, Captain Justice—all these things, those are great social media handles. And so the question here is: should Ohio 14-year-olds perhaps be able to have those handles and get online and do their thing without their parents' permission? I think is how the law works. So An is going to tell us the story there and how the judges on the Sixth Circuit can't make up their mind about how to deal with it.

A

An Altik 23:56

Yes. So I will be discussing NetChoice v. Yost, if I'm saying that right.

A

Anthony Sanders 24:00

Yeah, it might be Yast. He's been in all kinds of stuff, that Attorney General, but yeah, say what you want.

A

An Altik 24:06

Okay, I'll stick to Yost. Okay, yes, the opinion is quite long, but I think I can break it down to some digestible pieces. But I may omit some details. So if you're interested, I would definitely go and take a look. So as Anthony suggested, Ohio enacted a law requiring parents to provide consent before their children under the age of 16 may access social media. NetChoice, the plaintiffs, is a national trade organization that has filed suit in nearly every single state that has enacted a similar law. And some of the members—there are many, but the ones that you would recognize most commonly—are Airbnb, Amazon, eBay, Etsy, Google, Lyft, Meta, PayPal, TikTok, etc. Of course, as litigators, we know that the words of the statute are the most important part and provide all the legal basis. But I'm going to paraphrase a little bit just so we can get to the meat of the opinion. The act lists generally four elements that define the covered operators, as they call it, and then they have an additional 11 factors to assist in deciding whether these specific sites actually target and attract children. And it's basically any site where you can create a profile, have a friends list, interact with people, and create posts or other content. So if the attorney general finds that you're in violation of this in any way, it's really just a civil penalty that escalates; it's monetary. And there are a couple exceptions: any cloud-based storage sites, and any news or media sites where the interactions are limited to commenting, for example. All right. So starting at the district court level, the district court granted NetChoice's request for a TRO and a preliminary injunction. Later on, at the summary judgment hearing, they held that NetChoice did have prudential standing to assert the rights of children in addition to all of their members. The statute was facially unconstitutional and overbroad, and it was unconstitutionally vague. So, just to zoom back a little bit, the opinion was written by Judge Clay. There was a concurring opinion by Judge Batchelder, and a dissent by Judge Ritz. But I'm going to sort of describe what I think each of them are saying about each topic, so as not to try to go back to every single one.

A

Anthony Sanders 26:26

And none of them sign on to the others in much of any way, right? Even the two in the the who rule for for the attorney general.

A

An Altik 26:34

Yes, some of them, even though Judge Ritz is dissenting, some of them agree on some things and disagree about other things, so we'll see if I can keep that clear. First up is standing, very very exciting topic, I know, but interesting in this case, because I think when you first hear about the law, you immediately assume that it would be children's rights, children's First Amendment rights at issue. But obviously NetChoice is representing all of these different social media companies, and so the question is: can they, using third-party or prudential standing—they're interchangeable—assert the rights on behalf of children who access these sites? The district court found no issue with that; that they did have standing. But Judge Clay says that they don't. And just to put this aside, NetChoice does have associational standing on behalf of all of their members. But yes, so starting with prudential standing, Judge Clay says, look, these two parties, normally if you can adequately represent the children's rights, then it would be okay. But in this instance, they are so opposite; they have the opposite interests. Even if the social media sites were able to completely agree that social media is terrible, their interest is still to actually target the children and have the children access the sites as much as possible, right? That's just their monetary interest in running the sites. So he just feels like their interests are so conflicting; it just wouldn't make sense to agree to let NetChoice represent the children's rights. Now, moving on to Batchelder: she uses a slightly different test, but ultimately comes to the same result, that there is no prudential standing for NetChoice, and so they can only represent their own members' rights. On the other hand, Judge Ritz, who is dissenting, says that NetChoice can assert the minors' rights. The only factor that is at issue is the very right asserted. So the First Amendment rights—we don't need to think about whether the children are actually negatively affected by social media. It's about their First Amendment right to access the content and NetChoice's First Amendment right to curate and provide that content. And so he finds that they do have standing to assert the children's rights. But of course, he is in dissent. So, after that, of course, the majority deciding that they do not have prudential standing, we move on to the facial and overbreadth First Amendment challenge. So Judge Clay starts by separating them. He says that NetChoice is bringing a facial challenge and a secondary overbreadth challenge. And Judge Ritz discusses it as a facial overbreadth challenge. So that alone is a little bit confusing. Are these separate challenges? Do they mean the same thing? Can it be facially unconstitutional and overbroad? I'm not sure. And the opinion is not clear.

A

Anthony Sanders 29:30

Yeah, I'm not sure either. I mean, overbreadth is a kind of facial challenge, usually, is how it's thought of.

