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SPEAKERS

Anthony Sanders, Matt Liles, Bob McNamara

A **Anthony Sanders** 00:16

A New Jersey firefighter says his religion requires him to wear a beard. His employer says that means he can't fight fires. But does that violate his right to religious liberty? We'll discuss that case from the Third Circuit, plus statutes of limitations hijinks in the Fourth Circuit. 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 Wednesday, June 18, 2025, and although the podcast will come out a few days later, tomorrow is Juneteenth, so I want to wish a happy Juneteenth to everyone. Here on June 18, we will be discussing this case from the Third Circuit about beards, and everything you might ever want to know about beards is coming up. But first, I want to introduce my colleague and Deputy Director of Litigation at IJ, Bob McNamara. Bob is going to be discussing this case a little later in the program from the Fourth Circuit and statutes of limitations. If you're not a lawyer, it may sound like kind of a dry subject- like, do I really want to stick around for that statute? It just sounds like regular law, right? Well, statutes of limitations can be a dry subject even if you're a lawyer, but they can also be absolutely terrifying. There probably could be horror movies written about lawyers who blow statutes of limitations. No matter how good your case is, no matter what awesome facts you have or what a good deal you're going to do for your client, if you blow a statute of limitations, it's probably game over for you. So my question for Bob is not whether he's ever blown a statute of limitations- I'm sure that's never happened- but have you ever had to litigate it? Is this something you've had to spend time on and maybe add a little bit of terrifyingness to it?

B **Bob McNamara** 02:24

I have definitely spent time on this. In my experience, government defendants believe there are only two times a lawsuit can be filed: it's either filed too early, so it's not ripe and you're not allowed to sue, or it's filed too late, and the statute of limitations has run, so you're not allowed to sue. Someday I will manage to file a lawsuit in the magical sweet spot between those two poles and won’t have to have this fight—but I can’t recall that ever happening yet.

A **Anthony Sanders** 02:49

Yeah? Well, there are many layers to statute of limitations, and of course that's one of them, but I'm glad you're still searching for your sweet spot. You'll get there one day. But first, we're going to discuss the sweet spot of a beard—which, apparently, in some circles, is no beard at all. Before we get to that, my colleague Matt Liles is going to discuss the case, but first, a little introduction to a word that some of you may not have heard before—and I hadn't heard before I started researching this week—and that is pogonology. Pogonology: four vowels in a row after a consonant, which is pretty impressive for a word, and it means the study of beards. So here's something about beards: it's a work on beards from 1786 called Pogonologia, or a Philosophical and Historical Essay on Beards. It was by a Frenchman, Jacques Antoine Dulaure—which I'm sure I'm pronouncing incorrectly—who went on to be a major figure in the French Revolution. But at this point, during the Ancien Régime, he was just writing stuff about beards. And here's what he had to say: "When I figure to myself the noble aspect of these great men, when I perceive on their venerable faces the air of gravity, that character of virtues which their long beards express, my imagination catches fire. They no longer appear to me as men, but gods to whom we should bow down. Such is the marvelous effect which this ornament of manhood has produced in all ages. Even now, that our effeminate customs so justly paint the faculties of our souls, the sight of a long beard still commands respect." So, this guy was into beards. And we have this other fellow who—I don't think he wears a beard because he thinks he's a god we should bow down to. He's a serious Christian, so I don't think that's true. But he's very much into a beard—so much so that he won't shave it for his job. And yet, that could infringe upon his religious liberty rights. So, Matt, what's going on with him? He's a firefighter, and he works for a municipal, I believe, firefighting department, which means it's the government, and so the Constitution applies.

M **Matt Liles** 05:17

That's right, that's right. So, I mean if you're someone who's passionate about facial hair or the Constitution, this is a really interesting case for you- or both at the same time. And I should say, I often have a mustache myself. I don't have one right now. So that's probably just a lack of foresight on my part that would have really elevated the episode.

A **Anthony Sanders** 05:39

Although a mustache is okay for these firefighters.

B **Bob McNamara** 05:42

That's true. That's true. You really have gone all in and just had the beard.

M **Matt Liles** 05:46

I can't really grow one

B Bob McNamara 05:49

So we're learning all kinds of things on this podcast.

