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SPEAKERS

Anthony Sanders, Brian Morris, Evan Lisull

A Anthony Sanders 00:00

"By this time, we were both half-crazy from too much whiskey, sun, fatigue, culture shock, lack of sleep, and general dissolution. We hung around the press box long enough to watch a mass interview with the winning owner, a dapper little man named Layman, who had just said he'd flown into Louisville that morning from Nepal, where he'd bagged a record tiger. The sportswriters murmured their admiration, and a waiter filled Layman's glass with Chivas Regal. He had just won $127,000 with a horse that cost him $6500 a few years ago. His occupation, he said, was retired contractor. And then he added, with a big grin, "I just retired."" Well, that means this is IJ's annual preview of the Kentucky Derby. Those words were from Hunter S. Thompson's famous essay on the 1970 Derby. And so, we want to give you, perhaps, the chance to retire- with the odds that will be given by IJ's own Kentucky boy, Brian Morris. We'll hear from him, and then we'll hear from him about some actual legal issues- a case from the Sixth Circuit, the Kentucky Derby's own circuit, involving easements and a pipeline. Then we'll move down to Florida and hear from Evan Lisull, who is IJ's own legal writing guru. Evan will give us some legal writing tips and then discuss a First Amendment case from Florida in the Eleventh Circuit, which has some very Florida facts. And although we won't get terribly into them, it may be a time to hit pause if you have some younger listeners. That's because some of the plaintiffs in this First Amendment case from Florida include Wacko's Too, MHHS- Sinsations, Patmilt Inc., d.b.a Passions, Bare Assets Inc. (which apparently doesn't need a d.b.a), and SES Jax Inc., d.b.a Flashdancers. All that and more, this week here on Short Circuit, your podcast on the federal courts of appeals. I'm your host, Anthony Sanders, Director of the Center for Judicial Engagement at the Institute for Justice. We're recording this on Monday, April 28, 2025. The episode, we believe, will come out as normal on Friday, May 2, 2025. The Derby is run late in the afternoon on Saturday, May 3, this year. So, if you're listening to this in the first 24 hours the episode is out, you are in luck, because you're going to hear the knowledge you need to retire at the Kentucky Derby-with the usual disclaimers applying. We're going to hear from Brian in a moment on that, and then we're also going to hear from Evan at the end of the show with a little bit about that Hunter S. Thompson essay and legal writing tips along the way. So let's move now to Brian. Brian Morris. As I said, Brian is a Kentucky boy. For those of you who haven't listened to every episode of the show the last four years or so, you may not know that Brian has come on year after year just before the Derby to give his thoughts. I think one year it

was too late, so we did the Belmont instead. But this year, we're in time for the Derby. We've got the horses running. We've got some cool names, as always, including some that have a legal spin on them. So, Brian, what are you watching this year?

B Brian Morris 03:53

I'm glad to be here for gambling and strip clubs today.

A Anthony Sanders 03:59

I didn't design it that way guys, it just came together.

B Brian Morris 04:02

Last year was one of the most exciting Derbies I've ever seen. I don't know if you remember—it was a three-way final finish. If I remember correctly (and if I didn't say this on the podcast, I'm remembering that I said it), I think we actually picked Mystic Dan on the podcast. Those were 18-to-1 odds, so here's your chance. The Kentucky Derby is the fastest two minutes in sports. I still think only two horses have ever gone under two minutes- Secretariat from 1973 still holds the record. I was just watching a stellar tweet the other day- I don't know if you've seen it, Anthony- the video of Secretariat winning the Triple Crown in the Belmont Stakes. I must have at some point. Yeah, he won by 30 lengths.

A Anthony Sanders 04:55

Oh, yeah, I do remember that.

B Brian Morris 04:58

Some recent tweets put that in perspective: the Masters just concluded, and it would be the equivalent of someone winning the Masters by 15 strokes or someone winning the Super Bowl by 96 points. This year, the odds-on favorite is a horse called Journalism at 3-to-1, which won the Santa Anita Derby- which is a big lead-up to the Derby. Horse racing is all about pedigree, which, Anthony, your royal background could appreciate.

A Anthony Sanders 05:33

Yeah if you go back about 500 years, it's in there.

B Brian Morris 05:38

So journalism's dad is a horse called Curlin who won the Preakness back in 2007- so he won like four races in a row. And that is where most of the horse racing money is made. The stud fee for

Curlin, is at $225,000 so this horse is a lot of pedigree. But the biggest plot twist, probably this year for the derby is Bob Baffert is back.

A Anthony Sanders 06:07

Oh yeah!

B Brian Morris 06:09

Horse racing's favorite villain. You know, he's also wildly successful. He's coming off his ban because his horse tested positive for banned substances after it won.

A Anthony Sanders 06:21

Well, so we did the case about him, which was out in the Ninth Circuit. Do you did that case Brian? It was like two or three years ago?