A

An Altik 29:35

Okay, so that aside, Judge Clay notes that the Supreme Court has held that social media is protected speech, and in this instance, the exact First Amendment right that NetChoice is asserting is their ability to curate the third-party speech. And he finds that, yes, this is protected speech, and the law does burden that protected speech because it limits the audience to which NetChoice can provide this speech. And then he analyzes whether this is content-based or not. And he decides that it is, because as I mentioned earlier, the statute provides 11 factors that people can look to to decide if the sites are targeted or meant to appeal to children, such as the subject matter, the visual content, if they bring in child celebrities and things like that. And on the other hand, because they exempt certain news organizations, he finds that they are favoring those organizations, and therefore it's content-based. Now, moving on to Judge Batchelder: she does not decide to reach the merits at all. She says that the claim fails because the plaintiffs have to set up the suit in the exact way that Moody suggests, which is a different SCOTUS case but also involving NetChoice. But because the parties stipulated to many facts, this was a very fast litigation, and so Batchelder says there was not enough of a factual record to fully decide. And so the claim just must fail because there's not enough information for her to decide. And lastly, moving on to Judge Ritz. Again, he phrases it as a facial overbreadth challenge. And after deciding that strict scrutiny does apply, he says the scope is not in question. It's the same First Amendment violation in every application. And so he finds that it's just very obviously protected speech. Now, in their actual application of strict scrutiny, Judge Clay finds that the state—he defines the state interest as protecting children, involving parents, and regulating contracting with children. He finds that it doesn't regulate what the operators post. It's only operating on who they can give access to that content to. And because of all the strong evidence of the negative effects of social media, this is a narrowly tailored law and serves a compelling state interest. Again, Judge Batchelder, because she finds that this was not sufficiently pled in any way, doesn't reach the merits. And Judge Ritz obviously finds that—and this is all based on the fact that he found that there was standing to represent the children—he says that social media is clearly a zone for constitutionally protected speech, and asking parents to provide that permission before they're able to use it is a significant burden that's a basically insurmountable barrier for some children. And he uses an interesting quote that I found a little bit perplexing, I would say, because he said we should be wary of governments supplanting parents. But I just thought that was weird to say because the law literally is asking parents to provide their permission.

A

Anthony Sanders 32:59

Right, it's not a complete ban. It's just you need the parents' permission.

A

An Altik 33:03

Yeah. So he basically concludes that this law fails strict scrutiny, and because he reaches that, there's no comment on vagueness. All right, I'm nearing the end here. So now we just have Clay and Batchelder on vagueness. So Clay states that "operators that target children"—this is the phrase that's at issue—"operators that target children that are reasonably anticipated to be accessed by children." NetChoice argues that that is vague and it's unclear who falls in that category. And secondarily, the media outlets that are reporting news, they don't like that phrase either. Judge Clay says that even if the language tracks federal regulations, which is what Ohio used to draft this law, some operators may not know if they will be considered as targeting children. And for some operators, it's not vague at all, such as the big players like YouTube and X and Facebook and more classic social media sites. But NetChoice has not shown the act is impermissibly vague in all of its applications or to all of its members. So he sets a standard that they had to show that it was going to be vague basically all the time. Batchelder does take issue with this. She says that applying that standard is actually overbreadth and not a vagueness inquiry, so it doesn't need to be vague as to every single application. But again, she points to the fact that, for her analysis and her points, she needs a fuller factual record, and so she's not able to reach the merits of that decision. But she does comment, of course, on how the phrases are not vague at all. If you target children, you know that you target children. And it's anything that's just not targeting adults. So she finds it a lot more obvious. So I believe that was an extremely unclear explanation of what three different judges thought of this.

A

Anthony Sanders 35:07

I think it was much clearer than the opinions themselves. So thank you.

A

An Altik 35:11

I tried, but one thing that I wanted to get your guys' opinion on that is related to this is: in August of 2025, the Supreme Court actually denied a request to stay enforcement of a very similar law in Mississippi, and that's called *NetChoice v. Fitch*. However, Kavanaugh concurred in that denial, stating that although he agrees with the Court that the plaintiffs did not sufficiently plead that the balance of harms and equities was in their favor, the law as stated would actually violate the First Amendment based on *Paxton's* precedent. So it's almost like he already gave his opinion on its constitutionality. And so it's definitely interesting to see when the first one of these cases will reach the Court. It seems like we already know at least one justice's opinion on it. So I guess I'm wondering, is it that these judges are clearly going the opposite way in the face of that opinion? And then also, one last thing that I thought was interesting was that Ohio stresses that this is trying to regulate contracting with children. And so how does that sort of affect your thoughts on the First Amendment analysis, if at all, and if that should play a role? Christian?

