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Anthony Sanders

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. We're recording this on Wednesday, August 4, 2021. If you enjoy this podcast, you should check out our newsletter and often irreverent take on recent court of appeals opinions, which we publish every Friday. And please also check out our sister podcast the documentary series, Bound by Oath. Also, if you're in the DC area, you're invited to join us for a conference on September 10, 2021, at George Mason University in Arlington, Virginia, it's all about the concept of the “Will of the People” and its relationship to judicial review. You can find a link to the conference in the show notes, where you can read all about it and register to attend. Today we have a follow up show of sorts where we're going to revisit two issues from past shows, one of which is revisiting the same case. That case has taken a very interesting turn. You may remember a few months ago that IJ attorney Josh House joined us to tell the tale of a high school football coach who liked to pray after games quietly to himself at the 50-yard line, joined by several players and even on one occasion, a gaggle of cameras and reporters. At that time a panel on the Ninth Circuit ruled there was no constitutional violation for the school to tell him to stop. And that panel opinion stands for now. But last month, several Ninth Circuit judges had a lot to say about the case. Josh rejoins us today to give the update and pontificate about where this case and this issue may be heading this next. Welcome back, Josh.

Josh House 01:54

Thanks for having me, Anthony.

Anthony Sanders 01:56

In addition, today, we're going to get back into guns. In May, we had noted Second Amendment scholar Dave Kopel to discuss the bear arms issue, the question of whether the Second Amendment extends to protecting carrying arms outside the home. The Supreme Court has a case before it on that question that arose from the Second Circuit. But that's not all the Second Circuit has done lately on the Second Amendment. Last week, it issued an opinion, which we'll hear about today, on the scope of the already established right to own guns in the home. And it also issued a few other opinions on various nooks

and crannies of Second Amendment law. While reporting on these developments is IJ constitutional law fellow Adam Griffin, welcome to the show, Adam.

Adam Griffin 02:44
Thanks for having me, Anthony.

Anthony Sanders 2:50
So, Josh, we talked a lot about high school football and religion and speech and all kinds of things last time. And apparently, a lot of judges also want to talk about it. So, bring us up to speed.

Josh House 02:59
Anthony, who doesn't want to talk about this? That's what I want to know. This is I could go on and on. In fact, this to me would be the ideal law school exam question. This case is First Amendment it is, you know, in two different ways, both free speech, law and religion. So, it's a fun one. So where is this case now? Well, so we've got nine different opinions from the Ninth Circuit or statements I should say from Ninth Circuit judges on the Ninth Circuit's denial of a petition to take this case en banc. The original panel that we spoke about a few months ago, ruled that basically this high school football coach who would go to the 50-yard line after games to pray, he would take a knee pray, the people would surround him: players and as you said, on one event, people from the stands and reporters. This football coach argued, or the panel denied his free exercise claims, and kind of did on two grounds. One, basically that the government can tell a government employee what they're saying when they're speaking on behalf of the government. It's known as sort of a government speech doctrine. It stems from a Supreme Court case called the Garcetti. And the idea is that if you are a government employee, and you speak as part of your employment, of course, the government can dictate what you say. And in this case, of course, the government can tell him not to do certain things, you know, when he's a coach. And then the second reason they said, look, even if that prayer were private and off duty in that one moment, right after the game, he still hasn't stated a claim that his free exercise rights were violated because basically, your free exercise rights only go so far as the government's Establishment Clause rights and that or Establishment Clause fears might be a better way of putting it and so the government's fear of bridging the establishment clause. As of creating an establishment of religion can justify can be a compelling interest to restrict the free exercise of an individual's religion. So that was the panel's decision. And they asked for en banc review, the Ninth Circuit voted and decided no, it was going to deny en banc review. But that generated a variety of opinions. Which brings us to what we're discussing today. We've got two opinions, two concurring opinions that is concurring with the decision

to deny review. And then you've got, I believe it's four it might be I think it might be five separate statements. Some of them are just statements that they agree very briefly with someone another justice, or another judge, excuse me. But it's all these different statements saying, no, the court should have accepted this for en banc review, because it gets the law wrong, it gets the facts wrong. And so, you really have these judges trading barbs with both each other. And I would also say, with the plaintiff, in this case, the main concurrence in the denial, this is Judge Smith's concurrence, you get the sense the Judge Smith really doesn't like the plaintiff, in fact, goes so far as to in the conclusion of the concurring statement actually says that, it's ironic that the plaintiff wants permission to pray in public on a football field, when Jesus on the sermon of the mount said that when you pray, you should not be like the hypocrites who pray in public and instead should go into your room and close the door. You know, I don't know of another example of a judge quoting a Bible verse back at a litigator.

