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Hello, and welcome to Short Circuit, your podcast on the Federal Courts of Appeals. I'm your host, Anthony Sanders, Director of the Center for Judicial Engagement at the Institute for Justice. We're recording this on Thursday, July 15, 2021. If you enjoy this podcast, you should check out our newsletter an often irreverent take on recent court of appeals opinions, which we publish every Friday. And please also check out our sister podcast, the documentary series, Bound by Oath. You may have learned at some point that the United States Constitution has been interpreted to not protect positive rights. That is, it doesn't guarantee that the government or anyone else must do things for you. There are exceptions to this, but generally, only if the government is already doing things to you, such as trying to lock you up, does it have to do anything for you, like give you a jury trial as a federal constitutional matter, at least. But what if the government is doing things for other people, but not for you? One thing we often gloss over is that the Equal Protection Clause doesn't actually say equal treatment of the law, but equal protection. We have a special guest this week with a case where the issue of equal protection is at the heart of it. I'm very pleased to welcome Laura Schauer Ives to Short Circuit. She is a civil rights attorney in Albuquerque, New Mexico, where she practices at Ives and Flores PA. And she used to be the director of the ACLU for New Mexico. She just won an appeal in the 10th Circuit where she defeated qualified immunity on behalf of her clients in a rational basis case. As regular listeners know, that's frankly, amazing, almost by definition, impossible. Laura, congratulations. And thank you for coming on Short Circuit.

Laura Schauer Ives 01:55

Thank you so much. And thank you for having me.

Anthony Sanders 01:58

We'll get to Laura and her case in a moment. But later we'll also be looking at an opinion from the Ninth Circuit that raised the question, “is a massage parlor in a closely regulated industry?” That's important because the closely regulated industry standard is an all too often used exception to the warrant requirement of the Fourth Amendment. Joining us to discuss the opinion is one of IJ’s Fourth Amendment experts, Josh Windham. Welcome, Josh.

Josh Windham 02:24
Hi, Anthony. Thanks for having me.

Anthony Sanders 2:26
Laura, your case, Dalton vs. Reynolds is a tragic story that we can nevertheless learn a lot from. Please tell us about it and what you were able to achieve at the 10th Circuit?

Laura Schauer Ives 02:37
Sure, so the facts are somewhat horrific. In 2016, then Lieutenant Contreras of the Silver City Police Department in southern New Mexico, was drunk and holding his handgun and his partner at the time, Nikki Bascom's son called the police because he was so concerned. He called 911. And when he called 911, the officers who responded didn't do what officers would normally do. They didn't interview. Nikki's son who had called the police, they allowed Lieutenant Contreras to drive while drunk. They changed the nature of the call from a welfare check or from a domestic violence call to a welfare check. They didn't do a tracking sheet and the following day, all that Lieutenant Contreras department told him to do was to maybe follow up with Employee Assistance. Which wasn't good enough, obviously. And two weeks later, he was following and harassing Nikki and man that he believed that she was in a relationship with. Nikki complained to the chief of police about that as well and asked him to ensure that Marc would stop harassing her. And all the chief of police did was told him to knock it off and gave him a promotion and a raise in the same conversation.

Anthony Sanders 04:10
Wow.

Laura Schauer Ives 04:12
Two weeks after that, on the morning, in April of 2016, Marc pushed Nikki off the side of the road. He was in his police unit, he was in his uniform. He pushed her off the side of the road, took her cell phone when she was about to call 911. She again, a word at the police department went directly there told the chief of police that this had happened. While she was there, they got word that he was at the man's house who they, who Contreras believed that she was in a relationship with. He was threatening that guy. And they took a complaint at that point and they put Marc on administrative leave But what we came to discover is the Silver City Police Department has a written policy. And the written policy is that if there's a criminal allegation against an officer, before that allegation is forwarded to another department for investigation. They have it, and they do an IA. And then they make a determination if

