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Adam Shelton 00:06
Hello, and welcome to Short Circuit your podcast on the Federal Courts of Appeals. I'm Adam Shelton filling in for your regular host Anthony Sanders. We're recording this on Monday, August, 23. If you enjoyed this podcast, take a look at our newsletter, and often irreverent take on recent court of appeals decisions, which we send out every Friday. And check out our sister podcast Bound by Oath a documentary series that this season is focusing on all things immunity and accountability. And if you're in the DC area, come join us on September 10, at George Mason University for a conference. If you like political science, economics, and legal theory, then this event is for you. We will be discussing the concept of the will of the people and its relationship to judicial review. You can find the link for the conference in the show notes. This week, I'm joined by two returning guests IJ attorneys Patrick Jaicomo, and Andrew ward. Welcome back, gentlemen.

Patrick Jaicomo 00:57
Hey, Adam, thanks for having us.

Andrew Ward 00:58
Thank you. Thank you very much.

Adam Shelton 01:00
This week, we'll be discussing a Ninth Circuit case Ford v. Peery about the Anti-terrorism and Effective Death Penalty Act. And one not so respectable dissent in the Third Circuit Drummond v. Robinson Township about zoning in a gun club with some judicial engagement language. We're going to start it off in the Third Circuit. So, Andrew, did the town really changed its zoning code just to prevent this Gun Club from fully reopening as it intended.

Andrew Ward 01:25
Well, that's what's so alleged. Ultimately, the panel decides it doesn't really matter. Because, you know, we're not going to focus on intent in a facial challenge. But, you know, probably, we'll see, we'll see what we'll see what discovery reveals. But this is Drummond v. Robinson Township. And just even

before the subject matter, you know, this is an extremely well written opinion, it's out of the 3rd Circuit, it's by Judge Krause. And it's just sort of a great guide, like it's a very case book type opinion. It's a great guide to sort of how modern constitutional litigation works under a form of heightened scrutiny. And you can really see the panel just marching through the, here's how we decide these issues. Here's what we do. Here's how the pleading standards work. And you can, I don't know, I sort of imagined this getting put into a con law case book as I was reading it, because it's a very just good, direct, clear opinion. And what it's about is the greater Pittsburgh Gun Club, which is in the defendant, Robinson Township, which is an old Township, about 12 miles west of Pittsburgh, and the township does not seem to want the Gun Club to operate. So, it's been there for almost a century in one form or another, the National Guard practices shooting there, but the town doesn't like it. So, in the 90's, there was some sort of nuisance action, that maybe they tried to shut it down. In the 2000s, they arrested the owner, I mean, not them but the owner was arrested for being a felon in possession. Not Mr. Drummond, it seems to be the prior owner, and the thing just shuts down. But eventually, Mr. Drummond buys this thing. And he's planning to reopen it in 2017. And the town again, just doesn't seem to like it. There are citizen complaints. And they go, and they see if they can zone it away. Maybe or maybe they just change their zoning code for entirely unrelated reasons. So, they, what they do is two separate things. So they change the rules for Sportsmen's clubs, which is what the greater Pittsburgh Gun Club is, and they say two different things. One is that Sportsmen's clubs can only use a certain kind of ammunition rimfire, as opposed to centerfire. And without getting too, too technical. That's just where the primer is in the round. But basically, it means smaller Caliber Rounds as opposed to bigger ones. And the other is that Sportsmen's clubs have to be nonprofits. Both of these are going to put the greater Pittsburgh Gun Club out of existence. So, Mr. Drummond goes he gets Alan Gura who's actually probably the most well-known Second Amendment litigator in the United States these days, who litigated the major Second Amendment decision, DC v. Heller, and they sue, they bring a lot of different claims. But primarily, you know, that this case is about the Second Amendment on a motion to dismiss it goes up and down and up and it's in the Third Circuit. And the Third Circuit ultimately says these restrictions on the pleadings are not going to survive intermediate scrutiny, and how did they get there? Going through the sort of standard, historical originalist sort of analysis that you see in modern Second Amendment law. So, referring to Heller, which is the major case in this area that Justice Scalia wrote back in the 2000s, they say we, we need to do a historical analysis. So first, you look and see if the regulation is the sort of historical thing that could pass muster, just based on history. So, like a restriction on felons possessing firearms, for example, is a good example of that. But here, they say there's no real, real historical analog, you, it's interesting, balancing the sort of level of generality and they talk about this because they say, you know, if it's, if it's way too specific, they're going to be no