B Brian Morris 06:29

I can't remember exactly, but yeah, there's been a ton of litigation following Baffert's horses- about who actually wins when a horse is scratched for testing positive for substances. But he's back this year with two horses: Citizen Bull at 20-to-1 and Rodriguez at 12-to-1. Citizen Bull, I think, has been doing really well, and I'd imagine those odds are going to come down a bit. Betting on Baffert at the Derby is always a relatively safe bet. But my two favorites are probably- well, one of them ties into another case I'll be talking about- there's a horse called Sovereignty, which is a good IJ name as well. If we're talking about pedigree, it's impressive- its great-great-grandfathers are Affirmed and Seattle Slew, both Triple Crown winners. And it's a Kentucky horse, so you've got to root for the hometown favorite. Anthony, after the podcast is over, maybe we can have a quick lesson on how to say "Louisville" correctly.

E Evan Lisull 07:40

Probably needs a bourbon or two, right? You gotta, swallow it a little more. You have to be a few drinks in, and then it'll come out.

A Anthony Sanders 07:46

That's, that's true. I tend to not do that right before a podcast, but next time we speak.

B Brian Morris 07:52

And then, if you want a long shot- the way I like to bet, which never wins- is doing a tri-box with a long shot, because that's where the real payout is. There's a horse called Owen Almighty at

30-to-1, which is actually the longest shot in the race this week, which is a little surprising. Sometimes you'll see a 40-to-1 or 50-to-1, but 30-to-1 is the longest this year. It won the Tampa Bay Derby, beating a horse I really liked in that race- one that didn't make it to the Derby. So that's Owen Almighty- you heard it here first. Might be worth throwing a little money on. But it did draw the 20 post, which is way on the outside. That's one of the fun things about the Derby, for those who aren't familiar- a lot of horse races might only have seven or eight horses, but the Derby has 20. So drawing the post way outside means if it makes a fast break, it could be right up there.

A Anthony Sanders 08:44

Okay, it's cool that you raised Secretariat and winning by 30 lengths. I was reading not long ago some sports science thing, and it was talking about the distribution that you have in all sports about talent and all that. And basically, there's two examples of absolutely breaking the curve, and one is Secretariat, and the other is Missy Franklin, the swimmer. And both of them are just beyond anything you would ever expect in an athlete.

B Brian Morris 09:19

Secretariat still holds the record for all three triple count races. It's the fastest horse for all three races.

A Anthony Sanders 09:25

Well hopefully some of you can retire on although we do not endorse sacrificing everything for betting on the horses like my grandfather apparently did with the firm's Christmas money one year. That's an old family secret we're not proud of, but we'll move away from gambling. So Evan, later is going to talk about this First Amendment case, but he alsocorrects all of our writing at IJ, and he does a fantastic job at it. He's going to have a few tips. But just give us aquick preview on what you'll be sharing with us.

E Evan Lisull 10:04

Yeah, so I want to shift a little to something somehow even more boring than appellate writing tips and talk about the wide world of citation. A lot of what I do at IJ is cite checking, which means making sure that when we cite a legal principle, the source actually supports it- and also making sure it's formatted correctly. A lot of lawyers immediately think of the Bluebook and cringe, probably having Pavlovian flashbacks to 2L or 3L year when they were subjected to its many rules and intricacies. There's definitely a lot of that, but what many lawyers might not realize is that there's an entire world beyond the Bluebook. A lot of courts don't use it and some even recommend against using it. I want to tie this into our argument tomorrow in Martin v. United States, where IJ will be arguing before the Supreme Court on an important issue involving the Federal Tort Claims Act. But this isn't about the substance of those legal issues- it's about how those briefs look and why they look the way they do.

A Anthony Sanders 11:05

That sounds juicy. And of course, by the time listeners hear this, we'll know all about the Martin argument, and we'll talk about on later shows too, I'm sure. And have Patrick Jaicomo, who is doing the arguments, back on Short Circuit. But until that time we're going to go north of Louisville, almost to the UP in northern Michigan. As people know, Michigan is divided into two halves and there's a pipeline under the water there that apparently is not very popular these days. So Brian, what's that about?

B Brian Morris 11:45

This case came out of the Sixth Circuit last week- it's called Enbridge Energy v. Whitmer, involving a pipeline that runs from Wisconsin through Michigan into Canada. Enbridge has had an easement since the 1950s to run the pipe between the Upper and Lower Peninsulas, which crosses the bottom of the Mackinac Straits. The state owns the submerged land at the bottom, and a few years ago, Governor Whitmer tried to revoke the easement. The state's concern is about the potential for a rupture or a ship's anchor hitting the pipeline and causing a spill. In response, Enbridge filed a federal lawsuit seeking an injunction to stop her and the state from interfering with the easement. There are three arguments: a Supremacy Clause argument, an Interstate Commerce Clause argument, and a general Commerce Clause argument. The merits aren't at issue in this appeal- as IJ knows in a lot of their cases, when you sue the government it takes years to even get to the merits of the case. So this litigation is years in the making and the issue is whether Eleventh Amendment immunity applies, which bars suing a state in federal court. But there's a major exception- Ex parte Young- which allows suits against individual state officials in their official capacity. If I remember correctly, Ex parte Young was an old railroad case where Minnesota passed a law limiting what railroads could charge, and the attorney general was sued to stop enforcement.

