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Anthony Sanders 00:04
Hello, and welcome to 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. No fooling. We're recording this on April 1, 2021. And no joke. When you're done with this podcast, you should register for our online event on Tuesday, April 20th, where we and several experts and civil rights lawyers will celebrate the 150th anniversary of the adoption of Section 1983. One of the most important civil rights laws in our history. It's a birthday party! To join us, use the link in the show notes or go to ij.org/cje and click on the icon that says outrage legislation. Years ago, there was this thing that people did, they'd come close to one another, extend their hands, usually the right hand and clasp them together and move them up and down. It was called a shake or shaking hands. Some of you listening may be old enough to remember the social phenomenon. Well, in those olden times, specifically in early 2018, the police saw a man engage in a shake, in fact, two shakes, they thought this was very suspicious, and you wouldn't believe what happened next. That is until IJ attorney Ari Bargil tells you all about it in this Fourth Circuit case that he'll discuss in a moment. Ari, welcome back to the podcast.

Ari Bargil 01:41
Thanks for having me, Anthony.

Anthony Sanders 01:43
Now, this is a big week for Christianity and Judaism, of course. And in light of that, we're going to take a look at a religious liberties case. It's about kneeling at a football game. But as it primarily concerns religion and not speech, it's not the kind of football kneeling that's been in the news lately. We'll hear about that case from the Ninth Circuit from IJ Attorney, Josh House, who's on the podcast for the first time in a while. Josh, welcome back.

Josh House 02:10
Happy to be here.

Anthony Sanders 02:12
Also stick around to the end for a “circuit splits update”, where we'll bring you up to speed on a couple issues we've recently discussed on the podcast. Okay. All right, remind us about shaking hands, in this case, U.S. v. Drakeford from the Fourth Circuit?

Ari Bargil 02:29
Well, this is a case, as you said from the Fourth Circuit, in which the Fourth Circuit applied our old friend Terry v. Ohio, which is a 1968 case decided by the US Supreme Court in which the court essentially held that it's appropriate in some circumstances, for the police to be able to stop and frisk as it's known. But when it does that, when police do that, there needs to be an articulable suspicion, and you can't just, you know, operate based on a quote unquote, “hunch”, which, you know, is sort of a colloquialism used to describe unfounded suspicion and sometimes reflects and oftentimes reflects built in biases and the concurrence gets to that but we'll start with the majority opinion, which talks about that antiquated habit that you mentioned at the beginning, Anthony, of shaking hands. Tremayne Lamont Drakeford, was a North Carolina resident. And he was suspected of being a drug dealer and the Police suspected him of being a drug dealer because they were told he was a drug dealer by a confidential police informant. So this sort of involves already the greatest hits of Fourth Amendment lore. We've got confidential informants, we've got mysterious handshakes and questionable circumstances of arrest. And these all combined after several weeks of surveilling Mr. Drakeford. The police see him enter a house empty handed. And he comes out an hour later after another woman had entered with several bags. And now he's coming out with a bag of his own, he makes a phone call to the confidential informant and says, “Hey, I now do have some drugs to sell you,” but they don't arrest him, then they just continue to follow him. And they follow him to the parking lot of a car stereo parts store. And they watch him sit in his car. And he gets out and two other men approach him, and he shakes their hands, which is either a drug deal or the single most mundane thing a human being can do. And he shakes their hands and rather than getting back in his car and driving off, which as the police officer in the case testified is consistent with what drug dealers do. They all go into the store and they shop for stereo equipment. And Upon exiting the store, a police officer approaches Mr. Drakeford and stops him and then frisked him. He didn't have a warrant to do this. And he's operating based on what he describes as his reasonable suspicion that he just witnessed a drug deal or a handshake. You decide. So he reaches into Mr. Drakeford’s pocket, and lo and behold, he finds a small amount of drugs. That gets him what he needs to secure a warrant to search his residence with They find some more drugs and a gun. And they charged them with a whole bunch of stuff, a bunch of drug offenses, felony and possession of a firearm, possession of a firearm in the commission of a felony, etc, etc. This

