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SPEAKERS

Anthony Sanders, Tahmineh Dehbozorgi, Suranjan Sen

A **Anthony Sanders** 00:17

"Well, it's Monday morning. He's kissing Mama goodbye. He's up and gone with the sun. Daddy drives an 18-wheeler, and he's off on a Midwest run. And three sad faces gather around Mama. They ask her when Daddy's coming home. Daddy drives an 18-wheeler, and they sure miss him when he's gone. But he calls them every night and tells them that he loves them. He taught them to sing this song: roll on, highway, roll on along. Roll on, Daddy, till you get back home. Roll on, family. Roll on, crew. Roll on, Mama, like I asked you to do. And roll on, 18-wheeler, roll on, roll on." That's what Alabama said in 1984 with their hit number. But ironically, it's hard to roll on if you don't have a truck stop- a place where you can fill up your rig, grab a bite to eat, and get a shower. Unfortunately, a county in Georgia decided that Daddy wasn't important enough to come home, so they didn’t allow a truck stop to be built. We're going to talk about that case, and also a case about “come and take it” when it comes to a hat. This week 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 Thursday, May 15, 2025. It's all about truck stops and hats with guns on them in schools this week- a couple of maybe slightly controversial subjects, but we'll see what we can do with them. I have two intrepid young IJ attorneys with me to sort these questions out. They are Suranjan Sen and Tahmineh Dehbozorgi. Welcome to both of you. We're first going to speak with Suranjan, and then we're going to get to Tahmineh, who’s going to tell us about this truck stop case that I'm intrigued to dig into. But first, Suranjan, you're going to be talking about a case involving a kid wearing a hat in school that had some controversial speech on it, and it was actually argued by our friend Eugene Volokh. But I have a question to start with, Suranjan: What is your most controversial hat that you own? So if you put this hat on and you walk to, I don't know, a school, workplace, whatever, people would be like... uh.

S **Suranjan Sen** 02:52

Oh, well, Anthony, I'm glad you asked me that, because this has been something that weighs on me a lot. I have this hat that I love, but I'm really quite scared to wear it in public. I feel like everybody's looking at me, and this case really spoke to my heart because of it. I am, in my

spare time, a barbershopper. I'm in a barbershop quartet. And like any good barbershopper, I own a boater hat, which is a brimmed straw hat that was popular 100 years ago- just like all my favorite judicial precedent. I hope one day I can have as much gumption as the little girl in the case I'm going to talk about later- to wear it. Wear it loud and wear it proud.

A Anthony Sanders 03:43

And have you ever worn it to school when you were doing such things?

S Suranjan Sen 03:47

No, I didn't wear it to school, but I have worn it to work. And I have to say, I experienced severe discrimination here at IJ, people were looking at me, pointing and laughing. They were asking me if Halloween came early or asking if it was Dress up day. And, I think my constitutional rights were violated.

A Anthony Sanders 04:07

Do you think part of that was that it was just one of you and you weren't in a quartet? So if there are four of you, with hats, people would say, "Oh, I get it."

S Suranjan Sen 04:15

I mean, you know, in the barbershop community, we always say that the party goes on until there's only three guys left. So, everything's always better when you're ringing chords together. So maybe that was it.

A Anthony Sanders 04:29

Well, Tamineh I'm not going to ask you about hats. I think we'll leave that aside, but I am going to ask you about truckers and truck stops. So we have this property rights case from the 11th Circuit about just the property owner trying to build a truck stop. You said you're interested in this case because you have truckers in your family. So if you could tell us a little bit about your personal experience with truckers, and then we can move on to trying to build this truck stop.

T Tahmineh Dehbozorgi 04:59

Yeah, absolutely. You know, having trucker family members is an understatement. I would say my entire lineage was of truckers, since trucks were a thing, and before that, they were settlers, and long before that, they were Kingsguard. So background a little. I'm originally from Iran. I moved to the United States on Fourth of July 2015- some would say was destiny that I came on that day. But my entire family, my grandfathers on both sides, my great grandfathers on every side- were all truckers.

A Anthony Sanders 05:36

Wow. So you have four great grandfathers who were truckers?

T Tahmineh Dehbozorgi 05:41

Yes

A Anthony Sanders 05:42

That's amazing.