historical analogues. Because it's centuries later, nothing is going to be analogous. If you're looking to specifically of course, in 1789, there aren't going to be laws about AR 15 or something. But at the same time, if it's too broad, then everything will have a historical analog. If it's the level of, were there restrictions on firearms, then the answer is yes. So, they, they go and sort of balance, what's the right level of generality. And they talked about restrictions on common weapons that are otherwise permitted. And basically, they don't find any historical analogues for either of these things. There's, there's really nothing on common weapons that aren't abnormally dangerous, the closest thing is maybe having too much gunpowder in one place. And they don't see that as analogous. They also talk about just being totally unable to find anything about who could own and sell guns, whether it has to be a nonprofit entity, as opposed to a for profit. The closest thing they have there is something on who could buy guns, that slaves for example, were not allowed to and they say that's, that's nothing like this. So, they say there isn't a historical analog, this isn't grounded in history, which means it needs to survive, and this is the second part of the analysis, some form of heightened scrutiny. So that leads to the question of whether it should be intermediate scrutiny, or whether it should be strict scrutiny, or maybe a very exacting form of intermediate scrutiny. The levels of scrutiny keep multiplying in the courts of appeals, but ultimately, they decide the intermediate, you know, substantially tailored to an important government interest is the right level. This doesn't strike at the very core of the Second Amendment, which is the idea of self-defense in the home, this is being able to practice using firearms outside the home. And they say that that's not really the heartland, it is not strict scrutiny, but it's because it doesn't have historical analogues, the Second Amendment's an enumerated right, so it's still going to get some form of intermediate scrutiny. And after that, they basically reject everything, because this is a motion to dismiss. It's on the pleadings. And of course, there's just zero evidence in the complaint that the plaintiffs drafted, that this is going to be able to survive intermediate scrutiny. You know, they talked about there not being less restrictive means, you know, there's no evidence that the county or excuse me, that the township looked at something less restrictive, or had other ways to deal with these things. You know, maybe it's enough if they just follow normal safety rules. This is a total outlier. And in fact, Robinson Township didn't change the zoning for shooting ranges, it only changed them for Sportsmen's clubs, which is very much suggesting that this is suspiciously under inclusive, so on the pleadings, there's, there's a totally valid claim, and it's going to go back down to get litigated. They declined to issue a preliminary injunction in the first instance. They leave that for the district court, they also deny Mr. Drummond's request to get a new judge, pointing out that, you know, just because he wrote against you in a complicated area of constitutional law does not mean he's actually biased against you, you can go back and have the same judge, but it is a big win for Drummond and for the Second Amendment more broadly. You know, the thing that I think is most interesting about it, besides

that, we're seeing this precedent really developed in real time because the Second Amendment, protecting an individual right to bear arms is only meaningfully existed since Heller in the 2000s. And watching that evolve is pretty interesting. But the thing that I see in it as an IJ attorney, and I think I've said this one, maybe every time I've been on this podcast, but it just shows so much how standards of review matter. This is an enumerated right; it is a favored protection. It's in the Bill of Rights, by name, not in the Ninth Amendment. And so, the court cares about it. They say of course, you went on a motion to dismiss you know, we're going to take the pleading standard seriously, there is no evidence here that you don't win. And of course, you went under in your media scrutiny on the pleadings. And I just contrast that with IJ often litigates under the rational basis test, which is the lower form, and there, the result would be completely different. I mean, you can posit an identical thing, you know, what about a golf course? Or like batting cages? These are, you know, also places where people go to have fun with projectiles. But if the township said some equally, possibly silly thing of like, well, you know, golf balls could be dangerous, they could they could hit the cars that are passing by or, you know, they could distract people yelling for is noisy. Yeah, the court may well uphold that on a motion to dismiss, because it's a different test. They might say, Well, sure we can. We can imagine that happening. But as long as they're under sort of real review, no way, no way on a motion to dismiss. And so that is what I take away from this besides evolving Second Amendment jurisprudence, that pleading standards, and real substantive review standards really, really matter.

Adam Shelton 10:55
Patrick, any thoughts?