guy is facing like 20 years, and he moves to suppress the evidence as fruit of the poisonous tree on the grounds that the entire search was unjustified and was actually a violation of his rights under the Fourth Amendment. And the argument that he makes is, you know, under Terry v. Ohio, you need to have actual suspicion that I did something wrong before you stopped me outside of that car stereo part store and searched me and because you didn't have articulable suspicion, of me having specifically done anything wrong, namely sell drugs, everything that came after is now inadmissible in court, and I should go free rather than going to jail for the next 20 years. And the trial court disagreed, and they said, “Now, based on this officer’s, you know, experience and expertise, this was reasonable for him to have suspected that a drug deal took place, all of this behavior was consistent with how drug deals go down. And so we're going say that he had reasonable suspicion to stop you and frisk you and those drugs that he found and everything that came after is perfectly legitimate.” And the circuit court disagreed. And they said, “Yeah, you know, you have to consider the totality of the circumstances. And yeah, he did arrive in his car and shake hands with a couple of guys, which is sometimes consistent with how drug dealers are done. But it's also entirely consistent with how handshakes are always done. And you need to have a little bit more, rather than just here's a guy, I think, is a drug dealer, and he just shook hands with two other fellows in front of a car stereo store, you've got to consider the totality of the circumstances, it's got to be more than just a hunch. And wouldn't it be great if Oh, perhaps you had seen drugs change hands, or money change hands.” And neither of those things occurred in this case. And I think that concurrence, really hammers down on, on what's really going on here saying, you know, over time, we've been, you know, a little bit too, too quick to rely on the experience and expertise of police officers and their understanding of how drug crimes sometimes take place. And what we need to be doing is encouraging strong police work rather than just encouraging these guys to say, “based on my experience, I know what it looks like. And I know a drug deal when I see one and this was a drug deal.” Because really, in this case, they probably could have nabbed this guy had, they actually waited for a little bit more evidence, because as it certainly turned out, he had a whole slew of drugs, it certainly appears that this man was in fact a drug dealer. But they, you know, because they arrested him in this way. They weren't able to get any of the charges to stick. And so there's sort of a lesson here to be learned in strong police work and building a case rather than relying on “Hey, I know a drug dealer, when I see one that's a drug deal, I'm arresting you for dealing drugs.”

Josh House 07:50

Ari, it strikes me that the police officers might have a case of sort of “when you're a hammer, everything looks like a nail.” And you know, the case reminds me of all the times in which totally innocuous activity is seen as suspicious, like tea leaves in a trash can or carrying too much cash or just sitting in your car,

the court have anything beyond totality of the circumstances to provide guidance to, you know, officers, to keep them from thinking that innocent activity is, is indeed suspicious.

Ari Bargil 08:25
Umm not exactly. The court did mention, especially in the concurrence that, you know, it's important for us to be mindful of the fact that sometimes biases play into the way that we process seemingly mundane and benign activities. And in this instance, we saw two people shake hands or three people shake hands, one guy shook hands with two of them. And there are a lot of different conclusions that one can make when you when you witness that activity. In this case, the police believed all along that this man was a drug dealer. And so of course, when they see the handshake, they think that that's consistent with a drug deal, and they arrest the guy. Most ordinary people who are not police would probably just think that these are three people who haven't seen each other in a minute. And they're shaking hands, even if it's a prolonged handshake. And so the court does mention, you know, you've got to consider the totality of the circumstances. This was in broad daylight, it was in front of a security camera. The guys stayed after the supposed transaction was consummated. They went into the store, and nobody actually saw drugs or money change hands. And under those circumstances, it's just not enough to conclude that you had more than just a hunch or a suspicion that you had witnessed a drug deal, or based on your belief that, you know, this guy was in fact a drug dealer, and that's not enough.

Anthony Sanders 09:35
One fact, in the case I like, was that when the three men were in the stereo store, the cop walked in there and it was unclear to me whether he wasn't playing clothes or not. So they knew he was a cop, but he walked past them at the counter. And one of the guys had his backpack on the ground and he pushed it behind his legs with his foot because the cop was walking past. Which, of course, is consistent with a drug dealer trying to hide drugs from a cop? Although I think most drug dealers would be smart enough not to do that in that case. But it's also consistent with someone trying to protect their belongings when they're anywhere in public. I think I would do the same thing. In fact, I probably wouldn't do it if it was a cop, just because I know that the cop would be suspicious of me. But if it was anyone else, I probably would do it.