T Tahmineh Dehbozorgi 05:43

And my dad's side of the family, my grandpa and my great uncle, they owned a trucking company in Shiraz, Iran- the Dehbozorgi Trucking Company was the brand. And my grandpa used to drive 18 wheelers, and also like multiple types of trucks, he used to transport oil and diesel and things like that, very dangerous stuff. And I have seen and heard a lot of stories about how difficult life of a trucker is. It was so difficult that my dad decided that he would not want to continue the family business, and he went to complete opposite direction, and he became a telecommunications engineer.

A Anthony Sanders 06:30

That, yeah, it sounds a little maybe less time consuming. I would guess.

S Suranjan Sen 06:35

Have a great respect for truckers, you know? I mean, a lot of people these days seem to think that the products on the shelves come by magic and this whole country runs on on trucking. So that's amazing.

T Tahmineh Dehbozorgi 06:50

Yeah also, the other aspect is that that anybody else in my family, which are very few of them who are not truckers, all have trucking licenses, including my father. So, you still have to learn how to drive a truck, even if you're not a trucker in the Dehbozorgi family.

A Anthony Sanders 07:06

So have you ever driven an 18 wheeler?

T Tahmineh Dehbozorgi 07:08

No, I have not yet. One day.

A Anthony Sanders 07:13

So the thing that we heard in the opening being a trucker, is you need a place to stop and refuel, and that's hard if there's no truck stops. So what was the problem with this poor fella down in Georgia.

T Tahmineh Dehbozorgi 07:28

Mr. William Corey- he is my personal hero. He was fighting for people like my grandfather to have a place to rest and a place to get gas. Given the fact that being a trucker is so difficult- a lot of truckers get into accidents because they're sleepy, because they are deprived of basic necessities- having truck stops, especially in a country like the United States where truckers have to drive long distances, is very important. Mr. William Corey, for 25 years, has been fighting with Rockdale County, Georgia, to build this truck stop. Unfortunately, Rockdale County was very dead set on not letting that happen. So the case we're going to talk about today is very important because it really illustrates the tension between individual property rights and the authority of local government to regulate land use and zoning laws. I mean, Mr. Corey fought for 25 years- that's almost my lifetime- to build this truck stop, and at the end of the day, he got an Eleventh Circuit ruling that said, “We don't think you should,” and that was it. So here’s what happened. Mr. Corey had this piece of land with a grand vision to build a bustling truck stop near a busy highway, and he started in 1996 when he began acquiring property. But when he bought the land, it was zoned under the C2 zoning code, meaning he was allowed to build a convenience store- even a gas station- but he would not be allowed to build a truck stop. His property was at a prime spot by the highway, so it would have been a great place to build a truck stop. But because of the zoning restriction at the time, in 1996, he was not allowed to do that. So he decided to apply for a permit. In 1999- that’s a year after I was born- he applied for a permit to build a travel plaza to serve both cars and trucks. The county said, “Nope, that looks like a truck stop to us,” and rejected his permit.

A Anthony Sanders 09:54

It seems, under these ordinances, it's a real hazy line between what is a Truck Stop vs what's a gas station. There's, \ just all this criteria. It's almost a "I know it when I see it" kind of thing.

T Tahmineh Dehbozorgi 10:06

Exactly. And that's why, like Mr. Corey, he kept fighting- and the county kept fighting back. So, when his permit was rejected in 1999, he sued in state court, but he still lost. In 2006, the county updated its zoning ordinance to explicitly prohibit truck stops in C2 zones. They defined a truck stop as places with services like truck fueling, repairs, and overnight parking. But at the same time, if you look at the language of the ordinance, it’s so unclear what could constitute a

truck stop. I mean, there are different types of trucks- small trucks, big trucks- not all of them have the same fuel requirements or even height requirements. So maybe a small truck would be okay? How exactly are trucks different from cars? That wasn't really clear. But what was very clear from this ordinance is that the county really did not like the fact that Mr. Corey was so determined to build this truck stop. They wanted to use every legislative tool they had to prevent him from doing it. But he wasn't deterred. So in 2018 and 2019, Corey teamed up with QuikTrip. I don't know if you guys have been to the South- I know Suranjan is from the area- but I lived in Atlanta for a bit, and QuikTrips were my favorite places to go.