A Anthony Sanders 14:23

Yeah, so you're testing my knowledge. And I should know this, because I live in Minnesota, but I didn't even remember -

E Evan Lisull 14:32

It's a case that shows up like, every day.

A Anthony Sanders 14:36

Yeah, every day.

B Brian Morris 14:40

But they sued the AG, to basically not enforce this state law. And they said, well, they named him in their official capacity as an individual officer, so that was okay.

A Anthony Sanders 14:54

It's slicing things pretty thin, but it does make sense that this fella enforces the law, you're just suing the fella, you're not suing the state- and so the relief will be that this person who's in charge of enforcing the law can't do it. So, you don't have to say you're actually suing the state- but of course you can't sue for damages. This is only about getting an injunction or a declaration.

B Brian Morris 15:23

Yeah. So the boxes you have to check is that you're actually are suing a named official, not the state itself. There is an ongoing violation of federal law, and as you were just mentioning, there's prospective relief only- so it's like an injunction to stop the violation for example. In contrast, if you're actually suing the state, the 11th amendment immunity applies, which I looked it up and that goes back to the old Chisholm v. Georgia case. Which was about a Charleston merchant who was owed a bunch of money because Georgia took supplies to help when the Continental Army was in the state, and the merchant wasn't paid. So he sued the state of Georgia, and the Supreme Court said that was fine. And so that actually provoked the passage of the 11th amendment.

A Anthony Sanders 16:24

And then the 11th amendment's actual terminology only applies to citizens from outside of state, suing the state. But it's not really 11th amendment, it's just reaffirming sovereign immunity and overturning Chisholm v. Georgia, which I contend was correctly decided, but we don't need to have that fight right now.

B Brian Morris 16:45

So, here, Enbridge says, Governor Whitmer- look, this is straightforward. We sued Governor Whitmer in her official capacity. She's allegedly violating the Constitution, and we're seeking forward-looking relief that says, "Hey, you can't interfere with our easement." It seems like a straightforward application of Ex parte Young. But the tricky part is that the Supreme Court has said even if a plaintiff checks all the boxes and everything looks correct, you still have to consider the effect of the relief to determine whether the plaintiff is really trying to get around sovereign immunity and is, in effect, suing the state. There's a case from the 1990s- Idaho v. Coeur d'Alene Tribe- and..

A Anthony Sanders 17:32

Good pronunciation, by the way. Idaho listeners will be really proud of you.

B Brian Morris 17:37

So the Coeur d’Alene Tribe sued state officials over part of a lake they claimed ownership of. They checked all the right procedural boxes- they sued individual state officials, sought forward-looking relief- but what they were really asking for was ownership of the lake. Essentially, it was a quiet title action to say, “We own this part of the lake,” and to completely exclude the state from regulating or using that area. Normally, the 11th Amendment would bar a direct quiet title action against the state. And the Supreme Court said that even though the plaintiffs had styled the suit the right way, Ex parte Young didn’t apply, because the substance of the relief sought was really a judgment against the state itself. So the oral argument in the Enbridge case was really interesting because it was all about whether Coeur d’Alene applies. The key question was: what is this easement? If the pipeline company already has the easement and wins an injunction against Governor Whitmer, does the state of Michigan retain any rights at all? Or is Enbridge effectively asking for exclusive control over this property? And just to give a visual for listeners- the pipeline at issue here runs submerged across the strait. It’s only a few inches above the lakebed and stretches right across the bottom of the water, which has been a long-standing source of controversy and litigation.

A Anthony Sanders 19:11

So our YouTube audience has just seen that picture, but for listeners, if you want to see it, go to YouTube. But yeah, it's a picture of a pipe. It's actually not as big as I would think-it looks like some pipes in large septic from your house.

B Brian Morris 19:25

Yeah correct. And during the oral argument, the lawyer for Enbridge was like, "this is just a small little pipe that goes across the bottom." And I was kind of rolling my eyes, and I looked it up, because it is just a small pipe that goes across the bottom of the strait.