M Matt Liles 05:53

And that was Alexander Smith's problem too, so we'll get into it. Alexander Smith works for the Atlantic City, New Jersey, Fire Department, and Atlantic City requires all of its employees who respond to fires to wear air masks that prevent them from being exposed to hazardous or harmful air—which makes a lot of sense. The problem is that the fire department prohibits employees from growing facial hair in a way that inhibits the mask seal. So if you have a beard that's long enough that, when you try to put on the air mask while fighting a fire, it inhibits the seal or causes the seal to come undone after a short period of time, they don't allow that. It seems like the policy, as written, allows sideburns and mustaches but does not allow beards or goatees. And so we get to the plaintiff, a guy named Alexander Smith, who has worked for the Atlantic City Fire Department for 10 years. He was originally hired to be a firefighter but is now an air mask technician—so he doesn't really go in and fight the fires themselves. He comes on scene and stands safely away from the fires, and the firefighters come to him to refill their air masks. He checks the air masks to make sure they're put on correctly and, pretty importantly, he doesn't wear an air mask himself. He is also an ordained minister of the Christian faith, so he has a sincere belief, coming from his faith, that men should grow beards—for a couple of reasons, actually: both to emulate Jesus Christ and the biblical prophets, and to show that they are leaders—leaders of the house, leaders of the church, things like that. And of course, with free exercise law, it's not really the court's job to question the sincerity or correctness of someone's religious beliefs. A court is not going to say, "Well, actually, according to your church, your beliefs are wrong," or "You should believe this."

A Anthony Sanders 08:21

but Paul and Thessalonians said this. So what are you talking about?

B Bob McNamara 08:24

Exactly. I actually really liked the footnote in this case pointing out that whether men should grow beards, it's like a hotly contested point of Christian theology that the court does not want to resolve.

M Matt Liles 08:35

Exactly. I think that might be the first footnote in the case. It says, the third circuit does not take a position on whether Christian men should grow beards or not. So that's a good start.

A Anthony Sanders 08:46

And what's that? I mean, a lot of people listening who are Christians may think, "Wait a minute,

I've never heard about that at my church." But one religion that is much more associated with beards is the Sikh religion. Sikhs are from India, and there was some amicus support in this case—there were a lot of amicus briefs filed—and one of them represented the Sikh Coalition. In their faith, I believe men are always required to wear a beard. There are certain other items that men are also required to have on their person, but the beard is a constant. And I know there has been other litigation involving Sikhs in various walks of life about whether they can wear a beard too. So, although if you're a Christian listening to this and you've never heard of this practice before, you might think this guy is kind of off his rocker—this idea about having a beard being religiously significant—but it's actually a very real and ongoing issue.

M Matt Liles 09:55

Yep. And so the plaintiff, Alexander Smith- my understanding is that either because he was originally hired as a firefighter or because he's kind of on reserve in case they need more hands to respond to a fire- he's subject to this facial hair policy.

A Anthony Sanders 10:19

It seems like he wants the fight fires too, right? He's not happy with his position.

B Bob McNamara 10:27

That's a good question. The whole deal with his job is he's the guy you go to when you want to switch out your air tank. So he, like, definitionally, doesn't stand near the smoke. And so he doesn't need a face mask in order to do his job fighting fires.

A Anthony Sanders 10:44

Maybe I just misread that then. But okay,

M Matt Liles 10:48

Well, he requests an accommodation. He goes to the fire department in Atlantic City and says, "I would like to wear a short beard. I believe my religion compels me to do that. If you can allow me to abide by this policy and still practice my religion, that would be great." The Atlantic City Fire Department does not like that. They basically tell him no, and warn that if he asks again, they'll suspend him. So he decides to sue. He brings several claims, and the bulk of the Third Circuit's opinion focuses on his Free Exercise claim—which is mostly what I'll be talking about—but he also brings an Equal Protection claim and a couple of Title VII religious accommodation and retaliation claims. Importantly, for background, the district court ruled in favor of the fire department on all four of Smith's claims. He appeals and asks the Third Circuit to reverse on all four. The Third Circuit's opinion is a little complicated in terms of the panel and how it shakes out. Most of the panel decision is written by Judge Porter, although it seems he did not write the portion on the Title VII retaliation claim, and he dissents from that part. There's also a separate dissent from Judge Chung, which I might touch on. Like I said, the bulk of the opinion is about