Ari Bargil 10:26
Yeah. And the court talks about that. And this is another one of the totally benign things that the police in their in their testimony sort of seized upon and said, this is consistent with drug dealing. And the court says kind of in a footnote, yeah, it's also consistent with the way almost every single human being

reflexively responds when they have a bag and somebody approaches them. And, you know, I do think that he was he was plainclothes in this in this instance. But the court there says, like, “Look, there needs to be more than just people who are acting consistent with what you would normally expect as part of simple human behavior. For you to say this is a drug deal. And, you know, I think that the bag example really hits that.

Anthony Sanders 11:09
Yeah, the and one other thing is the training. I mean, I really like the concurrence, talking about the training and experience, this mantra, you see in in affidavits from officers, federal state in all kinds of applications for warrants that based on my training and experience, this guy, this, this guy is no good is essentially what it comes down to. And you would think, in 2021, we would have been moving away from being able to rely on that in, in this kind of case. But it took the Fourth Circuit to reverse it to remind us that just not enough. What one other facts about this case, I didn't get, really and I think I think maybe there's more going on here is that the biggest piece of evidence was the confidential informant saying this guy now has drugs. So you know you might did that is that's a tip off that he's a drug dealer, and he has evidence on him. I know they don't want to blow the confidential informant and applications for warrants based on just a confidential informant that you don't name are often not enough to get a warrant. But the fact that they had that evidence shows me like, you're right, if they just waited a little bit longer, and maybe even just, you know, gone with that or had it a little bit more substantial. They could have got what they were looking for.

Ari Bargil 12:37
I think that's completely right. And the opinion, I think, really, in its tone reflects this sort of disappointment with the way this investigation was conducted. Where, you know, the police not only had a confidential informant, but that confidential informant in the first instance, calls this guy and says, “Do you have any drugs to sell me?” And he says, “No”, then they watch and pick up a bag from a house. And then he calls the confidential informant and says, “Hey, I now have drugs to sell you.” And the court is kind of confused as to why the police didn't try to orchestrate some sort of controlled by or get this guy in the act of selling drugs. After that, you know, it certainly seemed as though a drug deal had taken place. And this man was now in possession of drugs. And going back to your point about training and experience. The court, you know, again, in the concurrence sort of says, maybe by relying on training and experience alone, not only are we possibly allowing, you know, implicit biases to creep into the way investigations are being conducted. But we're also in a way incentivizing somewhat lazy police work, because why would a police officer go through all the trouble of building a bulletproof case,

if you can just write in an affidavit and then come in to testify in court that based on your training and expertise, this was a drug deal, and that's that this person was a drug dealer. So the court basically says, look, you could have had this guy a bunch of different ways, but you did it this way. And that's just not going to fly. And I think it sends a signal to police in the Fourth Circuit that if you want to be able to actually, you know, bring in when drug cases against people who certainly look like drug dealers, you need to do a little bit more to actually catch them in the act of selling drugs.

Anthony Sanders 14:18
Well, someone who was caught in the act of prayer is a football coach that we're going to hear about next. It's from a place where I grew up, actually very close to where I grew up. I grew up in the next inhabited island south. This is from Bainbridge Island, Washington. I was from Vashon Island just south of there. Josh, how are the good people of Bainbridge Island doing in football these days?

Josh House 14:43
Well, I don't know about their performance on the field. But I certainly know that the coach's performance was causing a stir, and he knew it was causing a stir and that's what leads the Ninth Circuit to its decision. So in this case, the Ninth Circuit was considering the claims of a football coach from Bremerton High School in Washington state and the football coach. I think it was the assistant football coach. He would run to the middle of the field, following a game, take a knee, and pray. And this became a bit of a local-cause celeb. People would show up to the game specifically to see him do this. People were crowding around him. There was one time when a bunch of people from the stands actually rushed onto the field to pray with him. After, it became a little bit of a movement you know and students that the football players were doing it. He would work motivational speeches into it which he also called to be just extended prayers and this was a this was actually an activity that went on for a long time before the school found out about it. The school found out about it from another school whose team had played against them and when the school found out it said, “you know,” took the coach aside and said, “hey this is not consistent with our policy on religious endorsement or avoiding religious endorsement” and because it was a public school, the high school had a policy that teachers or leaders at the school were not allowed to engage in or to lead or participate in religious activity with the students. The coach at first seemed to agree or to decide to keep his religious expressions to a minimum until a few months later with what at which point he apparently had an attorney who wrote a letter to the school saying he's going to do it anyway and he resumed his activity. The school, it was recommended to the school board that they not continue his employment and at that point he filed a lawsuit arguing three things. The lawsuit argued that this abridged is freedom of speech, that it