they're going to do that, once they do it, they won't even provide any of the information gleaned in the in the investigation. So, this investigation was open and they didn't provide any of the information to another department, Nikki would have had no reason to know that when she went to report to the police, it wasn't going to be treated like a normal criminal report. So, she leaves the police department learning the chief has put Marc on administrative leave. Her last words to the chief are “I can't believe you left him with all those guns.” And the chief at this point admits that he has probable cause to arrest Marc but isn't doing so because of this policy. On her way home, she calls 911 again, because Marc is following her to her home. Nobody does anything about that. They tell her that she needs to go get a restraining order. She goes to get a restraining order. And on her way to get the restraining order, he's following her to the domestic violence shelter. She calls 911 and they continue to tell her “No, there's nothing we can do right now at the end of the day,” and Marc is driving near, again, the man who he believed Nikki was in a relationships home, he's by that home again. And an officer from a different agency has word about some of what's happened in the day but doesn't have word of what's happened in the previous month or all of what's happened during the day. So, he has a little bit of information. He's far more concerned with the man and doesn't think that Marc is a threat to Nikki. So, he's following Marc and he wants to pull him over. But he feels like he doesn't have enough information. And he calls the chief of police for Silver City and says like, I'd like to pull them over. But I can't think of any reason to pull them over. And they again, withhold all the information about everything that Marc's done throughout the day. And within moments, and so he says, alright, I guess I'll just have to let him go. He lets him go. And within about 20 minutes, Marc follows Nikki again, he kills her. And then he calls himself. Just an utter tragedy.

Anthony Sanders 07:48
It's unaccountability for law enforcement on steroids. It's it seems it's not only is there no internal reprimands for bad police conduct. But when it's actually criminal, there's this wall of protection, that it sounds like no matter how many times you complain about what the what the police have done. They're not going to be criminally prosecuted.

Laura Schauer Ives 08:15
Yeah, no provision for exigency, No provision, right. And so even in the oral argument in the 10th Circuit, one of the judges asked opposing counsel like what if you had word that one of your officers had murdered somebody? And you had that information? Would you still apply this policy? And she was forced to say yes.

Anthony Sanders 08:40
Wow. Yeah. So you, you represent the family, and you go to district court and what happens there?

Laura Schauer Ives 08:47
So, we go to District Court, and we first went, we actually first filed in state court. So, we were able to get a little bit of discovery. I mean, when I when I went into this case, my expectation was the differential treatment that was likely was going to be with domestic violence and assault and that it would be a sex-based class. That's that was what I had expected. But well, we came to learn was the actually, the Silver City Police Department had a pretty robust domestic violence policy. They had, of the, I think it was 149 calls, in the previous year to Nikki's murder, there had been 140 arrests, the officers are advised that if you can arrest you absolutely should because it stops the violence. So, what I didn't expect that this policy would be as outrageous as it was, and that it would be a written policy adopted by Chief Reynolds, the person who is implementing it and so things you know, and that's what we talked about rational basis, right. That's, that's the class we had. So, I got discovery first in state court, figured out what kind of and whether or not we had a constitutional claim, and then we filed in District Court, and then immediately in federal district court. And they immediately moved for qualified immunity. And the case has been stayed ever since. And we've been fighting. So, the district court, we did a cross motion for summary judgment based on based on this policy. And we did not, the court said, we've made a very good argument, but he thought it should still go in front of the jury. And then he, you know, we defeated it in the district court, and then we got a good opinion out of the 10th as well.

Anthony Sanders 10:50
Right. And so as regular listeners, unfortunately know, in qualified immunity, if that defense is defeated, the district court, the government can appeal unlike almost every other case to the to the appellate court. And then, you know, the biggest problem we often see with qualified immunity, well there's so many problems. But I mean, one of the more outrageous is that you need a case, pretty on point to defeat it. And in a rational basis case that, you know, you put those two together, that just sounds so very difficult, but it seems the 10th Circuit did a very good faith analysis, that there actually are some cases where this kind of thing is happened before, right?

Laura Schauer Ives 11:36
Yeah, there are two previous cases where the 10th Circuit has held unconstitutional differential treatment between classes of domestic violence victims. And so, in one of those cases, it was assault versus domestic violence cases. And then in the other, it was lesbian victims of domestic violence, both

of those actually received practically a rational basis analysis. And both plaintiffs in those cases were successful. So, the defendants, you know, in, like, how on point to the cases have to be, you know, they're like, “well, your plaintiff isn't a lesbian,” and the 10th Circuit in more recent years, so yeah, the 10th circuit was a good amount, a good part of the recent development with use of force cases and the beyond doubt standard for qualified immunity. But they've said there's a few equal protection cases where they've said, even if there isn't something like directly on point, we happen to have that here. But the equal protection is not, you know, that there's all sorts of constitutional provisions that should be treated differently than a Fourth Amendment excessive force case. Because in those cases, you have like every factor makes a difference for what is putting an officer on notice you're talking about something, a decision that people are making in a split second. And to know like, well, do you get to shoot somebody who is a felon when they're running away if they've done x thing, whereas with equal protection, it is pretty straightforward, in a sense, like don't treat different groups of people differently, unless you have a very good reason. And so, though we had that we did have two good cases on point, in my opinion, I think that there was an argument in the time, even if we didn't right now. So, they're loosening up a bit.