the Free Exercise claim. If you know anything about Free Exercise law, it's more or less governed by the Supreme Court's decision in Employment Division v. Smith. So this is a case about Smith—Smith on Smith, like Anthony likes to say. In that case, the Supreme Court said that a neutral law of general applicability does not violate the Free Exercise Clause. So if the law you're challenging burdens your religious practice but is neutral and generally applicable, it only gets rational basis review. And if you know rational basis review, you know that means the government usually wins. What does the Supreme Court mean by "neutral"? That basically means: does the law target religion in some way compared to non-religious conduct? What about "generally applicable"? The Court hasn't written much on that, but the Third Circuit notes a couple of things we do know: a law is not generally applicable if it has exceptions or exemptions that undermine the government's stated interest, and it's also probably not generally applicable if government officials have broad discretion to grant exemptions however they want.

A Anthony Sanders 14:15

And those aspects of what it means for a law to be generally applicable were kind of tightened up recently by the Supreme Court. One impression you get from this opinion is that if it had come out, say, 10 years ago, it might have looked a lot different. But now, after a few recent Supreme Court decisions, the Court has basically put Smith in a much smaller box.

M Matt Liles 14:43

I think that's right. If I remember correctly, right after Smith came out, the Supreme Court didn't really address general applicability for a while—until recently, with Fulton, which is a big case from a few years ago on that. So, the Third Circuit, when discussing the Atlantic City Fire Department's facial hair policy, decided not to focus on neutrality. Instead, they focused on general applicability and decided the case based on that. The Third Circuit said the facial hair policy is not generally applicable, for a couple of reasons. They acknowledged Atlantic City has an interest in protecting its employees from breathing harmful air during fires, but the fire department actually has an exemption in its other policies: if you're an administrative employee, you don't have to go through air mask fit testing like a firefighter would. So they don't have to be checked once a year to make sure the air mask fits properly if they're not actually fighting fires. The Third Circuit said this exemption exposes those employees to hazardous air, which undermines the justification for denying Alexander Smith an exception from the facial hair policy. Plus, the Third Circuit noted the fire department has another exemption: if you're a captain, you can choose to ignore the air mask or facial hair policy, as long as you accept responsibility for the consequences. So certain employees can just ignore the facial hair policy and grow a beard, but Alexander Smith, who says his religion compels him to have a short beard, is still subject to the policy and doesn't get an out.

A Anthony Sanders 17:01

"Upset the consequences." Does that just mean like you just don't assign yourself the fires, or does it seem like you just, yeah, hey, you might die, but you got to accept the consequences.

B Bob McNamara 17:14

As I read it, it wasn't just that captains can exempt themselves—captains actually have exemption powers. That's kind of the dispute between the majority and the dissent about what exactly captains can exempt you from. The majority's view is that once a captain can exempt you, it creates a situation where, if you ask for an exemption, the captain has to ask, "Why do you want it?" That's when the Free Exercise Clause comes into play, because your reason could be religious—"I want it because I'm a Christian"—or personal—"I want it because my wife likes it"—and the captain has to distinguish between those reasons. According to the majority, that's where the exemption becomes a problem. The dissent, I think Matt says, is that this exemption just doesn't exist.

M Matt Liles 17:57

Yeah, that makes sense too, and I get that it creates the Fulton problem—you're basically giving someone unlimited discretion to grant exemptions, which risks animus against people like Alexander Smith. So the Third Circuit majority says these two features of the fire department's policies show that the department is disfavoring religious practice while still allowing kinds of non-religious conduct that pose the same risks. For that reason, it's not generally applicable. Then the court has to decide what level of scrutiny to apply to the facial hair policy. The parties actually disagree on that. I think Atlantic City argues for intermediate scrutiny, saying the policy isn't generally applicable but is still neutral, so they want the court to meet them halfway and not apply strict scrutiny. The majority responds that after reviewing Supreme Court and circuit case law, they've never really seen this so-called intermediate scrutiny—where you violate one prong of Smith but not both. They mention one military policy case as a sort of one-off that doesn't fit these facts. So the majority says strict scrutiny applies. The facial hair policy, at least as applied to Smith, has to satisfy strict scrutiny. And if you know strict scrutiny, it's the opposite of rational basis—it's very, very hard for the government to meet. Usually, the tricky part is narrow tailoring, and that's where the court says this policy collapses. They assume Atlantic City has a compelling interest in safety—not just abstractly, but specifically. Under strict scrutiny, the government has to articulate its interests precisely, not just with general terms like safety or public health. The Third Circuit says it's probably true Atlantic City has a compelling interest in safety, and if there are overwhelming fire calls and they need everyone with fire response training to show up—even if someone like Smith is a technician and not supposed to enter the burning building—Atlantic City likely has a strong interest in forcing him to respond. But then the court says the policy is not narrowly tailored. There are ways Atlantic City could meet that interest without burdening Smith's religious practice. The most interesting point, at least to me, is that the fire department could at least try putting an air mask on Smith after he grows his beard. The court basically says they haven't even tried to see if the mask would seal on his face with the beard he wants. They cite a case from the District of D.C. where they actually tried this with a Muslim who wanted to grow a beard, put the mask on him, and it worked.