A Anthony Sanders 19:40

-but with, like, zillions and zillions of gallons of oil

B Brian Morris 19:45

Correct. So the state is saying, “Look, what Enbridge really wants is ownership of this property- they’re trying to prevent Governor Whitmer and Michigan from regulating or doing anything related to the pipeline.” And the company says, “No, no, we just want to run our pipeline. You can still regulate us- we’re just saying you can’t do so in a way that violates the Constitution.” One of the interesting things about this case, and it shows up in the opinion, is that the court actually cites the oral argument transcript twice- which you don't see often. That really highlights how important the oral argument was here. The judges were working through, with both advocates, the practical effects of the requested relief: What would the state of Michigan still be able to do? Judge Kethledge was on the panel. He’s from Michigan- famously writes opinions at his cabin up there- and is a brilliant guy. But I think, to some of his chagrin, the advocate for Enbridge was a D.C. lawyer who wasn’t totally prepared to answer detailed questions about the geography. Judge Kethledge even laughed when the lawyer didn’t know

where the pipeline was in relation to the bridge. The judges posed some great hypotheticals to figure out what Michigan can do. Judge Kethledge asked whether, if zebra mussels- a known invasive species- were all over the pipeline, could the state require the company to clean them up? The answer was yes. He said, “Of course,” because nothing in the injunction would stop the state from doing that. Judge Moore posed a hypothetical about the state wanting to build a commuter rail under the strait- could they still do that? And again, the answer was yes. So I think the judge has really worked through some hypotheticals and showed the importance of oral argument, and then they ultimately came out and agreed with the pipeline company and said, that the state could still regulate, lay other utility lines, and do other things on that land. So, the court concluded this case falls under Ex parte Young and not Coeur d’Alene. It’s like the property rights concept you learn in law school- the “bundle of sticks.” Here, the pipeline company might have one stick, the easement to operate, but the state still holds all the other sticks. And in that situation, you can sue a state official under Ex parte Young. From my perspective, it’s a win- and the right decision. It’s always good when courts don’t find these jurisdictional reasons to let the government off the hook of accountability.

A Anthony Sanders 22:53

So Evan, I learned in property class about easements, which I always thought were fascinating and that it's only part of the bundle of sticks. It seems to me here the court has kind of a part of the bundle rule, and it seems to have no basis, in any actual rule of law. It's that Coeur d'Alene is a weird case, and we somehow need to keep ex parte young.

E Evan Lisull 23:23

Right. It's a stories problem, right? Like, how many sticks does it take until you've lost sovereignty? I don't know, and I don't know if they have an answer. I mean, that's a philosophical problem. But I think the Coeur d'Alene case is kind of weird, and I could see the concern. But fundamentally in the background here, and Brian, I think you were working on this case- what would stop Michigan here from just exercising eminent domain over the easement? And then they would seek just compensation. But as we know, they might just give them a bunch of IOUs in response. Not to give them ideas- hopefully the state of Michigan isn't listening to this podcast- but is there, would that be an option for the state here?

B Brian Morris 24:09

Yeah, I mean, it'd be interesting. I suppose the argument could be that the public use is protecting the environment or something.

E Evan Lisull 24:17

They don't really need one, right? There's a public thoroughfare or something that public waters, right? And just say, "All right, well, we've tried to regulate you. And you say, we can't regulate you, so we're just going to take it and you're going to ask for just compensation, and we're going to drag that out for years."

A Anthony Sanders 24:29

Just compensation for all that oil probably a lot right?

E Evan Lisull 24:32

I mean, that's certainly right. They would say, we would have had ex-gajillion barrels go through here, and you probably do that, and they say, okay, here's Whitmer bucks- you can spend them anywhere in the Upper Peninsula. It's good just compensation. I could see how the state, if they wanted to get really Machiavellian about it, would say, okay, we can't regulate you, we'll take you then. And in the meantime, they don't have the oil or gas or whatever it is- they want to have that. I don't know. It'd be interesting to see how this plays out down the road as a practical matter. But yeah, I think it's good. I think Brian's right- fundamentally, as a matter of law, this is just a classic kind of suit that should be heard. Let Michigan argue that they've breached the terms or aren't complying with federal law, but let's get to the merits rather than letting them use the Eleventh Amendment as a get-out-of-court-free card.

B Brian Morris 25:28

Yeah because there are still a ton of issues. Some abstention issues, there's merits issues, there's all these remedy issues. But here, the states just saying, the courthouse floors are shut before you move in.

A Anthony Sanders 25:44

Yeah, they say that on remand now there's going to be younger abstention- which is another thing they're going to have to deal with- our old friend. This seems like an odd place to have younger extension.

E Evan Lisull 25:54

Yeah, I don't really understand that. I didn't dive as deep as Brian, but I furrowed my eyebrows at that footnote.

A Anthony Sanders 26:01

So that brings me to kind of a legal writing point that I did not like about the opinion. So there's this other litigation going on, brought by the Attorney General. And so when the Attorney General, Dana Nessel, first got in office- who I think is still the AG, there-they refer to her later as 'General Nessel.' I know the Supreme Court does this for the solicitor general- but attorney general and solicitors general, they are not generals. They don't have four stars across their shirt. Does this bother you guys, too?