abridged his freedom of religion, specifically religious exercise, and also that it violated his Title VII rights to be free from religious based employment retaliation or discrimination. So the Ninth Circuit considered this case and actually the this was the second case in a string of cases or that the Ninth Circuit has decided. And the first time it decided this case decided on the preliminary injunction stage, and at that point it decided against him. But it you know that that wasn't the end of the case, and actually he appealed to the United States Supreme Court the that preliminary injunction decision against him. And what's interesting is that the Supreme Court denied the petition, but there was an interesting concurrence by Justice Alito and joined by three other justices which said “you know I agree the record isn't at the point to accept this case but I’m concerned that the school's decision would ban, for example a teacher who is praying at lunch silently to themselves and yet the students could see that activity.” So when this finally gets to our case here, the Ninth Circuit was very much aware of the Supreme Court's concerns, and so it decides again, that no this is not, you know, that the football coach's activity was not a matter of freedom of speech because he was acting as a school employee at the time, that this did not burden his free exercise rights primarily because the school had a compelling interest in avoiding looking like it was endorsing religious practices and having one of its you know school leaders lead and participate in these prayers. And also that no this was not a Title VII violation. First, for similar reasons that again the school has a compelling interest in enforcing its religious, its non endorsement of religion policy. So, the Ninth Circuit decides again against the football coach, but as the Ninth Circuit makes clear this time around and as the concurrence in the Ninth Circuit specifically addresses it, you know nothing in the decision is supposed to ban the private practices of a teacher at the lunchroom. And really what the decision kind of rises and falls on, is how public this football coach was about his activities. It was in the news, he was purposefully marketing at a certain point, marketing his prayers on Facebook, either complaining about retribution when he got it, but also just talking about the prayers generally. And so you know it was in the news even before the case was filed, and the Ninth Circuit really relies on that fact when it's making its decision. But you know, it makes it clear that look, this is not a case of a of a football coach wanting to be left alone while he prays, this is a matter of the football coach wanting to be the center of attention while he prays. And actually, that's what kind of distinguishes this case from an Eleventh Circuit case, that involved similar prayer at a football game. And what distinguishes that case is that was two Christian Schools wanting to pray with each other using the government or the state run athletic field as a sort of public forum for their expression. And the 9th or the 11th circuit said, you know, at least on the record before them, then they couldn't say that there was no religious freedom claim to be made there, that they couldn't dismiss the case at that stage of the case, because they said, you know, it's just, for example, possible that the loudspeaker at that stadium was a public forum that other people were allowed to use it for public messages. And so that's

the public and private distinction is really what decided this case. And you have to say, actually, that the Ninth Circuit's decision is relatively engaged, because it focuses on really what was going on with the coach and not the snippets of facts that the coach was trying to put forward in the litigation about how private prayer is and can be when it was clear that he was doing it as a kind of communal activity with the team, leading it as a group activity and also doing it in the middle of a giant football stadium.

Ari Bargil 21:35

Yeah, Josh, I think you encapsulated that case really well. And one of the things that struck me about this, and that I think is probably concerning for people who follow, you know, this area of the law is this apparent distinction that courts are now carving out between prayer done quietly, and, you know, in solitude, and prayer done sort of publicly, or with others. And it sort of goes to, you know, these are some of the things that we deal with in our commercial speech cases, for example, where speech will be protected, or a certain constitutional behavior will be protected, provided that nobody's joining you. And it seems here that the court is sort of teeing up that same sort of question where, okay, yeah, you can sit in the cafeteria and pray quietly to yourself. But as soon as some people start to gather around, and maybe also want to express gratitude for the meal, or express gratitude or appreciation for their ability to play football on a given night, that somehow can start to become problematic. And so there's going to be major questions that need to be answered in my mind about at what point do you I mean, these are obviously two completely different ends of the spectrum, where is the line ultimately going to be drawn? And I think that's obviously something that's probably going to play out in the courts for the next few years, because questions about what the Establishment Clause means are not going away.