A Anthony Sanders 11:43

By the way, is quick trip, Q, U, I K. Trip,

T Tahmineh Dehbozorgi 11:48

yes

A Anthony Sanders 11:49

Where I live in Minnesota, there's Quick Trip, K, W, I K, trip. Are they different outfits? Anyway, I was struck by that. So there's more than one quick trip.

T Tahmineh Dehbozorgi 12:07

I think that's a trademark issue.

A Anthony Sanders 12:12

Maybe that's why it's KW. No one would confuse the two

T Tahmineh Dehbozorgi 12:17

I mean, we're confused now here's evidence.

A Anthony Sanders 12:21

Um, so the Wikipedia, page, by the way, says Quick Trip with a Q, and then it says, Not to be confused with quick trip with KW- The La Crosse, Wisconsin based chain of convenience stores.

T Tahmineh Dehbozorgi 12:33

So, there you go. Oh, I guess it is a generic name. So Mr. Corey teams up with Kwik Trip- with a

Q and K- to build a new travel plaza, which included a big convenience store with truck-friendly features like separate fuel pumps for trucks and wide turning areas. He works with the county to propose zoning amendments, but that's rejected. He still applies for another permit, but that application is also denied. He appeals through the county and state courts, but again, he fails. Meanwhile, in 2021, as his case is ongoing, the county tightens the regulations again. They refine what constitutes a truck stop and include features like truck scales and raised canopies for heavy trucks. I think that really added salt to the wound, especially considering gas stations could still serve trucks- trucks could still go to other gas stations and get gas. But just because Mr. Corey wanted to build a place designed to accommodate larger trucks more easily, he wasn't allowed to open his business. So, in 2022, he sues in federal court, claiming the county violated federal law- including the Surface Transportation Assistance Act, the Takings Clause, Substantive Due Process, and Equal Protection. For the purposes of this podcast, I want to focus mostly on the Takings Clause and Substantive Due Process claims, because I think those are particularly interesting. Substantive Due Process is a constitutional safeguard that says the government can't make rules or take actions that are unreasonable or arbitrary and that violate your basic rights, such as the right to use your property. In other words, zoning laws- like Rockdale County's- must be rationally related to a legitimate goal, like public safety or welfare. They can't be random or spiteful, and if they are, they can be struck down if the plaintiff shows the government is acting arbitrarily and capriciously. So, Corey's argument was that the 2021 ordinance was unfair, baseless, and specifically targeting his project without a good reason. He has a property right to use his land for a business, but the county, by passing legislation that effectively singled him out, was denying that right. The Eleventh Circuit didn't buy Corey's argument. Why? Because they believed the government. And what was the government's evidence? This is where it gets kind of funny. The government pointed to FBI statistics claiming that truck stops are associated with more human trafficking, along with increased pollution, noise, traffic congestion, and general eyesores for the community. One could argue that gas stations also cause those problems- so why single out truck stops? But the court didn't go into detail. It just took the government's word for it. The court accepted the county's claim that the regulation was about protecting public safety, the environment, and aesthetics. Nobody likes a bunch of big trucks turning into a street, the county said, and the Eleventh Circuit agreed. So the court concluded that the government had a legitimate reason to ban the truck stop- namely, to protect the community from things like pollution and noise. Meanwhile, trucks could still go to nearby gas stations and fuel up, so it's not entirely clear how banning a truck stop actually addressed the problem. On the Equal Protection claim, Mr. Corey argued the county was treating similarly situated properties differently based solely on use, but the Eleventh Circuit rejected that too. As for the Takings Clause claim, Corey argued the regulation essentially took his property by rendering it unusable for its intended purpose. The court said he hadn't applied for a permit under the 2021 ordinance, so he hadn't exhausted his remedies. Corey pushed back, arguing that applying would be pointless because it was obvious the permit would be denied. And this is the kind of issue Suranjan and I debate all the time when evaluating cases: how far does a client have to go in exhausting their options before they can go to federal court? It's one of the biggest frustrations public interest lawyers face with zoning cases- you have to jump through every single hoop, even when you know it's completely futile. But courts still require you to go through the entire process, spending time and money, getting denied, before they'll hear your complaint.

A Anthony Sanders 18:05

And this is even post Nick, which is a case that they cited here. Nick- 2019 Supreme Court case- said that you don't have to exhaust through your state court system your takings claim,

but you do need to get a final ruling from your local government, on whether what you're trying to do is against the rules or not.