Patrick Jaicomo 10:56
Yeah, I mean, if we keep it inside of the fun with projectiles analysis that Andrew is talking about, I shared the same observation, which is, you know, we don't know what's going on here. Is this truly an anti-gun thing? Or is this more of just a NIMBY or protectionist thing, and we'll hopefully we'll find that out as discovery proceeds. And so, I think that the courts right to have allowed the case to move forward. And as Andrew points out, you know, this is in such stark contrast to the way we see things that IJ normally litigates in the rational basis context, and I think that the most stark example of that is here. You know, one of the two things that the township did was prohibit for profit entities from running sportsman's clubs, which I'm still kind of scratching my head to figure out what was actually behind that other than, Hey, man, we really need to think of some reason we can keep this place from opening and apparently, based on the discussion The court has, you know, there was some weirdly phrased aspect of the for profit side of it that suggested there would be more people doing it, or there would be a higher

intensity of people doing it, which I don't understand how that follows. I've personally been to nonprofit and for profit, places where you can shoot guns, and I didn't notice there being a correlation between, you know, whether the ownership was allowed to have profit from what was happening or not, and the intensity of the behavior at the place.

Andrew Ward 12:18
I think it's that this guy's for profit, NIMBY, it's no guns in my backyard, I just invented a new a new acronym. Yeah, because this guy's for profit. But we'll see, we'll see a discovery,

Patrick Jaicomo 12:30
right. And I think you're right, it'll end up being some crossover of these two, you know, strange bedfellows situation where you have the people who want to, you know, make the, the selling and shooting of guns more difficult, and the people who just don't want to have whatever in their backyard, in this case happens to be a gun range. And, you know, there's a lot of good reasons why, you know, you might feel that way, selfishly, but not any good reasons why you should be allowed to use zoning law to prohibit these things just because, whoops, you realize after the fact like there's something coming that I don't like, and thankfully, as Andrew points out, because we're dealing with higher levels of scrutiny, that doesn't fly, at least at this stage in the case. But if this were a rational basis case, you can see going exactly the opposite way in the searching review that the court does to do historical analysis and decide whether the Second Amendment prohibits this type of thing. Would it be inverted? Instead, you can see the court doing a searching review of any possible reason why these fun projectiles should not be allowed to be shut off in the greater Pittsburgh area.

Andrew Ward 13:29
Batting cages are noisy. Patrick, you know, the bat hits a ball, you know, the same way around, that's a lot of noise. We gotta you can't, there's a rational basis,

Patrick Jaicomo 13:39
Well just think of the soundtrack to the batting cage, you're talking about, like music from the late 90s, early 2000s blaring loudly, the smell of pizza, who knows what else could be going on? That would be a nuisance to surrounding areas. So

Andrew Ward 13:51
that sounds rationally related to a legitimate state interest. That's what I'm hearing.

Adam Shelton 13:55
And Andrew, did you have any thoughts about kind of the way the Third Circuit here analogized or analogized, Second Amendment law to first amendment law and kind of First Amendment principles?

Andrew Ward 14:05
Yeah, that well, that's something that comes out of Heller And I think it makes a lot of sense. I like I think it makes sense, just in the fact that ideally, you know, constitutional law should be coherent, and you should be able to sort of treat rights the same way and treat limitations on government power. And in one way, you know, ideally, things would just be consistent. And if you want to do something that you have a right to do, we would analyze that in in one way. So, I like the analogizing. I think it's good for the development of common law.

Adam Shelton 14:45
Well, we'll keep our eye on this case. So, Patrick, turning to the Ninth Circuit, what in the world is binding dicta?

Patrick Jaicomo 14:52
Well, we're going to get to that but it's going to be a little bit of a bumpy road before we get there. So just bear with me people. So, this case is called Ford v. Peery. It's a habeas review case, which means that it's a situation where somebody has been convicted of a crime and is challenging the constitutionality of that conviction in federal court. So, let's start at the very beginning here and our petitioner for habeas review is Keith Ford. Keith Ford was convicted of murder in California state court. And at the closing of his case, the prosecutor giving his closing remarks, which are not evidence but are provided to the jury in very blustery fashion, ended with the statement, “the idea of the presumption of innocence is over Mr. Ford had a fair trial, he's not presumed innocent anymore.” Now, that's legally incorrect. But this statement was made at the end of a long explanation where the prosecutor over and over said he had the burden of proof. And essentially, I think there was a very clumsy way of the prosecutor trying to say that he'd met his burden of proof beyond a reasonable doubt. And so, the jury should no longer think of the petitioner Mr. Ford as being innocent. But anyway, that's where things ended. And the at the time, Mr. Ford's attorney objected to that statement, and the judge in the criminal case, overrule that objection, right before Mr. Ford was convicted of murder. And then he appealed that decision to the California Court of Appeals, which, in relevant part said, we're going to assume that what the prosecutor said was a misstatement of law. Nevertheless, there's no harm meaning what he