Josh House 22:51

Well, that's true. And of course, the you know, the issue is that, you know, underneath all this, he's an employee, and the government at some point is allowed to require a level of uniformity among its employees. But I think really, what your comment gets to is that these cases can be viewed. And what I mean by these cases are these kinds of public expressions of religion at public schools. These cases can be viewed really through two perspectives. On the one hand, you have the school's policies and efforts at having the employees endorse certain, preventing the employees from endorsing certain religions, and therefore running afoul of the establishment clause. And of course, there's also the interest in not subjecting students to religious practices they're uncomfortable with, but then you have the other perspective, that of the students who want to participate in religious activity. And of course, the teachers or the football coaches in this case, who basically just want to be able to privately express their emotions or their religious sentiments in a public-school setting. And the cases sometimes come

down to what is a religious message, for example, had the coach in this case, simply taken a knee in support of Black Lives Matter? Or had they taken had he taken a need to further some other, for example, some other kind of maybe local school, local cause, I don't know, charity, or whatever, at what point does that either political or charitable intention crossed the line into religion? Because religion, of course, involves charity, it involves, you know, social justice, there are aspects of religions that involve both of those things. And I think sometimes what these cases are coming down to is a weird line drawn between what is religion and what isn't? On the other hand, you know, on the one hand, there's the everything is religion, and so everything should be protected speech, and that's the very, very pro strong First Amendment sort of perspective. But, you know, the other perspective is that the First Amendment itself does give religion a special place in the constitution and therefore, religion can be treated specially, religious speech maybe can be a different sort of category of speech. And I think, you know, that yeah, that tension is really What's kind of at the center of these cases and really at the center of Establishment Clause issues in this entire area of law?

Anthony Sanders 25:07

Yeah, this this case is a fabulous reminder of, if you accept that the Establishment Clause applies to a place like a public school, which most people do. Although there's, you know, there's criticism that the court ever went that way. And then you accept that something that isn't technically coercive, so it's not like you will fail if you don't go and, you know, pray or write about why you should be a certain religion or not a certain religion. If it's something short of that, it is an Establishment Clause violation. Which I think a lot of people think, “Well, you know, that could qualify as a violation,” then you got to get into some really specific stuff to figure out what side of the line you're on. Like the court that, you know, the court seemed to think with a school said that said, and I think the court kind of was, was largely drawn by this, that this erupted, it didn't just erupt to the school's knowledge that this was going on. But that it was like a real problem. When a family with a kid who was on the team who was an atheist, self professed atheist, said he felt pressured to go do this event. Now. Maybe he felt pressured. Maybe he was doing this to cause a controversy. Who knows? But assuming that there's some kind of social pressure, and it's easily to see that there was right? Is that starting to veer into the coercion that you don't want a government to be engaging in, in an Establishment Clause viewpoint? Or is it you know, and what's the test there? Is an objective? Is it subjective? Is any eggshell plaintiff, as we like to say in the law, who feels that they need to participate in something like that, where actually, it would have been perfectly fine in the coach's mind, everyone else's mind the team's mind for team coercion from not to participate? Right, which side of the line is that on? And that means you got to throw the whole kitchen sink of facts into this analysis. And, you know, I don't know if that's where Justice Alito is at. I

think that's certainly not where say Justice Thomas is at in his Establishment Clause jurisprudence. Remains to be seen where say Justice Barrett and others on the court was, as this kind of case gets up there. But it's a real reminder that, unfortunately, when we're talking about religion, because as this special place with the Establishment Clause, and yet also the Free Exercise Clause, that all this stuff matters.