Anthony Sanders 06:47
That seemed to kind of leave the law behind to get into a bit of Scripture. A little bit unusual, I'd say.

Josh House 06:55
Very, very unusual. And, you know, I think what's also unusual, if you look at both the concurrences, as well as the statements that you know, regarding the denial, the dissents from denial, you get into this issue of the judges simply don't agree with the relevant facts are, and yet both of them are saying the to the other side, that you got the facts wrong. You've got the two concurring justices or judges go, hey, this public character of these prayers, the fact that they're happening on property that the coach only has access to because he is the coach of the public-school football team, because it's happening in full view of everyone. And because he made such a stink about it on social media, that those all color, the legal analysis here, and that those facts make the speech more likely to be government speech, and they make the speech more likely to be an endorsement of religion that the school district should be, you know, has a compelling interest to avoid in order not to violate the establishment clause. And then if you look at the other statements, the dissental, the statements denying in favor, sorry, dissenting from the denial

Anthony Sanders 08:14
I like dissentals as a word, by the way.

Josh House 08:15

Yeah, I might just start using that because we're talking about so many different statements here. It's confusing me. Those statements, the dissentals focus on what they said the relevant facts, I think, is how Judge O'Scannlain' s dissental put it, which was that there is a, you know, sure this coach was doing all these things. But at the end of the day, the right that was put forward at summary judgment to the right that he was that the plaintiff was trying to vindicate here was a right to pray privately whether or not other people join them. And whether or not there were people in the crowd, it was can I, after a football game, pray on the field. And based on that narrow definition of the right being asserted, the other judges go these other facts, would they're sort of irrelevant things facts about how public it is, because that's not the legal question we're being asked to decide. And so, I could look, Anthony, I could go on and on about all the intricacies of Establishment Clause and free exercise clause, but I think that is the key disagreement is how relevant are those facts about the public nature of the prayer? And do they actually change the legal test that the court should apply?

Anthony Sanders 09:26
Adam, what do you make all this?

Adam Griffin 09:29
So, Josh, there's been a lot of talk at the Supreme Court. And I think even in a previous iteration of this case, about whether the Free Exercise Clause has not been given its full protective scope and whether the Establishment Clause has been given to greatest fear. I think Alito wrote a denial or concurrence from dissent and the previous iteration of this case; Thomas has made numerous statements about this. How would that kind of more originalist approach, a stronger Free Exercise Clause, maybe a weaker Establishment Clause? How would that affect this case?

Josh House 10:04
Yeah, that's a good point. I think there are two kinds of questions wrapped up in there. Right, which is one, how would an originalist approach sort of this, this whole question of Establishment Clause of free exercise? And then how would a stronger free exercise because I don't know that that's necessarily a question of originalism, but rather perhaps the exact test that's being used. So, I'm going to take the second question first, right, what would it look like to have a stronger Free Exercise Clause and a stronger free exercise in this context, would say that perhaps the government's mere fear that it's going to endorse religion is not enough to trump an individual right to free exercise? The dissentals in this case point out over and over again, there's no plaintiff here, there's no litigant saying that my rights have been violated because there's an establishment of religion, right? This is not a case that arose

because some student showed up and said, this is an establishment clause violation. I'm uncomfortable at this school. You know, there's no, there's no, like in a normal Establishment Clause case. There's no suggestion that someone has been wronged by an establishment.

Anthony Sanders 11:08
There is a little sketchy, but there is one student right, who said he was an atheist, but he felt he had to join the prayer because of social pressure.