S Suranjan Sen 18:38

That's the narrow view of it,

A Anthony Sanders 18:42

And what is the wider view of it Suranjan?

S Suranjan Sen 18:46

Well, there's a question of exactly how far- what counts as exhaustion. Is it limited to state judicial remedies? What about state administrative remedies? Because there was a recent case- I can't remember where it was- where it was similar to the home equity theft case, Tyler v. Hennepin County, that our friends at PLF argued. Except the state had a procedure where, after they stole your home equity- if your house was subject to foreclosure because you owed the city a certain amount- and then they kept the amount in excess. The Supreme Court had said that that's a taking, they're supposed to allow you to keep the excess. This state kept the excess, but theoretically, they had some procedure whereby you could file something, and then maybe the state would give the excess back to you. So basically, they're flipping the burden- rather than them having to give you the excess, they're going to take it unless you come ask nicely, and then maybe they'll give it back. And somebody filed a federal 1983 takings claim, and they were told, well, you didn't exhaust the procedures for getting your money from the excess home equity. And notwithstanding Nick, because they narrowed Nick to just being about not having to file a state judicial takings claim, but not preventing the state from allowing other- like administrative- kind of, basically, to quote Justice Thomas's concurrence, they're taking a kind of "just sue me" approach.

A Anthony Sanders 20:24

And so Tahmineh, that's basically what ended up here is that, because they didn't go through this, what I would agree would be a fruitless exercise, for these same people to get a variance where they denied before, then there's no takings claim.

T Tahmineh Dehbozorgi 20:39

Yeah, in Persian, we have an idiom that says asking for justice from the unjust, and that's almost what is happening here. In many cases where the court hinges on exhaustion, everybody knows it's going to be fruitless and a waste of time. But the 11th Circuit says you have to go through the administrative process- apply for the permit through your county, get rejected, and then your claim is ripe for consideration for a taking. Mr. Corey had not done that under the 2021 ordinance, which had even tighter language than the previous ordinances he applied for and got rejected under. So here we are. This is a very important precedent for

anyone considering starting a business in an area where the zoning code doesn't allow it in the 11th Circuit because the court has taken a very expansive view of the rational basis test for substantive due process. The cases they cited, like Doe v. Moore, involved the government's desire to protect citizens from criminal activity as a rational basis for a law requiring sex offenders to register with the local sheriff's office. Another case was Hayes v. City of Miami, which involved concerns about pollution and visual intrusion as rational bases for an ordinance prohibiting houseboats. They also cited the Town of Jupiter case, where cities had rational basis to prevent car dealerships to maintain an aesthetically pleasing downtown area. I think all these cases are pretty varied, and it really sounds like the county and the 11th Circuit did not want truckers to have a place to stop, even if that area could be a good spot. As a member of a trucking family, I really feel for Mr. Corey because I understand the anxiety families of truckers feel when their loved ones are on the road and need a place to stop. If more places across the country prevent truck stops from being built, we're going to have a real problem.

S Suranjan Sen 23:15

I think this case illustrates something that anybody who's a regular listener of this will not find particularly surprising, sadly, which is that courts routinely disrespect property rights, routinely acting as though, you know, it doesn't really belong to you- it belongs to everybody. I mean, to the extent courts don't feel like giving serious review of zoning boards, there's a really easy fix for that: let's end zoning. I mean, this is basically feudalism- you know, the town saying, "We think that won't look pretty," or "We think that maybe if you have this truck stop, some of your people will come by, and we won't like those people." This is clearly exclusionary zoning. There are reasons to be skeptical of this on an equal protection level, or even maybe under a Dormant Commerce Clause type analysis, even if you aren't an ardent defender of property rights as we are. But at bottom, whose property is this? Does it belong to me, or does it belong to City Hall? Cases like this remind us over and over again that we don't really own what we have. And I don't mean that in a sovereign citizen kind of way, but I mean, I'm not allowed to build a truck stop on my property where I'm allowed to build a gas station. Come on. And again, on the substance, the courts routinely act like you don't have such a thing as a right to use your own property. And then, on the procedure, they do everything they can to get out of even having to deal with the substance at all. I'm hopeful that the second prong of Jameson County, which is the finality prong- which was what the court dodged the takings claim on here- is not long for this world, as part of generally rethinking this whole very notion of prudential ripeness. I mean, if there's some sort of case where the locus of your claim is, "I'm being prevented from earning a profit from my property, and the government must allow me some sort of way to earn a profit," then I can understand there being some notion of, "Well, how can we know that until you've exhausted the administrative process, and we know what the government will allow you to do?" But if what you're saying is, "Look, this is not about profit, this is my property, I should be able to build this thing," then I don't understand why you should have to go through the process only to have them say no. Declare they can't say no- I mean, what's the problem here? And it's because the courts just don't want to deal with it.