E Evan Lisull 26:03

Yeah, I think it's weird. Personally, I can't tell you, if you really want to do it, that it's not right or anything, but to me, it sounds wrong. Again, it's a military connotation that's too overpowering.

A Anthony Sanders 26:55

Brian, does it ruffle your feathers?

B Brian Morris 26:58

No, I completely agree. I understand, some of the pomp and circumstance of having an argument in SCOTUS, that they use the terms general to address people. But, yeah, I'm more probably laid back and just think that you should just reference people as AG, in the opinion.

E Evan Lisull 27:20

Or attorney. Or you could say AG Nessel, and have fewer characters and the same amount of words, not that we count here ever.

A Anthony Sanders 27:28

Well, for some briefs maybe that would work a little better just to have AG.

E Evan Lisull 27:34

Or just Nessel and save you the word.

A Anthony Sanders 27:35

Well I think that's a good segway, into legal writing. So, Evan, you said you're going to have some highfalutin details about when you get to the Supreme Court- that blue book you learned about when you were a 1L in law school, and you would roll your eyes about it- you get there and you learn that they roll their eyes about it too. That's right. And I think the main thing is for appellate Twitter folks and whatever is gonna be very obvious and kind of boring, they could fast forward to their real interests. We have real people who listen to the podcast too. So you can speak to that.

E Evan Lisull 28:17

There are dozens of us, right? For people who aren't familiar, you might look at a Supreme Court brief and notice that it looks a little different- part of it is the spacing, part of it is the formatting. But I think if there's one thing a writer might notice that others might not, it's the

number of asterisks. You might wonder, why use the asterisk? A lot of that comes from the Supreme Court itself, but also from the Office of the Solicitor General. Another good transition- the Solicitor General puts out a style guide that's primarily known for its Supreme Court briefs. It's essentially a rule-by-rule amendment to the Bluebook, where they go through and say: we'll follow this, we won't follow that, here's where we do things differently. Those asterisks you see are actually ellipses, and there's a reason they use them. When you come to the end of a sentence, it's sometimes hard to tell what's the period and what's the ellipsis. The reason they prefer using three asterisks- which is a hard word to say repeatedly in a podcast- is because it clearly marks what's been omitted versus what's an actual sentence-ending period. There's actually an argument there. I thought it was just highfalutin, just pretentious, but there's a semantic logic to it that I didn't appreciate until I really got into this work.

A Anthony Sanders 29:51

So if you have a period at the end of the sentence, but then you're leaving off the next sentence, or part of the next sentence- so if you do have a period.

E Evan Lisull 30:00

You do have a period, so that's the period- it makes clear what's different from the three asterisks. Whereas before, if you have two groups of words, it's hard to tell: are you omitting from the end of the first group or the beginning of the second? When there are four periods in a row, you kind of have to squint to figure it out. But if you use asterisks, it's very clear that the three asterisks mark the omission. The period just shows the end of the sentence.

A Anthony Sanders 30:27

If you omit say half of the next sentence, but the second half is in there, or you just omit an entire sentence and then you go to the beginning of a further sentence. Are those asterisks different?

E Evan Lisull 30:41

No, you'd have to choose which side. It's going to be the same, whether you're omitting it, so you could take out multiple sentences if need be.

A Anthony Sanders 30:48

But I mean, is it just still three asterisks?

E Evan Lisull 30:51

Yes, it's still three- you will never have four or some strange variation. Just like the ellipsis, but by using a different character, it's clearer. So there are little things like that, and then there are

even more esoteric quirks. For example, there's this reporter called the Federal Appendix, which is a bizarre concept. It's a reporter of unreported cases, which already feels contradictory. You're told these cases are unreported, but they're bound in a published volume. It's not precedential, so the message is: we published this, but don't you dare rely on it. It's odd when you really dig into authority and publication. And even the Bluebook gets in on this- typically it has you cite it as F. App'x. But for the Solicitor General, it's F. Appx. with different spacing and punctuation. The reason is because Michael Dreeben said so back in 2003. If you look at the OSG's style guide, it literally says, "per Michael Dreeben, we will continue to use Fed. Appx." I kind of lost it when I found that. I mean, he was a qualified Solicitor General, no dispute there, but it's 2025 now.

A Anthony Sanders 32:25

And does the Supreme Court and its opinions follow the SG'S guide to some extent, or is it just a whole other thing?