Josh House 11:16
That's right. But again, because the procedural posture of this case isn't that that student is a litigant. There has not been a whole record developed on whether or not for example, that students fear of coercion is reasonable. There are a bunch of facts about that in the record. And the different opinions and statements give different weights to those to those sorts of facts. But I think my point is sort of unlike a normal Establishment Clause case, the center of attention is not on sort of the coach or the school creating a policy that coerces that student, but rather that student as sort of an incidental bystander of the of the coach's privately intended speech. And so, I think just the procedural posture of this case means that the Free Exercise Clause or means that the Establishment Clause concerns here are very, very theoretical. And so again, to go back to Adam's question, I think the Free Exercise, you know, if we analyze what's going on here, the Free Exercise Clause, it's that, well, the government can override an individual's Free Exercise rights, if it has a compelling interest. The only compelling interest here is the government, the school district, trying to avoid endorsing or taking a religious position, right, trying to avoid establishing a religion. But again, there's not been a full record that it was establishing a religion. And so, I think that's kind of the main issue is here's it's just the fear that an establish it might happen. And this might be where this case goes up on appeal. Right is on this question is, you know, if the Supreme Court were to take this, is that mere fear of an establishment enough to trump an individual's Free Exercise rights? So, to answer Adam's question, I think a stronger Free Exercise Clause would say something like, no, that mere fear is not enough to defeat the individuals' rights. And then as for the originalist question, I would just point to Judge Nelson's dissental, in this case, and Judge Nelson says, you know, there's a whole originalist analysis of what is an establishment of religion. And so instead of focusing on like, you know, whether there's this fear of an endorsement of religion that the coach would be doing, and therefore the school district can have a policy that the coach avoid endorsing on behalf of the school, a religion, we should instead look to was the coach or the school establishing a religion as that meant, you know, as that would have meant back at the founding, and that would be the sort of original historical test rather than the what's used as the Lemon

v. Kurtzman test. And specifically, in this case, the prong of that test that concerns endorsing a religion. And so, you know, I think an originalist would here go towards Judge Nelson's analysis and look at the historical definition of an establishment.

Adam Griffin 14:03
It's interesting that this case, the other prong of Lemon is the coercion test. And that's talking about the idea that the Establishment Clause interest was just a fear of establishment not an actual establishment and maybe a fear that students would be coerced. And there might have been some evidence of that. But was, did any of the opinions rely heavily on that coercion prong on a finding that either students or the public was coerced into some kind of religious demonstration that violated their conscience in a way that would lead to an establishment of religion?

Josh House 14:35
Yeah, absolutely. They did. I mean, I think that's sort of the fallback position that the statements that were defending the denial are kind of focusing on is this case out of the Santa Fe Independent School District case, which precisely had to deal with this coercion prong. That was the basis for that decision. And there the issue in that case was a football case. And it had to do with the students doing a pregame prayer. And they'd have access to the PA system. They the school had a policy of allowing them to do the prayer was part of sort of the pregame festivities. And the Supreme Court in that case, said the fact that it was a school sort of sanctioned policy did create this element of sort of coercion for like the other parts of the student body, and it certainly created the appearance that there was an endorsement happening. That is the school that was endorsing, you know, religion. And so, you know, I think that the coercion, this is something that those statements keep coming back to is they keep coming back to that case, they keep coming back to the student that Anthony brought up, which was this one student who said he felt like he was sort of had to pray just to go along with the coach's routine, because he didn't want to lose playing time, but he himself was an atheist and not religious. And so, you know, I think coercion is another flashpoint for this case on appeal, which is if there is a compelling interest in overriding Free Exercise rights as a sort of prophylactic to avoid an establishment clause violation. Is it enough? Is that coercion prong enough to create that possible Establishment Clause violation? And if so, there's another even layer to this and I could I told you I could keep going on. Is the coercion objective or subjective, is there actually coercion? Or is it that the student felt coerced? And then is it a reasonable person feeling coerced? Or is it a reasonable student who is, you know, 14,15,16 years old feeling coerced? So, there are layers upon layers? And I am just excited to see where this case goes for?