A Anthony Sanders 25:52

One sad endnote on this also is that this was a 35-acre property that he acquired it in 1996, but he's actually sold it since the case ended. I don't know if he sold the whole property or if the last request was only for 6.7 acres of that 35 acres to develop the truck stop. But so he had this

one statutory claim that the court didn't rule on because he didn't have the property anymore, and that he wanted an injunction about that property. But in any case, you know, life goes on. You fight this for almost 30 years. Of course, someone's going to- for whatever reason, hopefully not too bad of a reason- need to sell the property and move on with their life if it's an investment property. One thing I was thinking about is that he seemed like he really wanted a truck stop, not just a gas station. And I'm guessing- one of the truck stops is probably bigger, like we've all seen those massive gas stations with trucks off the side of the highway that sell like everything on earth, instead of just a few bags of chips and a couple Ho Hos. But in addition to gas, I'm guessing also that a truck stop, when you have big rigs filling up their tanks, you make a lot more money selling diesel to a massive truck than, you know, all the individual cars coming by and filling up with unleaded. Is that probably right? And that may be the basic economic thing going on here, and that might point to the value differential between these two- as a truck stop and a gas station- actually being substantial enough that maybe there was a takings claim there. Because usually, for a takings claim, you do need a pretty massive difference in value.

T Tahmineh Dehbozorgi 27:46

Absolutely. When he bought this property back in 1996, he wanted to build a truck stop. I think you're absolutely right that there are more profits to be made from a truck stop- it's a different market with less competition, probably in that area. His property was located in a pretty strategic spot for something like that, and obviously, he didn't have to compete with gas stations. That's why he wasn't building a gas station; he wanted a place for trucks because he wanted to enter the truck market, which is massive and very lucrative. It's not just gas- trucks need repairs all the time, they need to change their tires regularly, and overnight lodging for truck drivers is important too. So it's a completely different ballgame than a gas station, but he would still be able to sell gas on the property to cars as well. It's just a larger business than a gas station, and that's ultimately what the county did not want to have in the area.

A Anthony Sanders 28:59

Well, the only silver lining here, I guess, is that this particular case, for some reason, is unpublished. Unfortunately, the rational basis precedent- as Tahmineh already laid out in the 11th Circuit, and as we at IJ probably know all too well- is pretty bad. Rational basis precedent at the Supreme Court and elsewhere is bad, but there's rational basis, and then there's rational basis, as we often talk about. Sometimes you can win a rational basis case when the government is basically dabbling in pure fantasy, as the Fifth Circuit put it in one case. But I think, as circuits go, the 11th Circuit is even worse than other circuits. So this is an example of that.

S Suranjan Sen 29:45

You can rationalize just about any monstrous thing. If the notion is that, well, the people in the community think it'll be ugly- then okay, yeah, that satisfies it.

A Anthony Sanders 30:01

Sometimes in state court for zoning law, especially when it's just a statutory claim, esthetics is not enough. Often it is not. I don't know- I don't read the cases in Georgia state court about that matter. But sometimes that can work in state court. So this is property rights, where it's very easy, often, for the government to win free speech. We like to think that's where the government's on its heels, and the individual has a really good chance of winning in court, but not for one little girl in Michigan. So, Suranjan, can you tell us her story?