A Anthony Sanders 22:15

Yeah because there's beards, and there's BEARDS. like, If you have a hipster lumberjack beard, that might be a little difficult, but if it's just a closed shaven, pretty short beard, then it's probably going to be better.

M **Matt Liles** 22:28

Yeah, yeah. And as far as I know, I think the opinion describes Alexander Smith's desired beard as short.

B **Bob McNamara** 22:37

It's a quarter inch. Very specific. I think he wants, like, a big, bushy, like Old Testament beard, but his compromise position is, I'll grow a quarter inch beard so you can still put a thing on my face.

M **Matt Liles** 22:49

Right, right. Yeah, a quarter inch does not sound bad at all. I don't know, but I've never worn an air mask, so.

B **Bob McNamara** 22:54

Though neither does Alexander Smith. Okay, well, can we talk about the retaliation claim in this case? Because the retaliation claim, I think, is amazing. Alexander Smith doesn't fight fires. He hasn't been asked to fight fires. His whole job is not to fight fires; it's to switch out the air tanks. But after he sues saying, "Hey, I don't even have to wear these masks. It's not fair to not let me have a beard, but I don't wear a mask," in 2020 Atlantic City says, "Hey, just for today, Alexander Smith, you have to come fight fires because we have nobody else to fight fires." First of all, they claim they have no one else, but when Alexander Smith says, "I don't fight fires. I've been trained to fight fires," they call somebody else—so they did have somebody else. And also, nothing caught on fire that day when they supposedly needed emergency firefighters. So that is my favorite claim in this case. Can we discuss that one?

M **Matt Liles** 23:55

We can. We can. And if I understand this right, Judge Porter is not the one who writes that section of the majority. He actually dissents.

A **Anthony Sanders** 24:05

Yeah, but they don't put it in the headings like they do when the Supreme Court does this kind of thing. But it says at the very beginning of the case that he doesn't do that section.

M **Matt Liles** 24:15

Yeah, and Bob, you probably understood this better than me, but the majority says that they they don't find causation between his accommodation request and the fact that they called him up in 2020 to fight the Tropical Storm

up in 2020 to fight the Tropical Storm.

B Bob McNamara 24:33

Right. His claim is basically: I sued saying my job doesn't involve wearing these masks, and then a year and a half later, out of the blue, breaking with decades of how you deploy firefighters, you say, "Well, today, sir, you have to wear a mask." That seems like punishment for suing you—sending me into a fire I haven't been trained to fight so I might get hurt or worse. Maybe you shouldn't be allowed to do that when people sue you. The majority says, "Sure, that's weird, and it seems like maybe they're lying about why they did it. But you sued them 18 months before this happened—why would we just assume that?" It's important to remember this is in the context of summary judgment. We're not deciding whether they definitely retaliated; we're just asking whether it's plausible—like, maybe one wild day they contrived a way to make him wear a face mask because of the lawsuit he filed about not wearing one.

M Matt Liles 25:32

And an interesting point too is apparently Atlantic City has not made an air mask technician go fight a fire in decades.

B Bob McNamara 25:41

But just on this one day when they had an emergency that turned out to not involve any fires.

M Matt Liles 25:47

Yeah, so that's an interesting one.