said didn't actually affect the outcome of this case, and therefore the conviction was sustained. The California Supreme Court didn't take the case at all. And then Mr. Ford moved for habeas review in federal court, eventually the case made its way to the Ninth Circuit. And here's where things get interesting. So, for habeas review, since we're talking about the mischief that can be, that can be created through standards of review, we're dealing with a statute that Congress passed called the Anti-Terrorism and Effective Death Penalty Act, which greatly restricts the availability of habeas relief. And what it does in this context is it says that federal courts can only grant habeas relief when a state courts decision is unreasonable in its application of clearly established law, as announced by the Supreme Court. So, call back to our immunity work, clearly established law is a phrase we've seen in the qualified immunity space that makes it very difficult for plaintiffs to sue government officials who violate the constitution. Well, this has a similar effect, in that it allows there to be constitutional violations that keep people in prison, because Congress has said only unreasonable, first of all violations and only violations of clearly established law as determined by the Supreme Court. So essentially, if there's not a Supreme Court case on point, and even if there is, if reasonable jurists could disagree on how that would apply in the case, you can't get habeas relief, therefore, you have to stay in prison, even if your constitutional rights are violated. So that's the background standard that we're dealing with. A lot of judges in the Ninth Circuit don't like the AEDPA and I share their dislike, but they're the ones that have to apply it and I don't I can just take shots at it from the perspective of a civil rights litigator, which I love doing. And in this case, there's a three-judge panel in the in the Ninth Circuit, and they issue an opinion and they say, the prosecutor statement here was misconduct. And that misconduct did affect the outcome of the trial. And so, there is habeas relief here he gets a new trial. Well, the state moved for rehearing of that decision. And then before it got to that point, en banc, the panel withdrew its opinion, wrote a different opinion and this time said actually, we do have to defer to the state courts here. And when we do that, we think it's a close call. But because of the AEDPTA deference standards, we cannot grant review to this case, Mr. Ford has to stay in jail. But along the way, it also said weirdly, in my opinion. Here the California Court of Appeals said that we're going to assume the prosecutor had made a misstatement of law when he said that the presumption of innocence no longer applied. But if it didn't, here's how we would have analyzed it, and then it goes through its analysis. And then it does a similar thing when it deals with the prejudice the amount of harm analysis, it says, well, we're focused on AEDPA deference. But if we were reviewing this de novo, it would come out a different way. And so in these two passages, of dicta, the Ninth Circuit basically says, Well, if it went the other way, and if we could review this the way we think we should through to novo review, instead of through this deference review, that the AEDPA allows, it would have come out another way Mr. Ford would have gotten a new trial. Well, after that's done, one judge in the Ninth Circuit sua sponte calls for a pole for en banc