E Evan Lisull 32:33

The Supreme Court has its own style guide that overlaps, but is not perfect, and is not actually recommended for practitioners. It's just their kind of own internal publication manual that the reporter, the U.S. Reporter, will follow. And so then it's kind of like, well, who are we appealing to? Why are we doing it this way? And a lot of it's just kind of fitting in, right? You want your briefs to look like the best. And the Office of the Solicitor General, whatever you may feel about the positions they take, put together very professional briefs- it always looks the part. And so I think part of that is looking the part, going before the Court. Dress your best. I mean, they're the ones who have said it's the tenth justice, the Solicitor General. And as much as you can emulate that aspect of the practice- that's the best practice for your own firm- is to try to look the part. Since the Solicitor General guide is out there if you ever find yourself submitting a Supreme Court brief, different people have different opinions, and it's not like a guarantee or anything, but it's just a little something you can do to nudge your foot a little more in that very small and often closed door.

A Anthony Sanders 33:40

And it's the same rules for a cert petitions?

E Evan Lisull 33:43

Yes, cert petition and merits briefs are all following the same style.

A Anthony Sanders 33:46

Right. And they have these little booklets instead of a full size paper.

E Evan Lisull 33:49

Right, luckily our incredible, undefeated paralegal team here, best in the business- they make sure that magic happens. So it looks very nice when it's done, but I don't do the printing.

A Anthony Sanders 34:04

Well wonderful. Well, another place where the magic happens is some certain establishments in Jacksonville, Florida. But there was a little too much magic for the for the city councilors there, so they passed this ordinance. And they're saying it restricts the First Amendment rights of what they do at these establishments. And so, Evan, what did the 11th Circuit think about that?

E Evan Lisull 34:30

That's right. So I think it's important, before getting into this, to start, the layman's view might be: well, what was the First Amendment even involved here? It's pretty undisputed that the First Amendment protects exotic dancing writ large. It sounds strange, and maybe it goes against your priors, but if you think about it there's a lot of expressive speech that's been protected. You can think of the black arm bands. You can think of silent demonstrations. There's a lot of speech that isn't written words.

A Anthony Sanders 34:59

Chalking on sidewalks

E Evan Lisull 35:08

That's right and so you accept that prior. The other thing that's kind of important here is a case that we cite a lot in our First Amendment work, which is Reed v. Town of Gilbert, which was a signage case, but it kind of has this important overarching rule that I'm going to read before getting into the First Amendment case. It's a brief little excerpt: "a speech regulation targeted at specific subject matter is content-based even if it does not discriminate among viewpoints within that subject matter." And so there, he uses the example of a law that bans sound trucks for political speech- and only political speech- which would be content-based even if it imposed no limits on the political viewpoints that could be expressed. So you can't just ban a form of speech. That's exactly what happens in Jacksonville. There are two aspects of the opinion, but the one that's kind of more interesting to discuss involves a straight-up ban- no exceptions, no anything- on exotic dancers ages 18 to 21. And so you would think, if you only knew Reed and you had no other background, you'd say, "well, okay, that's a content-based restriction. It only applies to a certain group, no others. Strict scrutiny would apply." But that's not what happens. And so there's two reasons that the court gives for that. We'll start with the court, then we'll move into Judge Newsom's concurrence.

A Anthony Sanders 36:23

And the court is also Judge Newsom, I should add.

E Evan Lisull 36:26

That is true. This is Newsom's panel. Newsom agrees, he agrees with the decision, so he's not dissenting here.

A Anthony Sanders 36:32

Which is not that unusual these days

E Evan Lisull 36:34

No not at all, concurrence is common. I would have done it differently, or maybe somebody else should do it differently-you gotta get the viewers right. And so here the court relies on an even older Supreme Court case that's City of Renton v. Playtime Theatres.

A Anthony Sanders 36:58

I remember that because Renton is a suburb of Seattle. And when I was growing up that was a big story in the Seattle area.

E Evan Lisull 37:10

Oh really, I didn't know that aspect of it. And so there, they upheld- not even a ban- but a locational restriction on where adult theaters could even open. This was about movie theaters rather than live performances. They just upheld a restriction before any theaters could even open, which was kind of curious, and that seemed to be a big fixation in the Supreme Court's decision. But they relied on what they called the "secondary effects" approach. And the secondary effects approach is basically: look, we're not concerned about the content of the speech-it's not the fact that you're showing adult movies. It's the idea that there are secondary effects from having movie theaters that show adult movies, whether it's crime or even littering or things like that associated with these theaters. And they claimed to have evidence and reports and all these things showing that had happened in other cities. So those secondary effects let you analyze the restriction just under intermediate scrutiny. But it's hard to square that with Reed. The majority opinion in Reed doesn't even discuss Renton, but the concurrence- which was one of those "concurrence with an air of dissent" kinds of opinions- says, you know, we've upheld these in other contexts. And that concurrence, which Kagan wrote, does mention Renton and says, basically, we've had no trouble applying intermediate scrutiny in these types of cases. So the Eleventh Circuit is kind of left with a pickle: okay, Renton says that because of the secondary effects, we only need to use intermediate scrutiny. We also have Eleventh Circuit precedent squarely on point saying, yep, intermediate scrutiny applies here. We understand Reed came out later, but Reed didn't talk about these kinds of establishments- it was about signs for church events, which seems very different. So we don't see Reed as directly overruling it. Our precedent still applies. If you want this changed, you've got to take it upstairs. And that's kind of where they left it. Now, Newsom writes a concurrence- and that