A Anthony Sanders 25:50

It's odd that the one judge peeled off that, because I know you haven't discussed this part, Matt, but the he did win on the meat of his title seven claim, or at least he'll get to keep going with it, but then he loses on the retaliation. So that one judge, who belongs to all the majority, who doesn't write separately, decided to go to one and not the other. It just seems like an interesting decision.

M Matt Liles 26:18

Yeah, and, you know, I won't imagine to know anything at all about Title Seven, other than what's in this opinion. But that is interesting. The Third Circuit reverses the District Court on his accommodation claim, basically saying, you know, everyone agrees that Alexander Smith has a facial accommodation claim, and so all Atlantic City has to do is say, well, it would just be an

unjustifiable, undue hardship on us to allow him to grow this beard. And they just can't, I mean, and part of that is because no air mask technician has been called to fight a fire in decades and and apparently no other employees were seeking accommodations from the facial hair policy.

A Anthony Sanders 27:07

So you have to give them an accommodation, but maybe you can retaliate again against him too. Is that kind of the message?

B Bob McNamara 27:13

Yeah. You have to let him grow the beard, but as punishment, you can make him go into a burning building. That's, I think the outcome of this case.

A Anthony Sanders 27:23

That's pretty much the outcome of the case. That's pretty much it.

M Matt Liles 27:28

There’s some good language in the Free Exercise portion about how religious freedom is not a second-class right—that it’s one of our fundamental, first freedoms. So if you’re someone who likes poetic language about constitutional rights, like I do, it’s definitely worth reading. They get into Equal Protection at the end and affirm the district court, saying Alexander Smith hasn’t won on that claim, which isn’t quite as interesting. But then the Third Circuit does enter a preliminary injunction that the district court had originally denied, based on both his Free Exercise and Title VII accommodation claims. So that’s still a pretty big win for Alexander Smith, I think.

A Anthony Sanders 28:20

Bob, other thoughts you have on this?

B Bob McNamara 28:23

I mean, I think this is one of those cases that might seem like a dispute about high-minded religious liberty, but at bottom, the dispute between the majority and dissent on Free Exercise is really just a factual dispute. The majority says there’s a policy allowing exemptions from the facial hair rule, which they say necessarily violates City of Fulton. The dissent doesn’t say captains are allowed to do that; they just say, no, that’s not actually the policy—captains can’t do that. It seems like that’s probably a question with a clear answer one way or the other. I don’t pretend to know what the answer is, but for all the highfalutin back-and-forth about the nature of the Free Exercise Clause and religious rights, at bottom this looks like a fact dispute. It’s also a fact dispute about retaliation and whether there’s actually an exemption policy. I

often read appellate opinions with these deep factual disputes, and it strikes me that the place in our judicial system where we're supposed to resolve fact disputes isn't dueling appellate opinions. Don't we just need a jury and some witnesses to tell us whether there's an exemption policy or not?

A Anthony Sanders 29:35

Yeah, and the appeal here was from summary judgment, which is supposed to be based on undisputed facts. But as we know, sometimes there's summary judgment, and sometimes a summary judgment. I wonder if, to some extent, the majority feels that this could be worked out by just remanding for a trial, but while the case is there, the majority wants to straighten out some law it thinks the district court got wrong, so it doesn't want to do that full-throated remand. Now, one case that has also been remanded is in the Fourth Circuit. It's about that, as I said, boring-sounding subject of statutes of limitations—way to sell it, Anthony—but this case has some pretty chilling facts and some odd legal twists about South Carolina law, including some strange laws states pass to protect their own governments that might make you scratch your head, or maybe not. Bob, what's going on here in E.R. v. Beaufort County School District.