review, and that judge is Judge Lawrence VanDyke, he doesn't get anyone to vote for en banc review. So, he dissents from the denial of en banc review in a very fiery way. There's a lot of colorful language in this in case he basically says it multiple points. At one point he says that this is like a kid getting caught with his hand in the cookie jar, and then spitting into the cookie jar in like in like a moment of insolence and he has a lot of other little flourishes like that along the way. And his point here is twofold. So, one, he at least evinces some amount of approval of the AEDPA standards. And so, he goes through, and he says, You know, I think most egregiously, here, there's no case that even necessarily from the Supreme Court's perspective says that a prosecutor telling a jury that there's no presumption of innocence is a clearly wrong statement of law. And therefore, in his opinion, there would never be any basis for a reversal on habeas grounds of something like this. But I think the more important takeaway here is what Judge VanDyke is driving at is what he calls the binding dicta rule. And so, the Ninth Circuit has a rule that it calls the well-reasoned dicta rule. And under this rule, the Ninth Circuit says, well, if a case has dicta, which to our non-lawyer listeners is language in a court opinion, that's not necessary to its decision. So, if a court says, you know, we decide this based on x, but by the way, y is important because of this other reason? x is the holding. But y is the dicta? And in future cases x is binding. But y is not it may be persuasive. Well, the Ninth Circuit takes a different approach. And it says if the dicta is well reasoned, whatever that means, then it is actually binding on future panels of the Ninth Circuit. And this is very strange. I did a little bit of extra research on this this morning. And there are at least a handful of other states that apply a similar rule that is kind of like well, if the issues before us or if we really give the issue a close look, then it is actually binding, even if it's dicta in the case, which is odd and allows for quite a bit of mischief, which is what Judge Van Dykes' point is here. He's saying, look, because we have this binding dicta rule, the outcome of this case was ultimately this panel changes mine and said that, hey, Bs does not apply in this case. But then it goes on this hypothetical frolic, where it says if the state court had done this, and if we were deciding this under different standards, this is what the law should be. And his theory here is that what the panel is doing there is trying to set up a future panel to be able to grab that and say, Well, this is well reasoned dicta, therefore it is binding, in this case, whatever the case won't be presumably another case involving a prosecutor pushing the limits of what he can say as far as the legal standards in a criminal case. And then, you know, Bob's your uncle, you have new case law that's just been resurrected from this case, and the as Judge VanDyke also points out because here, ultimately, the panel reversed and held that there wasn't habeas review. There's not really any party who's able to challenge its use of dicta in this case, and therefore, there's not any party that's able to challenge its future use under this well-reasoned as Judge VanDyke calls it binding dicta rule in the Ninth Circuit. And so, I think, I disagree in almost every respect with Judge VanDykes discussion of the AEDPA as far as its substance, but I think that he's definitely

pointing out something that is a problem with this well, binding dicta rule, because you can see all sorts of nefarious uses for it. And the Fifth Circuit actually has some similar rules, they're kind of different. So, the Fifth Circuit has a rule of orderliness and rule that alternative holdings are binding to future panels. And so, you can have decisions in the Ninth Circuit that just go off on any issue that may or may not be before the court that certainly doesn't have to be dispositive, and then that can become binding in future cases. And the Fifth Circuit has rules where you can say, well, this is we're deciding this case on this basis. But alternatively, we could decide it on this basis. And then going forward that alternative ruling is binding to future panels. And so unless the courts are going to take a much more robust approach to doing en banc review, in any cases, these are problems that are very difficult to solve, because the best you can hope for is something like Judge VanDyke's, dissent from the en banc denial here, since the parties are almost never going to be able to challenge those rules, and the Supreme Court's very likely not going to be interested in granting cert to address something as esoteric as you know, the way the Ninth Circuit's dicta rules operate.

Adam Shelton 24:33
So, Andrew, what do you what do you think about binding dicta? Putting aside all the colorfulness of Judge VanDyke's opinion who I'm not sure I ever want to be on his bad side necessarily, after seeing that opinion, but what do you think about binding dicta?

Andrew Ward 24:45
Or, you know, I don't know how often this happens on the podcast, but I think I lightly disagree with Patrick on sort of both sides of this. As first on the on the substantive ruling, Judge VanDyke points out that it's not like the prosecutor got up in front of the jury and just said, you know, there is no presumption of innocence. These were sort of inarticulate statements sandwiched between repeated reminders that there is a presumption of innocence, including in the in the judge's jury instructions after the prosecutor had summed up. It's not I tend to agree it's the due process standard here is that it's supposed to so clearly, infect, the trial that you know, there's a there's a real chance of a of a miscarriage of justice. And it's not obvious to me that these sort of stray things were that and I tend to kind of be sympathetic to Judge VanDyke on that. But on the binding dicta thing, I don't know that I could ignore the tone of the dissent, it does seem perhaps out of proportion to the, to the panel opinion, you know, I looked at it and it's not. It's not like some lark into the First Amendment in a case about whatever zoning law if it were totally unwarranted, in that, it's like, pretty short. It's just kind of, here's what you might do. I wouldn't write an opinion that way. You know, Chief Justice Roberts once wrote something that was like if it is not necessary to decide more, it is necessary not to decide more, and I