was, to be honest, the reason I wanted to discuss this case, because a Newsom concurrence is usually a good sign. They're always interesting, and this one is too. He basically says, yeah, I get it: the precedent's still there, the secondary effects doctrine still exists. But when you apply the logic of Reed- however different the facts are- we don't really look at it factually. We need to look at what standard applies. And here, there's no reason Reed's logic wouldn't apply to this case. And you could say that the secondary effects justify the restriction. And here- and kind of my background, we've had the jokes, but this part is a lot less funny- the concern is about human trafficking. And there's a lot of connection between human trafficking and exotic dancing. And that was the justification the city of Jacksonville gave.

A Anthony Sanders 40:19

especially with the the younger set.

E Evan Lisull 40:21

Exactly. And that's why I was focused on the 18 to 21 piece- that was their justification. These are laudable policy goals and concerns, but to Newsom's point, that all comes downstream of the standard of review. You can make those arguments after we've determined what level of scrutiny applies. But once it's content-based, you're in strict scrutiny territory. And yeah, you can win under strict scrutiny. It's often said, "strict in theory, fatal in fact," but that's not always true. For example, in Holder v. Humanitarian Law Project, the government was subjected to strict scrutiny in a national security/terrorism context- and it won. So it can happen. It's not unfeasible. And honestly, this feels like a close enough call that the government could arguably win here. But Newsom offers reasons why it might not, and one of the big issues is underinclusiveness. Remember, with strict scrutiny, the regulation has to be narrowly tailored to serve a compelling interest. So, if it leaves out significant parts of the problem, that can be fatal. And one of the arguments the appellants made was that while dancers aged 18 to 21 are banned from performing, they're still allowed to work in these establishments, in other roles. And the evidence presented (at least generally, if not in this specific record) is that traffickers don't necessarily care whether someone is on stage or not. And again, this is all for the sake of argument- I don't know the actual facts or statistics. But, these establishments can serve as a funnel for the behavior they're trying to prevent, regardless of whether someone is dancing or just working the door or bussing tables. So the concern still applies- but the regulation only targets a narrow slice of it. That kind of under-inclusiveness can be enough to strike it down under strict scrutiny. But again, all of that depends on first deciding that strict scrutiny applies. That's the threshold question. And frankly, I think Judge Newsom's analysis is persuasive. I don't know what argument he would make if he were writing a dissent, since, like you said, he concurred. He didn't disagree with the result, but he clearly wasn't fully comfortable with how the analysis got there. I do wish his opinion had been the majority. But I also get that, from the standpoint of one of these establishments, it's a bit unsatisfying- it doesn't get you the result, and it leaves you with an opinion that's more useful as setup for a cert petition than anything else. And even that's tough, because it's such a bespoke set of facts. So yeah, a little frustrating in that respect. There are still a lot of unanswered questions post-Reed, and this seems like a perfect example of that.

A Anthony Sanders 42:53

Part of what's going on is this other case they discussed- City of Arlington- from a couple of years ago, which we originally talked about on Short Circuit before it got to the Supreme Court. That was a while ago now. It involved the on-premises sign versus off-premises sign issue. Now, this Court said, "Ah, that's okay under Reed," which kind of doesn't make sense from the actual wording of the majority opinion in Reed. Brian, where do you see this moving as we keep trying to sort out an actual principle from what maybe the judges don't want to do when it comes to enforcing that principle?

B Brian Morris 43:33

As a background idea, I'll keep this in my back pocket the next time I need an excuse to go to a strip club.

A Anthony Sanders 43:42

Case research.

B Brian Morris 43:43

It's for First Amendment research. It reminds me of that won Best Picture this year- Anora. The writer said he spent a lot of time in strip clubs for research for his screenplay.

A Anthony Sanders 43:59

Well it paid off, I guess.

B Brian Morris 44:00

It's interesting. Even in Newsom's majority opinion, they say it feels content-based- and it is content-based, right? It doesn't apply to other types of dancers, such as jazz dancers or ballet dancers; it's just erotic dancers. And this whole line of cases kind of brushes that aside by treating it as content-neutral simply because of the industry. It reminds me a lot of our First Amendment cases involving traditionally licensed spaces like lawyers, doctors, and therapists, where courts get involved in these industries, get in the weeds a bit, and the doctrine kind of goes out the window. They say, "Oh, well, this industry is different when it comes to the First Amendment," but it really shouldn't be- at least not for these threshold questions. To your point, Evan, I agree that Florida could have some really compelling interests in this space- on trafficking issues and safety- and that could all be valid. But I think it should still be held to the regular strict scrutiny standard. Basically, the government should have to come into court and prove it. And I think that's what they should have to do when they impose these types of restrictions. That's exactly what Newsom said in his concurrence- the stronger the interest in these types of cases, the more likely the restriction is to survive. And we should operate in that world, rather than just putting blinders on when certain industries are involved.