Anthony Sanders 16:42

Yeah, I'm going to have to cut you off here. I'm sorry. But I do have another question. Which is what is your feeling about the Supreme Court taking this case? Because when they when they originally didn't take the case on a preliminary injunction, posture, and Justice Alito wrote this statement, and they said, Well, we want more factual development, but then we might take it out on Final Judgment. Now, there's factual development, it is a lot messier, I think then it was presented at the preliminary injunction stage. Do you think they'll want to bite? Because I, frankly, after reading the circuit opinion, when we talked about it back in April, this, there's way more dissents here than I expected. And so, I wonder if there's more to this case, then, you know, people who aren't as into the, these issues might surmise. So perhaps there's a good chance that court will take the case or perhaps, you know, given the messy facts. It's just not worth it.

Josh House 17:48

Yeah, I mean, the facts are messy, but I think the facts are sort of perhaps Messier, precisely because there are these two legal issues, I think, in a way hadn't had there been like a single issue, either it was just whether the coach was speaking as a government employee or not, the Garcetti issue, or whether it was just, you know, the free exercise versus establishment clause, I think it might have prevented presented a simpler vehicle for the courts to take on review to narrow it to the relevant facts. And then to just decide those one of those issues. The fact that the Ninth Circuit decided sort of an alternative holding where, okay, if even if it's not government speech, there's still this establishment clause slash Free Exercise issue. I think that that's what makes this so muddy, because I certainly think that the government speech issue is the one that Alito's opinion was some of the most concerned with, right was this idea, if you read Alito's concurrence for the denial of cert, you know, there's this example of what if a teacher sits there and prays in the cafeteria during the school day? That's clearly private speech, and it would seem, but it would seem like that the Ninth Circuit's very broad application of the Garcetti test is saying almost anything a teacher does just by virtue of their position as a teacher could be construed as sort of government speech and therefore subject to the school district's regulation. And so, I think that would, that is a I think, a question that the Supreme Court looks like it's chomping at the bit to kind of, at least if you if you take Alito's concurrence as definitive on that is chomping at the bit to decide, I think the messiness, as with any law and religion case is going to be that that Free Exercise establishment question. So, I just don't know about that.

Anthony Sanders 19:31

Yeah, well, I mean, we've had many Establishment Clause cases and Free Exercise to where you have many different opinions from the court a split decisions often this if you count up just the substantive opinions, it was six. The Ninth Circuit of course is famous for having a lot of judges saying a lot of things including Judge O'Scannlain who because he's a senior, he couldn't vote on the decision of whether to give en banc, but he could make a statement. And he sure did make a statement. So, always interesting in the Ninth Circuit. And, of course, there is an interesting case that maybe that may be coming to the Supreme Court. The case is Kennedy v. Bremerton school district, and perhaps look at it at a cert petition near you. So, thank you, Josh, for that summary. And we're going to go on to Adam with Henry v. County of Nassau, hope I said that right, in the Second Circuit and some other Second Amendment stuff in the Second Circuit, too. So, take it away.

Adam Griffin 20:33

Thanks, Anthony. There's a lot of Second Amendment activity in the Second Circuit. In addition to the cert petition in New York Rifle and Pistol that we talked about a few episodes ago, there was also this case Henry v. County of Nassau and two other cases out of the Second Circuit dealing with this gun rights issue. One is United States v. Javier Perez, which dealt with an immigrant's right to keep and bear arms and the scope of the Second Amendment right when it comes to an immigrant and they applied the Second Amendment intermediate scrutiny and found that the restriction on his rights were upheld, with an interesting concurrence by Judge Menashi, questioning whether immigrants should have full Second Amendment protections. There was another case on fingerprinting and the Second Amendment, and it was held to be moot. But the case that we're dealing with today out of the Second Circuit is Henry v. County of Nassau, which is a county in New York. Lambert Henry was accused of having a dispute with his daughter over grades and he blocked the door and put her in a headlock, and then she got a protective order against him. That started a cascade. The protective order was instituted, his pistol license was revoked based on a New York policy, and there's a separate New York policy that says if your pistol license is suspended or revoked, that you lose your right to possess all firearms, including rifles and shotguns. The police showed up and confiscated all of his guns. Five months later, the order of protection was revoked or was allowed to lapse, and the family court dismissed the action. Two months later, he asked for his pistol license back and his firearms back. And the county said, a year and a half later, told him no you can't have your firearms back. Your pistol license is completely revoked. And so were all your firearm rights. You can apply again in five years, but there's no guarantee that you will actually get your rights back at the end of that time. So, he sued and regular listeners of the podcast will recognize Section 1983. He brought a Section 1983 lawsuit in federal court to protect his Second Amendment rights. And the district court did a really interesting thing. The district