B Bob McNamara 30:52

E.R. v. Beaufort County School District is a Title IX case. Title IX allows lawsuits against entities that accept government funding—like public schools—that permit certain kinds of sexual abuse or sexual discrimination. ER is a student in the public schools down in Beaufort who alleges she was sexually harassed and sexually abused by multiple male students, and that the school knew about it but did nothing to protect her. That's a Title IX violation, so she sues under Title IX. But Title IX, like many civil rights statutes Congress has passed, gives people a cause of action—a right to sue—but doesn't say anything about when people are allowed to sue. The Supreme Court has said that when Congress doesn't provide a statute of limitations, courts should borrow the most analogous state statute of limitations, unless the analogous one doesn't make sense for federal purposes and you should figure it out. So ER files this lawsuit, and the school district says, "We're a government entity, and under South Carolina's Government Tort Claims Act, the statute of limitations is two years. You filed too late, so dismiss." ER responds, "No, this is a sexual assault claim, and under South Carolina law, when a minor is sexually assaulted, the statute of limitations doesn't run until she turns 27. So I have plenty of time. The analogy isn't to the government defendant; it's to the harm that happened to me—sexual assault." The district court dismisses the case, siding with the school district and saying the government tort act's two-year statute applies. It goes up to the Fourth Circuit, and they say, "You're making this way too complicated. The Supreme Court said you should find the most analogous statute of limitations, but really they meant the most obvious one." So the Fourth Circuit holds the baseline tort statute of limitations in South Carolina—three years—applies across the board to keep things simpler. This leaves us with a rule that statutes of limitations matter because they tell people what their rights and risks are, so they should be clear. But the only way to figure out which statute applies for a federal civil rights claim in a given state is to litigate it all the way through appeals because it won't be clear in advance. When I see cases like this, it strikes me as an easy problem for Congress to fix. We're talking about statutes of limitations, which usually means there's a clear statute, but Congress doesn't set one for many federal civil rights claims, so courts end up doing this kind of common law statute-finding. Even in the Fourth Circuit here, the opinion tries to be clear and simple by using

the default state tort statute of limitations unless there's a closer analogy. But Title IX is about accepting federal funds, so there isn't a direct state analogy. Who knows about other federal statutes? We have to leave an escape hatch. It just seems easiest if Congress did what legislatures normally do: set their own statute of limitations. I don't have a theory why Congress refuses to do that. Meanwhile, the statute of limitations that attaches to almost any federal civil rights claim is a mystery, varying by state, claim, and more. Speaking as a plaintiff's lawyer looking at a brand-new federal civil rights claim, I don't know how to predict which local statute an appellate court will say is the right analogy, which is, as I said, pretty terrifying.

A Anthony Sanders 35:31

Yeah. And if you're a good attorney, and you get the case in time, you're just going to file the earliest one that you can, the earliest one that might apply. And therefore, sometimes this doesn't get tested for a while, because maybe the attorney wasn't as on the ball, or the plaintiff wasn't on the ball when it actually happens.

B Bob McNamara 35:49

Oh yeah, and it is very easy in the abstract to look at these cases and say two years is a long time, why can't you file a lawsuit in two years? But the actual reality is, it takes normal people a long time to even find their way to the right lawyer. You have to find a lawyer who knows, in this case, what Title IX is, who knows how to litigate a Title IX case, which takes some time—people don't always know that. The lawyer then has to do due diligence and make sure he's filing a lawsuit where the allegations are true, where he actually thinks this happened. And those months add up really quickly. So there's a huge difference between a two-year statute of limitations and a three-, four-, five-year statute of limitations, because we're not talking about necessarily legally sophisticated people who have a lawyer on retainer, and the instant the harm comes, they call their lawyer, and the lawyer says, "Ah, here's a memo with your five best causes of action." It takes time for people to even get things in gear to have a lawyer start looking at their case. And so it really does matter what the statute of limitations is, and it matters knowing that in advance, because you walk into a lawyer's office and you say, "This terrible thing happened to my daughter," and the lawyer looks at the calendar and he's like, "Well, I could file a good case, but there's also this uncertain risk that in two months, I can't file a case at all." So let's just shoot from the hip, right?

A Anthony Sanders 37:13

Matt, have you had the honor of researching statute of limitations since you left law school.

M Matt Liles 37:21

I have a little bit. I'm aware that for Section 1983 claims you borrow from just kind of the general personal injury tort statutes of limitations. I haven't litigated it. And reading this opinion it kind of comes off like this was just the easiest way to decide the question, and that's why it

was done that way. But it doesn't seem like the most obvious one as a litigator, or as a party either.

B Bob McNamara 37:52

Well, I think where the court is coming from is that it's kind of nuts to demand the most analogous statute of limitations, because then we'll never know what it is. Even in the 1983 context, the rule is you borrow the state personal injury statute of limitations unless it's too short. And what's too short? Well, no one really knows—you have to litigate that. So it's one of those things where Congress could just pass a statute that sets the number—like four years—and then we'd all know what it is, and we'd stop having to do this. But they won't do it.