A Anthony Sanders 45:44

Yeah, it happens in so many areas of law where you can tell the judges are saying, "oh, we can't rule that way, so we're going to go down a different track," even though there's not really a reason to go down that track.

E Evan Lisull 45:58

Yeah, I think of secondary effects here. The name itself points to that- like, that's exactly what happened in Reed. The concern wasn't the message itself; it was things like traffic issues when you have these signs and people turning, all the downstream effects. The Court was very clear: that's fine, you can talk about that, but you have to address it under strict scrutiny. It just seems like we're treating this differently because of the subject matter, as Brian points out. It would be interesting to see the Supreme Court wrestle with this, but it's hard to see the votes there. They have a very crowded docket, and it's unclear who would be willing to say, "Yeah, this is where we need to stick our neck out and finesse our First Amendment approach." I just don't see it.

B Brian Morris 46:43

They should grant it just to hear Justice Alitos questions.

A Anthony Sanders 46:50

It didn't come up in the opinion, but you could argue that the Renton theaters cases are zombie precedents- like how the Lemon test was called for so many years as the old establishment religion test. It still seems to have a lot of life in the lower courts, so I wouldn't exactly call it a zombie precedent, but if the Supreme Court wanted to, it could declare it one. I'm guessing, though, there aren't the votes to actually do that. So that's what's going on in the 11th Circuit. Bringing it back to Kentucky, Evan, in prep for this show, you sent me this old Hunter S. Thompson essay. I'm guessing you're a fan of his for the writing, being a writing guy yourself. Anything you want to tell us about that? The essay-if you want, we can put a link in the show notes- Evan found a place online where it's posted. I think it's okay for us to link to it. It's basically details about how the Kentucky Derby actually happens in 1970, and it's basically everyone's vomiting, essentially.

E Evan Lisull 48:14

Yeah, I can't speak from personal experience, but that sounds exactly like what's happening. You mentioned this was the Derby episode and we watched the race, of course, but it's also a personal tradition to make time to read this essay every year to set the stage. It's a nice piece- not super long, even for a vanity long form- it probably won't take more than 30 minutes to get through. It's fun and has a pace of its own; he's a master of pacing. The aside is that, despite all the focus on lifestyle antics and everything else, the drugs are really just a means to an end

to get to the heart of the beast. His writing is much more than just about drugs- it's about catching details and presenting them in a way that doesn't overwhelm you but uses those details to advance a bigger point.

A Anthony Sanders 49:17

At times it kind of sounds like you're reading, James Joyce- with all these details just flowing with not a lot of narrative. And then he'll step back, and then have more of a narrative writing.

E Evan Lisull 49:33

Right, and that really is the Gonzo ethos- focusing on first-person experience as a way to capture what it's like to be in a place. It butts up against traditional sociology or anthropology, where we have this image of the journalist as a neutral viewer- which can often feel cold and distant vantage point to view something. The Kentucky Derby deserves more than just that kind of cold vantage point of mere observation; it should be a participatory event, and I think Hunter S. Thompson really captures that energy well. I always enjoy reading it- it makes me happy when the Derby is on and this essay is out. It's just good Americana.

A Anthony Sanders 50:18

Brian, have you actually gone to the derby?

B Brian Morris 50:20

I have, and I'll say a lot of people think of the Derby as the grandstands, the hats, the mint juleps- and it being very highbrow with pretty dresses, seersucker suits- but Hunter S. Thompson shows that the infield is a whole other world. It's pure chaos and debauchery. The last time I was there, I was in the infield for when American Pharaoh won the Derby on his way to the Triple Crown. You're really there for the party and just catch the horse flying by one corner briefly. Yeah, I think he really hits the nail on the head.

A Anthony Sanders 51:12

Yeah, not the greatest vantage point in the infield- I would imagine. You can do that on TV

B Brian Morris 51:19

At this point in my life- if any listeners have grandstand tickets and need someone to go help them bet- please reach out. But I will not be in the infield anytime soon.

A Anthony Sanders 51:31

Well, you can find Brian's contact information on IJ.org and click on staff. So, he's standing by for your call. But in the meantime, I'd like to thank him for the preview and for his legal analysis. And same to Evan and for some legal writing citation tips and otherwise. And for everyone else, please be sure to follow Short Circuit on YouTube, Apple Podcast, Spotify and all the other podcast platforms. And remember to get engaged.