court said your Second Amendment rights have barely been infringed because the core of the Second Amendment is a collective right, not an individual right. The District Court said Mr. Henry's burden is light here because he did not allege that the county of Nassau had infringed the Second Amendment for all people. And because he only alleged that, as an individual, his rights had been infringed. It wasn't really that big of a burden. And the Second Circuit said, well, not so fast. That's not what the precedent said. And that would make a real oddity of the Second Amendment. They said that the core of the Second Amendment is the right of law abiding, responsible gun owners to protect their home and earth. And in making this decision, they said the Second Amendment is not at core a collective right. It's an individual right. And that the Second Amendment protects an individual right, no less than any other right and the Bill of Rights. And this is a lot like what we talked about at IJ. That there shouldn't be any second-tier rights, and that all the rights in the Bill of Rights, that all of your rights should be treated as fundamental individual rights. And the Second Circuit went on to apply it a traditional Second Amendment test. You know, what is the core of the Second Amendment right? It's an individual right. And then how substantial is the burden? They said the burden was substantial, because by the end of this process, he would be without firearms completely for seven years. And no guarantee of getting them back at the end. And then they assess whether he was law abiding and responsible. If he was law abiding, responsible, strict scrutiny should apply. If he's not law abiding and responsible, then intermediate scrutiny would still apply. They said they could not determine whether he was law abiding or responsible based on the evidence and applied intermediate scrutiny, but still found that his claim should proceed to the merits. And they did so based on the facts and based on the evidence, they said, you know, look, he lost his right for seven years at least to completely possess any firearm based on an order of protection that was not subject to adversarial testing. There was one allegation in order protection issued and that's what had all of his rights revoked.

Anthony Sanders 25:02
And it was provided ex parte, right? So he didn’t even show up to defend himself.

Adam Griffin 25:06
yeah, so he had no way to defend himself no adversarial testing, no ability to bring any evidence on his own defense. And that's what lost him is right. And the court said, No, facts matter. Evidence matters if you're going to lose your right, your Second Amendment rights, your fundamental rights, you have to be able to present evidence to support your case and to challenge any case against you. And that's something we also talked about at IJ. The facts matter, evidence matters, especially when it comes to

your fundamental rights. And so, the court, the Second Circuit here said, we're going to take the evidence seriously, we're going to take the facts seriously. District Court, you did not look at his evidence, and you've got to look at his evidence. And so, they're allowing the claim to proceed to the merits, so that he can try to bring that evidence to show that he is law abiding, that he is responsible. He had an affidavit from his wife and daughter saying that, and the evidence that was put up against him, the Second Circuit had no evidence that the district court had considered his evidence, and it only considered the county's evidence. And that kind of rubber stamp on the scale for the government's position was rejected by the Second Circuit. And, you know, I think that this is a really interesting case, because it deals with something that we were often looking at IJ, where there are certain rights that are treated very fundamental, like the First Amendment. The court to a direct analogy to the First Amendment, they said, we would never say that someone had an alleged a core violation of the First Amendment, simply because they hadn't alleged that all people everywhere had their speech restricted. One person speech restriction is enough to trigger a First Amendment violation

Anthony Sanders 26:34
It is ridiculous to even think about that.