A Anthony Sanders 38:24

And there are a couple states where the the general statute of limitations is literally a year.

B Bob McNamara 38:30

Right. And it's actually a live question in civil rights litigation is like, at what point does the state general tort statute of limitations get so short that actually you can't reasonably file a complicated civil rights lawsuit in that time. And thats something the Supreme Court has not grappled with, and that it will have to grapple with unless somehow Congress actually manages to pass a general federal statute of limitations, which I would not hold my breath.

A Anthony Sanders 38:57

One thing—I was surprised. This was a short, sweet, and very logical opinion, which I like. But one thing they didn't cite that surprised me was one of my favorite cases: Felder v. Casey, a 1988 Supreme Court case. It was litigated in a place where I've had fun litigating—Wisconsin. That case involved federal court, but the argument was that you had to use the state process for suing the government, which required filing a notice of claim. That notice is usually denied—though I guess sometimes it isn't—by the governmental entity, and then after that denial, you can sue. The Supreme Court said you can't apply that to Section 1983 claims because it imports all this additional procedure and ends up discriminating against federal claims. So instead, you just need to use the general statute of limitations, like Bob just described. The argument in this case was that you should apply South Carolina's statute of limitations for suing the government, which is basically a notice requirement. It's less onerous than Wisconsin's, but it's the same idea: because it's the government, you apply a special statute of limitations. That seems clearly wrong—it's like saying you have to go through the notice of claim process in Wisconsin. Now, this is a Title IX case, and the statute of limitations case law is a little less developed than in the Section 1983 context. But both are federal civil rights statutes that are fairly straightforward when it comes to suing. So, I was a little surprised that that didn't come up.

B Bob McNamara 40:52

I mean, it does sound like the plaintiffs made that argument—so if the plaintiffs' lawyers are listening. And the Fourth Circuit kind of drops a footnote that says the plaintiff argues South Carolina, as a matter of federal supremacy, can't pass a statute that immunizes itself from these federal statutes. But the court says it doesn't need to reach that issue because it's a bad approach anyway. They're correct in pointing out that Title IX applies to private schools that accept government funding just like it applies to public schools. So you'd end up with one Title IX statute of limitations for private schools and a different one for public schools. They don't want to deal with that, and they're not really concerned with what's most analogous—they care about what's easiest and most straightforward. I think the more difficult question of whether a state can actually do this, or whether courts can be bound by a law like that, is kind of subsumed by the easier answer: we don't have to look at it, so we're not going to decide whether it's even possible to be bound by it.

A Anthony Sanders 41:54

The more philosophical question I'd like to bring up—maybe to close—is something I've thought about when looking at these cases involving federal statutes that don't include a time limit. Congress didn't include a statute of limitations. I get that, back when this kind of litigation was happening in the '60s, '70s, or '80s, federal courts were more willing to borrow from state law or other statutes, or even from Congress's motivations and legislative history. But these days, we live in the age of textualism—Congress says what it says, and that's the law. So what about the argument that there just isn't a statute of limitations? Congress didn't put one in, and if they wanted to, they could've. So, if someone sues 15 years later, that's fine. And if Congress wants to change that, like you said, Bob, they can amend the statute. I don't think the Supreme Court would go fully textualist and adopt that view, because it could lead to some strange outcomes—but it would be consistent with what they've been saying lately.

B Bob McNamara 43:07

I mean, it makes sense, as a textualist matter, that if Congress wanted this to be limited, they would have put a limitation in the statute. You can't create a statute of limitations without a statute. And honestly, the world might be a better place if the Court did go that route, because I'm quite sure Congress would instantly respond by passing a statute of limitations—just like they should have in the first place. But it is foreclosed by precedent. This is how the Court has decided to interpret Congress's failure to give us a statute of limitations. And so we're left with the kludge. But it's important to say out loud that the kludge is worse than Congress just doing its job and giving us a clear rule. Maybe someday someone should do something about that.

A Anthony Sanders 43:52

That's right. Well, if you're listening out there and you're interested, write your congressman a postcard, and maybe we can get this fixed. But in the meantime, I'm very glad you're watching or listening to Short Circuit with my colleagues today. Thank you guys for coming on, and thank you. Please be sure to follow Short Circuit on YouTube, Apple Podcasts, Spotify, and all other podcast platforms—and remember to get engaged.