probably wouldn't phrase things that wouldn't have phrased things the way the panel did. But it doesn't seem so egregious as to warrant being called sinister by the, by the dissent here and actually, without, but the potential is there, right. It's certainly, you know, I think alternative holdings being in binding seems to happen in many courts, and certainly the rules subject to manipulation. It's not clear to me that the panel was doing what Judge VanDyke was accusing the panel of doing more broadly, I think this is perhaps most interesting, tonally as opposed to the actual substantive issues. You know, it really exemplifies the trend of judges trying to make their writing more casual, more punchy. You know, Judge Newsom in the 11th circuit does that a lot. Judge VanDyke's here one sentence, "weird" comment reminded me a lot of then Judge Cavanaugh on the DC Circuit writing a one sentence thing like that was sort of like "the state's response, crickets." And so that that tone is something we're seeing more and more of, with sort of a new generation of younger judges. And it's interesting. And, you know, as the dissent writes, shout out to the law clerk, there's a footnote in here that says, "You know, I had my law clerk, compile all the times, we got reversed for screwing up the deference standard, but it was too long." And so, it felt to mean it was like beating up a career criminal with it with a super long rap sheet. And you know, I feel you clerk out there in the world. If you ever if you ever listen to this podcast, I'm sorry, your string sight was too good. You spent all that work making it too good and too convincing that it got cut. I feel you. I've been there. I'm sorry.

Patrick Jaicomo 28:26
Well, he did get footnote one, right. So, it's a pretty prominent shout out. You know, it's kind of funny to the to the tone issue. Yeah, of course, the tone of this is acerbic throughout with a lot of little jabs here and there. But it is funny to say something like that to say, like, well, I had my I had my clerk pull a list together, but it would have embarrassed you so badly that I'm not even including it. And so, you're kind of like, at this point, you should have thrown it in as an appendix to see if it's really as withering as you suggest it is because it feels like, you know, you prove too much with just a footnote saying it would have been so bad that you would have felt like a criminal being shamed with this rap sheet.

Andrew Ward 29:02
I forget the name of that, you know, the director of our Center for judicial engagement. Anthony Sanders knows a lot about the classical world and classical rhetoric, there's a specific naming Greek or something for the device. That's like, I'm not even going to mention this thing that I'm totally mentioning by saying I'm not going to mention it, but it's bad. Just trust me.

Patrick Jaicomo 29:21

Yeah, so to the substance of Andrew's disagreement with me, I think the reason that Judge VanDyke is able to use this, as you know, the example and he gets very hyperbolic with how terrible it is, that you do have this situation where the panel came out the other way on these issues, and then was, you know, in one way or another forced to sort of retract that opinion and replace it with this one, but then leave in that same analysis just as well, even if we did it the other way, we would say this, and so you have the dissenting judge on the panel, in both instances pointing this out and he even says I think in less of a direct tone, then Judge VanDyke hear that the panel's decision to leave in that dicta was less than noble, I think, is the phrase he uses, which is obviously, you know, much more of the sort of historically formal and forgiving tone that we see judges use with one another.

Adam Shelton 30:19
Usually, this whole binding dicta reminded me it you know, I think the real question is that, at what point does something like this really get into being an advisory opinion. But I think that Judge VanDyke kind of got into a little bit of that in his dissent but didn't like fully get there. But it's, it's a fascinating decision, and I'm sure it will see more of Judge VanDyke sparring with his colleagues over the years.

Patrick Jaicomo 30:45
I actually wonder, you know, if his response to this will be like, Okay, well, I'll start adding now well-reasoned dicta to my opinions and see how you guys like it, because one of the main rhetorical points that he makes in the dissent is that he points out that the author of this panel opinion has himself refused to follow dicta that others have called well-reasoned by just saying, well, that does not well reason so it shouldn't be followed.

Andrew Ward 31:12
Patrick's projection for the future is much cleverer than mine. I just assumed they'd be just really contentious at the at the next, you know, Ninth Circuit picnic or something where they get together.

Patrick Jaicomo 31:23
That seems like a safe bet. See how many cookie jars are being passed around to that picnic?

Adam Shelton 31:28
Well, thanks, Patrick and Andrew, and thanks for all of you listening. We'll be back next week and until then, I ask all of you to get engaged