Adam Griffin 26:36
Right, exactly. But we see that with, you know, the public use clause and the takings clause becomes a public purpose. The Second Amendment, which is an individual right to keep and bear arms becomes a collective right. The Free Exercise Clause, sometimes is seen as a nondiscrimination provision rather than individual rights provision. And it's that kind of treating rights certain rights is second tier, and other rights is more fundamental, that the Second Circuit was rejecting with respect to the Second Amendment here.

Anthony Sanders 27:05
Josh, what's your thoughts about tiers of rights? Does the court get it right here?

Josh House 27:11
Yeah, I mean, I think it does, I think they the nail on the head. And actually, I was, you know, I was going to ask Adam, about how does this fit into the larger body? If you know, on the Second Amendment issues that are cropping up kind of across the states right now, where it does look like there are courts that simply don't want to give full protection to the Second Amendment in the way that

they do other rights? Did you kind of look and compare this to the other cases kind of percolating throughout the country?

Adam Griffin 27:43
So, I think this does fit into that trend. I mean, this is a direct application of Heller, Heller decided that the Second Amendment was an individual right, and that the core right was of law abiding, responsible citizens to keep and bear arms to defend their homes. And so, it was a direct application of Heller. And you see the district court saying, well, yeah, Heller said that it's an individual right, but that's really a peripheral right. The core is still that collective right, which is what the descendant Heller had argued that it was a collective right of the people to keep in bear arms. So, it's attempting to kind of marginalize Heller's individual rights holding and still kind of pivot back to the collective rights holding. And if you look at the short circuit podcast we had with David Kopel, he talked about the Ninth Circuit opinion, the Young opinion, where he said, you know, it seems like a really robust and scholarly opinion. But if you look at the source material underlying it, that it's really not saying what the court says it stands for, and it looks like the court is just trying to make the Second Amendment a second class right. And so, I think that that is sort of what's going on here is that there's there is a lot of hesitancy on the part of courts to give the Second Amendment equal protection, among other bills, among other rights in the Bill of Rights, like the First Amendment freedom of speech. And that's probably part of the reason that there's been a lot of cert petitions and why the court took New York Rifle and Pistol to sort of clarify, if the Second Amendment is as protective of the right to keep and bear arms as the First Amendment is for free speech, for instance.

Anthony Sanders 29:10
I think that's all right. And I wouldn't really defend what the district court did here, but I think you could say, what happened with the district court is saying it's a collective right, which of course, is nonsense, because the Heller explicitly said, it's an individual right to keep and bear arms. The problem with since Heller and McDonald and it's the only time the Supreme Court has spoken on this issue is that they didn't spell out how the right is protected in our normal parlance, whether you like it or not, have tiers of scrutiny, whether it's strict scrutiny, intermediate scrutiny, heightened scrutiny, rational basis, whatever it's going to be how do you apply this right? They said, well, look, there's a there's a traditional right to, to keep and bear arms of handguns in the home and that has been violated in these two cases that Heller and McDonald because it was basically a complete prohibition on that. And so, the right has been violated in both of those cases. But when you try to translate that into other situations, and you don't have the tears of scrutiny, you know, rubric to go by, you can see how courts might try to take

from that, perhaps not with the greatest of intention, fair minded of intentions regarding the right to own firearms, but they might translate it in ways like, Well, okay, Heller was a case about an ordinance that was across the board. And this is just about an order of protection for one guy. And so, it just doesn't, you know, it doesn't translate. And so, I need to make it up. And I'm going to say that in that case, it's you know, and only, even though it's an individual right, it only applies collectively. I don't think that's the right analysis. But it's an example of what courts are doing, because they don't have very much information to go by from the Supreme Court, you know, whether they have good intentions or not, they don't have very much information to go by, which is why it is very good, that the Supreme Court has taken another case, the New York case, on the right to bear arms, and is going to hopefully flesh that out a little bit, maybe it'll tell us about tiers of scrutiny, maybe it will tell us about something else. But we're not going to have this you know, Heller box that really we've been because McDonald was just applying Heller to the states where that we've been stuck in since 2008. And perhaps we'll have less cases like that after we have some more flesh on the bone.