Josh House 27:48

Yeah. And with all these facts mattering, of course, the waters get really murky. But I think at the end of the day, like I said, with this case came down to was the fact that, you know, the analysis looking at whether someone's acting as a government employee or not really turns on how public the activity is, it turns out, it turns on, you know, what, what's going on in the context of the kind of school setting. And just like another case that actually came out of the Third Circuit in 2008, it was the Borden v. Township of East New Brunswick case, that case was very similar in the sense that involved a football coach who said, you know, look, I just wanted to bow my head at team prayers. But when you look at the record, in that case, he had been trying to lead the team in prayers for an extended period of time trying to get around the school's stated policy, which was one very similar to the one in this case. And I think what the Ninth Circuit did here is exactly what the Third Circuit was kind of doing there, which is, you know, yes, there are gray areas. But Don't try to fool us with selective citations to the record, we all know you were doing this publicly. And that that means that you're acting as a sort of representative of the public school. And so you're you have to be beholden to the public schools' policies.

Anthony Sanders 28:56

What other interesting thing about the concurrence here that you talked about, Josh, it was joined by another judge. So the case was written by Judge Smith is Kennedy v. Bremerton School District, written by Judge Smith, and then Judge Christen, wrote the concurrence joined by the third judge, Judge Nelson, and does Smith, you know, for whatever reason didn't join the concurrence. But we have two judges with a concurrence. And a three judge panel. Is that precedent? I think it probably is, I'm sure some smarter people than me have figured this out. And it is precedent, but it reminds you, there are concurrences, and there are concurrences. And this was kind of an Uber concurrence, you might say, I don't think it's going to maybe influence the Supreme Court much when it when it comes to that, but I'm sure we will see a cert petition coming our way. Speaking of cert petitions, there is another one or two or maybe three coming our way. And this brings us to our Circuit Splits update. So last week, just last week, we had an episode where we talked about this denial of en banc review in the Tenth Circuit that our friend Jeff Redfern described to us. And it's a case about this regulation that bans bump stocks

after the tragedy in Las Vegas with the shooting there. Where the bump stock, a bump stock has been redefined as a machine gun, which it wasn't before. And so there's a challenge to this. It is really not a second amendment case, it's an administrative law case. And the challenge failed in the Tenth Circuit, a three judge panel upheld it and said that is okay under the Chevron Doctrine, which many even some non lawyer listeners may recognize, because that's the doctrine about deferring to administrative agencies when language is ambiguous in a statute. That case went en banc, the en banc request was denied. But by a hair's breadth. And the large minority in a judge minority in that order said that they should take the case and that Chevron doesn't apply here because it involves criminal sanctions, and therefore they go with the ordinary language, which sure is not that a bump stock as a machine gun, as the statute is written. So that was just last week, we talked about that. The next day, the Sixth Circuit issued an opinion where a three judge panel with a dissent said that Chevron doesn't apply because Chevron shouldn't apply to a criminal situation where there's criminal penalties attached. And therefore they did a straight up interpretation statute and said, “You know what, this a bump stock is not a machine gun” and invalidated the rule. So now we have a straight up circuit split of a very important federal regulation. Unless somehow the case goes en banc in the Sixth Circuit and is overturned, which could happen but I don't really foresee happening, this case will get to the Supreme Court. But that's not all. Because a week or two before that we talked about the CDC rental, I'm sorry, the CDC order that bars evictions for non payment of rent that's been in place for a while. It's been extended by the Biden administration. And originally put in place with the Trump administration. We talked about a district court case that found it unconstitutional under the Commerce Clause. And our friend Michael Bindas talked about that a few weeks ago. Well, another district court found that it was more straightforwardly not an incorrect interpretation of the relevant statute. And that went on a rocket docket to the Sixth Circuit. Also, the Sixth Circuit, which just on Monday of this week, found that the appeal for a stay by the government had was unlikely to succeed on the merits, and then effectively said that, yeah, that claim is correct, that it is not a correct reading of the statute. That is unlikely to finally get to the Supreme Court, because, you know, hopefully, this pandemic’s over soon and then it's going to be hard for the CDC, I think to justify continuing this order much longer. But that is where we're at with that controversy as well. So all kinds of circuit splits for the Supreme Court, which has been relatively quiet recently taking cases saying there's not enough circuit splits. Well, here you go Supreme Court a little more work for you. And the supreme court could learn from our listeners, who I remind every week that all of you should get engaged.