S Suranjan Sen 30:43

We'll call her the little girl. Her name appears only in initials in the opinion, so I'll respect that. In this Michigan school, she's, I believe, about eight years old and in third grade. The school had a "wear a hat to school" day. Normally, hats aren't allowed in classrooms, but this day was part of some series- maybe about showing kindness or something- I'm not sure what that had to do with hats, but perhaps students were meant to express kindness through their hats. Her way of expressing that was wearing a hat with a picture the court described as an AR-15 style rifle. I don't know exactly what that means- whether they meant it just because AR-15s are popular rifles, or if it was actually one- but let's say it was an AR-15. Below the image, the hat said "Come and take it." Some teachers were disturbed by this and talked among themselves, thinking it might violate school policy about displaying weapons on clothing and cause a disruption. Part of their concern was that just a few months earlier, there had been a very sad and tragic mass shooting in a school in the same county. Four students had been murdered- it was the worst school shooting in Michigan's history. Some students from that school had transferred to this school. So the teachers were worried that showing a firearm like this might upset those students. The teachers also testified they were concerned the phrase "Come and take it" might be an invitation to disorder- students might see it as a taunt or challenge to take the hat. One of the teachers told the little girl to take the hat off. She did so and put it in her locker without any real issue. Then they called her father to tell him what happened and asked if he'd like to send a replacement hat so she could still participate in "wear a hat to school" day. The father refused. Shortly thereafter, a federal lawsuit was filed on behalf of the little girl, with the father as her next friend in legal terms. The father of the girl argued this was a violation of her right to expression, her free speech right, but the court disagreed. I'm on two minds about this. Before I get into it further, I want to say that the attorney who argued on the girl's behalf was our dear friend Eugene Volokh, a brilliant law professor in California. I've had the pleasure of meeting him multiple times. I'm sure IJ has co-signed amicus briefs with him, and he's been a guest on this show a few times. So your listeners are well acquainted with Professor Volokh. I have a great deal of respect for him and my hats off to him for fighting the good fight.

A Anthony Sanders 35:18

And I feel a butt is coming.

S Suranjan Sen 35:21

So yeah, and that takes me to where am I at-two different minds here. So under the Supreme Court doctrine, there's this case going back to 1969 called Tinker versus Des Moines school board, something like that. Tinker, which established that students have have the right to

symbolic expression in schools subject to certain narrow exceptions. And under Tinker they have a right to symbolic expression so long as it teachers wouldn't reasonably forecast that the expression would cause a substantial disruption to classroom activities. And since then, there's been several more ad hoc exceptions that have come up to this to this doctrine.

A Anthony Sanders 36:18

like nonsensical speech

S Suranjan Sen 36:22

At first, it was said that if it would reasonably cause a substantial disruption. And then there was, oh, well, if it's about obscene or sexual type language- that's the kind of stuff that wouldn't even be protected under the First Amendment- which, okay, fine. Then you have the speech that could possibly be mistaken for being endorsed by the school itself. So if it's some sort of school activity where they're wearing it, and it could be seen as the school itself speaking. And then the bong hits for Jesus, case where I'm not sure, really, quite frankly, what the logical distinction is here. But I guess the First Amendment doesn't protect advocating for drug use. I don't know.

A Anthony Sanders 37:24

That case will never not be funny

S Suranjan Sen 37:27

I don’t know if I’ve already telegraphed this enough through my tone, but my reason for being of two minds is this: on one hand, I’m strongly tempted to say Tinker was wrongly decided. Justice Black’s dissent, despite his needless dig at Lochner, was probably right. I’m not saying students shouldn’t have any free speech rights in the classroom- especially now, well past the founding when schools were mostly private- but, for example, if you get a bad grade because the teacher knows you support a certain political party, that’s clearly wrong. If you get expelled for attending a political rally on your own time, that’s another matter. But the idea of purely symbolic speech- the idea that students have the presumptive right to wear a hammer and sickle armband or a Nazi swastika in class- seems a bit too far to me. It reflects, maybe, too much of the notion that a student’s role is to protest, rather than to learn. I’m not sure that’s the right place for it, though we have to recognize that’s the law- or at least that’s what the doctrine says. Who knows what other ad hoc exceptions will be created, which itself shows the doctrine is unworkable. But I digress. Tinker is on the books, so this court of appeals has to follow it. Given that, I think the circuit court got this one wrong. The problem with allowing suppression of a student’s symbolic speech if it’s reasonably forecast to cause substantial disruption- including disruption by other students- is that it endorses a heckler’s veto. Tinker itself was about armbands protesting the Vietnam War. The record barely showed any real disruption- maybe one student said, “Don’t come near me with that.” But if enough students were angered, then the speech could be silenced. If your free speech right ends where others get angry, then what’s the point? What is this actually protecting? In practice, and it seemed

true here, the Circuit Court was really thinking something else. There are clues in the opinion suggesting they didn't really believe this was the student expressing her own political beliefs- there are footnotes suggesting maybe it was more her father's influence.