Adam Griffin 31:37

I think that's a really good point, Anthony that and you've heard a lot of scholars and litigators calling for the Supreme Court to take these cases because they do need more guidance. Heller was provided a lot of clarity to the Second Amendment that didn't exist before it. But there needs to be more cases, more decisions, fleshing that right out and Heller relied on an originalist sort of history and tradition approach that doesn't always fit neatly into the tiers of scrutiny. And people have questioned whether the tiers of scrutiny itself is originalist. And so, I think that there is some tension in applying Heller in the Second Amendment to this tear of scrutiny box with this, you know, originalist sort of history and tradition approach that might would give the Second Amendment sort of its own unique scope of protection based on the Second Amendment as an independent right, rather than trying slot the Second Amendment or any rights into this tears of scrutiny analysis.

Josh House 32:29

And you know, there's a tie in there to the Bremerton case. It's the case, the gift that keeps on giving. No, there really is because, you know, I mentioned in response to Adam’s question earlier about the originalism problem within Bremerton. You know, Judge Nelson goes on in the dissental. About the originalist test and how Lemon v. Kurtzman should be for be tossed out in favor of this originalist approach this historical approach similar to what Heller set forth for the Second Amendment. The problem, of course, and this is perhaps why Lemon is the sort of zombie case that keeps coming back no matter how often the Supreme Court kills it, is that it's just so much easier to apply sort of three

pronged tests that can you'll come up on a bar exam than it is, can you imagine on a bar exam, if someone asked you to do the originalist analysis of some hypothetical, like on a test? Like it would just be? It would be chaos. Right. And so, I think the courts are just gravitated toward some sort of, you know, give us something give us a standard and whether that's in the Establishment Clause context, or here in the Second Amendments, you know, context, I think what you have is the originalists on the court going it's not as easy history is complicated. You can't just give you a test. And you have lower courts and lawyers just begging for you know, it's like law students just begging for like the black letter law outline of the problem, so, they don't have to read all the cases and do all the history.

Anthony Sanders 33:56
And I don't blame them because law can be that way. We need we need rules of thumb to actually translate it into, you know, lower court rulings.

Adam Griffin 34:04
Yeah, I think that that is something that the Second Circuit did well, in the Second Amendment context. They said, you know, the core of the right as an individual. Right, and there's a two-part test for that. Right. Is it substantially like is the core infringed? Is it a law-abiding responsible citizen, and then to how substantial is the burden? And, you know, they said District Court go back and apply this two part test determine the level of scrutiny based on that two part test? And, you know, proceed on the merits based on the facts and the evidence from there. And it is that kind of structure that I think the Supreme Court is going to have to be more Express about in New York Rifle and Pistol to give lower courts a sense of what is the real scope of protection for the Second Amendment, and if Kennedy v. Bremerton is granted, or another Free Exercise Clause case. Hopefully the court provides a similar sort of implementable framework that gives lower courts the extent of protection for the individual right at issue,

Anthony Sanders 34:57
You know, yeah, it's funny. That way that Heller ruled that something was an individual right said that a law was unconstitutional, but didn't exactly provide preside provided test for how to apply that in the future. And I think very few people would compare Heller with Lawrence vs. Texas. But in a funny way, they're similar because Lawrence vs. Texas, of course, about the sodomy law in Texas, didn't say what scrutiny it was applying didn't say it was rational basis didn't say it was heightened. A lot of people read it as rational basis case. But Justice Kennedy just kind of, you know, said, this is a bad law. And I mean, it was more than that. But it doesn't make any sense. And so therefore, it's unconstitutional. And

no one knew what to do of it. And of course, it had ramifications after that, but, but it was, it was unclear. And so, you know, it takes more than one case, to figure these things out more than several cases sometimes. So, thank you, Adam, for your explanation of this case, which seems like a great case of judicial engagement from the Second Circuit. And we'll look forward to what else the Second Circuit has to say about the Second Amendment in the future.

Adam Griffin 36:06
Thank you, Anthony. I really appreciate that.

Anthony Sanders 36:08
And thank you, Josh. And thank you, all your listeners for sticking with us here on short circuit this week. We'll be back next week. But in the meantime, I would ask that all of you get engaged