C

Christian Lansinger 36:31

Yeah, I mean, I think at least regarding the first point, NetChoice has lawsuits across the country on this. And the way I see it, whether it was—I think it was Arkansas, Georgia—they all seem to be going the other way, which is to say that this violates First Amendment rights. So the Sixth Circuit is kind of going out on one side of this, but I'm not sure how long that sticks. And the contract thing—it sounds to me like another government argument to try to make speech something else and recharacterize it. I think it's more accurate with what Judge Ritz says, where he says Ohio cannot ban children from the library altogether absent a permission slip. I kind of like that permission slip analogy a little better than a contract. This is setting up a barrier for kids to receive information, which is a protected free speech right. And I think part of this, just to delve a little bit further, is that we talked about how unclear this all is. It is, because social media keeps changing. I feel like five years ago, the issue with social media was that you go online and you see all your friends doing all these cool things, because who would post something negative, right? It's always just like, I'm on vacation or I'm getting married or something awesome. But now social media has kind of taken on—it's not even an accurate term anymore. And that's why you can add 11 factors about whether something is targeting children or not. But this is inherently the online library, and it's a lot of visual content. It's addictive, sure. But this is a big issue, in part because I think that you're trying to apply least restrictive means to meet strict scrutiny. But you can define this all you want; you're trying to regulate the internet and access to it, an online library. And I just think that you're going to struggle to actually meet that standard.

A

Anthony Sanders 38:18

Yeah, I think that's really well put, Christian, about how social media is always changing. I mean, we all know, is YouTube social media? Which many of you are accessing this podcast right now on. Opinions vary, and definitions in some of these laws vary. I think the battle over whether the First Amendment applies to this type of law—like this clever argument about contracting for kids—the government can make those kinds of arguments. But at the end of the day, I think they're better off just admitting, yes, we are regulating access to speech, and there are First Amendment problems here. And then they can move on to: well, but we win anyway, because this is just really, really bad for kids, right? That is their argument. And so I like how the lead opinion here went there and applied strict scrutiny, and then said, no, but really, this really is so bad that the law survives strict scrutiny, even though that hardly ever happens. Now, whether that was correct or not—I tend to think there wasn't enough there, and actually it should be struck down under strict scrutiny. But I think he had some good points, and there's more evidence here than there is in many other cases about whether a law survives strict scrutiny. And he cited some scientific studies about kids and social media. And I think we could quibble with a lot of those studies, but at least there's an ongoing debate there. And so that is how these cases, I think, will eventually be resolved: looking at that real evidence. But it could be that they go in a little bit of a different direction, which is, a lot of you may remember the Supreme Court case from—is that also NetChoice? It was basically the same group or something. It was more the adult industry side of the internet.

C

Christian Lansinger 40:29

Yeah, Free Speech Coalition.

A

Anthony Sanders 40:30

Free Speech Coalition. That's it. So, but a similar group really. And that was at the Supreme Court about the Texas law that had online verification for using pornography online. And the Court applied intermediate scrutiny and found the law was okay. And so that would be outside of current doctrine. But I wonder if eventually, if this did get to the Supreme Court, it would go in that way as kind of a halfway measure to still say there's First Amendment interest here, of course it's regulating speech, but we really like these laws, we hate social media for kids, and so we're going to uphold it somehow. So that's another way I could see it happening. But that really can't happen until it gets to the Supreme Court, because, as these judges admit—at least two of them here; I don't really get where Judge Batchelder was going with her analysis—this is going to be a strict scrutiny case.

A

An Altik 41:31

Yeah, and I just wanted to add one comment on since we were talking about the evidence. You know, as someone who does have a past in science and doing experiments, not specifically psychology, one issue is that, as Judge Batchelder keeps insisting on a fuller factual record, and we talk about how there's more evidence here than in other cases, it's basically impossible in this day and age to get the sort of evidence that we're going to want. If we want to know how bad social media is, we would need to be subjecting a number of children to some crazy amount of hours per day, and then some less, to get a full picture of the harmful effects or positive effects. But we don't do things like that anymore. There's a reason we have stories about all the crazy experiments they used to do, like the prison experiments and all those that we wouldn't be able to do. So it's just a problem on all sides, I think, that we're not going to be able to get quite the same level of evidence that all these judges are wanting to survive strict scrutiny.

A

Anthony Sanders 42:30

Yeah, and that's a good point. I think that the crucible of all this litigation on various sides—this, it seems, being the first one to uphold a law like this—is maybe going to move the needle on evidence too, for good or for bad. And so that's something we'll want to keep a close look on, not just for how it affects social media regulation, but for how it affects all kinds of other regulation of speech. Well, please be sure to share this on social media, all of you who are older than 16 and love talking about Short Circuit online or various other projects of the Institute for Justice. So please do that. And also, I want to thank my colleagues here for this wonderful discussion of these two Sixth Circuit cases. And I hope you've enjoyed them. And I also hope that you please be sure to follow Short Circuit on YouTube, Apple Podcasts, Spotify, and all other podcast platforms, even social media. And remember to get engaged.