A Anthony Sanders 40:59

and there was a lot going on with her being eight or nine years old

S Suranjan Sen 41:02

Yeah, and her age. So I think, to distinguish this from maybe a 16-year-old student who might have more of an idea. When asked at her deposition why she wore the hat, she said, "It makes me feel safe." Now, granted, they didn't actually ask her if it was a political expression or anything like that, which Professor Volokh ably pointed out in his briefs. But nevertheless, I think it was in the back of the court's mind, fairly or unfairly, that this wasn't really the student's expression being violated, but more the father trying to launder his expression through the daughter. Another thing going through the court's mind- they say this outright- is that because of that shooting a few months earlier, however, from the record it seems the teachers themselves were offended by it. There wasn't really anything in the record beyond the fact that some students from the other school were now in this school. It seemed like a retroactive way to justify it after the fact. It wasn't advocating violence. "Come and take it" is a phrase with deep history in this country; it was used in the American Revolution, and I believe, correct me if I'm wrong, it was used in defiance by the Greeks fighting the Persians thousands of years ago.

T Tahmineh Dehbozorgi 42:49

I don't think that's accurate, but I'll take it.

S Suranjan Sen 42:54

No, you won't take it. You can come and take it.

A Anthony Sanders 42:58

associated with the Battle of Thermopylae

S Suranjan Sen 43:00

I could imagine something like wearing a hat that says "I'm going to shoot you" or something like that, or, God forbid, a shirt that said something like "shoot the school" or "school shootings are good." I mean, I could see something like that being different. But this was something that- whether you like it or not- we do have the right to access firearms in this country, and I feel like the turn toward equating support for that right with support for school shootings is a bit far.

And Professor Volokh also pointed out that if the school's rationale was to ban all depictions of weapons, that would also ban a hat displaying the Michigan state seal or flag- one of which, maybe both, depicts a rifleman. Because again, this wasn't actually depicting violence. It was just a picture of a gun. There was no record that any student was actually disturbed by this hat. It seems to me the court kind of framed it around, "Well, there was a school shooting recently," but- while I understand that the shooting was in the same county, and I'm not saying the hat was in good taste- the whole point is that if the First Amendment applies, then it doesn't allow you to stop someone from wearing a hat just because you think it's in bad taste. So, ultimately, even though I'm inclined to disagree with the premise of the Tinker doctrine entirely, if I have to accept it, I think the circuit court got it wrong here.

A Anthony Sanders 45:17

Tahmineh you seem a little bit more into Tinker than Suranjan, but I'm guessing you come out the same way.

T Tahmineh Dehbozorgi 45:23

Yeah, actually, I do. The reason why I support Tinker is not necessarily because of the legal analysis- I agree with Suranjan that Tinker actually leaves a lot of wiggle room, as we see in this case, for the courts to have a cop-out and still go against First Amendment protections. What I like about Tinker is the rationale behind it: we want schools to be safe environments for people to learn, but also, at the same time, places where they can express themselves- where they're not threatened, scared, or judged by administrators. You know, I grew up in Iran. I'm very much familiar with the feeling of being an edgy teenager who likes to dress differently but can't, because you're scared- are you going to get expelled if you believe a certain thing? Is the school going to call your parents and complain? So these are, I guess, things that, if I were a Supreme Court justice, I would side with the kids and be like, "Hey, you should be able to be yourself and learn, and your environment should be a safe place for that." Obviously, teenagers- children- they're still learning. They're not set on a political belief. Maybe they don't know the significance of a symbol, or maybe they do. But at the end of the day, they shouldn't face retaliation or punishment for that. I think it's really important to make sure that doesn't happen. The example you used- of a math teacher penalizing you for going to a political rally on your own time- I think that's a very significant threat. I mean, that happened to me. My chemistry teacher, when I was in ninth grade, penalized me because she was a very religious woman, and I said something that was controversial during a classroom break. She overheard me, and then she wrote a comment on top of my exam paper. And that kind of stayed with me. Even till today, I think about it. It's really important for children to feel like they can be themselves in school. Obviously, that's as long as you're not infringing on other people's rights- and that's just a basic First Amendment principle as well. Rights are not absolute; they end where someone else's space starts. And we should keep that in mind. I think the court really muddied the water here. As Suranjan said- and I absolutely agree with him- I don't think the teachers even understood what the significance of "come and take it" was. They saw the gun and kind of shut down. The slogan itself isn't really about that- it has a historical background.

A Anthony Sanders 48:19

Although like they would say, in context, putting it with that gun, it's about gun rights today, or

banning the AR 15 today. It's not about the Battle of Thermopylae or American Revolution.

S Suranjan Sen 48:35

Well, actually, what they were saying is that they were concerned more that the students wouldn't even necessarily perceive that context, but that they would view it as "come and take this hat."

A Anthony Sanders 48:44

Right. Well, when you're eight, perhaps they have a point.

S Suranjan Sen 48:50

Yeah, I think another way of looking at it- of the analysis the court used here, and maybe this is the analysis invited by Tinker, which again I find unworkable- is that it's less of a kind of First Amendment analysis and more of the kind of analysis that the rational basis test should be. Which is, you know, if rational basis- a really deferential, though still real, standard- applied here, then I think the court would've gotten it right. In that, like, it's certainly reasonably conceivable that wearing this hat could cause some kind of disruption. You know, do we have to wait until a disruption happens? Do we have to be able to provide students testifying, saying, "Oh yeah, I was about to do it"? If I look at it and I think there's a reasonable chance that something like this could happen- yeah, sure. Here's a hat that says, "Come and take it." Yeah, it's a picture of a gun. That's a reason. But if we're going to have this kind of: you have First Amendment rights, but also you don't really have First Amendment rights? It just feels to me like it's an invitation for picking and choosing. For figuring out that, oh yeah, you can do this- but not "Bong Hits 4 Jesus." Oh, you can wear a pride hat, you know, even if that's going to make some people uncomfortable for whatever reason- but you can't wear a hat that's celebrating an explicit constitutional amendment. And maybe the bottom line is, this is why we should be advocating for more robust school choice programs- get the students out of the government schools.

T Tahmineh Dehbozorgi 50:32

I 100% agree

A Anthony Sanders 50:34

Some of this was discussed in, I think, one of the most interesting cases from the last few years, which is the angry cheerleader case from 2001 it came out, where there was the girl who said some things on, I think, Snapchat about school activities. But it was on her own time, on the weekend, and then she was punished. And then the court said, well, what do we do about this? And essentially they said her speech was protected in that case, and the school was wrong to- whatever the punishment was- against her. It came out of Pennsylvania, if memory serves. But the interesting thing in that case is, both a little bit in- I think it was- Justice Breyer's

opinion and then Justice Alito’s concurrence, was they point out: these are public schools. And you can't have- when you have a school, yes, it's the government running the school, right? We've crossed that bridge. The government runs the school, like you were just saying, Suranjan. If everything was private, it would be easy. But we do live in a world where these schools are run by the government, and so the Constitution applies. But it's a school, and you can't just have strict strict scrutiny for, you know, speech. Like, what if I write an essay on a subject that they didn't tell me to write it on? And I say, well, strict scrutiny applies. That's a content-based restriction on speech- and it absolutely is a content-based restriction on speech- but that doesn’t make any sense. And so how the court does this, with a First Amendment analysis, it has to be kind of, you know, pieced together. And maybe Tinker is just a way to do that. And maybe it doesn’t make sense sometimes, but at least it's a way. And the argument, I think, would be: maybe this is the best we can do. Or maybe it’s not the best we can do. Maybe Suranjan's right, and there’s other ways we can do this. But at least it's a way of getting there where we have, right, these black armbands and the Vietnam War- they seem like they were good to protect that speech, but if it was more disruptive, maybe that's not great for the classroom. I don’t know. There’s no easy answer, but we’ll leave it at that, because I don’t think we’re going to figure it out today. So thank you, Suranjan, for your analysis of that case. Thank you, Tahmineh, for your analysis of the truck stop- and for your trucking family history. I think that was fascinating for us all to learn, and maybe we’ll talk about it again in the future. But for now, please be sure to follow Short Circuit on YouTube, Apple Podcasts, Spotify, and all other podcast platforms. And remember to get engaged.