Anthony Sanders 13:40
Oh, good to hear. Josh, your thoughts?

Josh Windham 13:43
Yeah, I think just to kind of talk about the rational basis aspect of this a little bit more. I mean, one of the things about rational basis review, like with qualified immunity, is that it's a doctrine that can easily be ratcheted up or down, depending on whether the court really wants the government to win, right? Like if the court wants the government to win or doesn't like the plaintiff, or doesn't like the relevant right at issue, like economic liberty, which is the thing we deal with a lot, then it will basically bend over backwards to help the government win. And it was notable, there are two ways in which the court could have done that, at least by my count on the rational basis analysis, it could have, for example, given you a hard time, Laura, over how the classes were defined, and what it means to be similarly situated. And the court even just outright says in the opinion, “similarly situated does not mean identical.” Right? And that's a useful, that's true, that's absolutely true. But there are plenty of other cases where if the court doesn't like the plaintiff or doesn't like the right, it will apply that much more rigidly and basically require identity of, you know, of classes. So that that to me was a good development in this case in a good faith application of rational basis review. And the other was the courts confession that it couldn't conceive of legitimate of rational basis for this differential treatment. I mean, apparently, the officers

didn't even try to offer one here. And I'd like to hear a bit more about that if you have anything to say, Laura, but it the courts, like, “Look, we can't conceive of any reason why you would treat these classes differently.” And if the court really wanted to government doing it would have spent like three pages thinking of all the different conceivable rational basis for the differential treatment, right. But here you have a domestic violence victim. So why would the court bend, bend over backwards to help that person or to prevent that person from getting relief? I'm happy with the result. It's just, this isn't always how the rational basis test works. And I wish it was.

Laura Schauer Ives 15:47
Yeah, well, I think that's right. And you're right about, you know, how this works with qualified immunity, how it works with rational basis, and just, you know, good facts or horrible facts in this instance, make good law. And yeah, the court can come up with whatever reason it wants, even if the government hasn't bothered to, is a problem with rational basis, and I've definitely had that happen to me, in this case, that what all the cops said, is that they were trying to, quote unquote, “keep it clean.” And the district court had questioned, you know, so we did layers upon layers, the in under 10th Circuit law, you do not have to prove intentional discrimination, if you have a policy that discriminates on the basis of a class that people are following. But we did, you know, presented evidence of intentional discrimination, which included the similarly situated instances that the defendants questioned, and then also just direct evidence of like, I don't, it'll be interesting to see what happens, ultimately, because I don't know that. I mean, I think that the I think that the policy was an excuse for discriminating against her, right? And so ultimately, like, what this is going to look like will be interesting.

Josh Windham 17:13
So by “keep it clean”, the phrase you used a minute ago, do you mean that their, their framing of this was that it was a way of keeping the process objective, when like, kind of at arm's length, because the first thought I had was, if I was a court trying to help the government, when that's the kind of thing I would latch on to as a potential rational basis for this policy and say, “Look, even though maybe it's not the best fit doesn't have to be done with mathematical nicety,” which is a phrase courts like to use a lot. And therefore, this is a totally legitimate basis. But it doesn't even seem like the government tried to make that argument, at least before the 10th Circuit. Did they abandon that kind of rationale or what happened there?

Laura Schauer Ives 17:56

I don't know. It was in the district court's opinion. And I think they mentioned it as well. I think that the 10th Circuit just thought it was so silly. Given how this policy works. In practice, it's hard to argue that they were in fact trying to do anything unbiased or to keep it clean, because what they did is protected all this information and just ensured that that he was never criminally investigated. You know.

Anthony Sanders 18:24
Laura, one thing I was pleased to see in the opinion, and I'm curious about, is in the briefing and argument is, if the infamous case, DeShaney came up, and for listeners benefit, this is this case, I think for 1989, or 1988, where the Supreme Court said there is no due process, right to police protection. It was another very tragic case about the death of a child at the hands of his father, who was never protected by the local authorities and Child Services. Equal Protection, of course, is different, because then you're just talking about while you're if you're protecting some people, you need to protect me. Did the government tried to use that in the background, as you know, infecting the protection analysis? Or were you able to stay away from it?

Laura Schauer Ives 19:14
We were really able to stay away from it. And I think you had to DeShaney itself accepted any instances where there may be an equal protection violation. So yeah, it wasn't a huge issue.

Anthony Sanders 19:32
Well, very good. Well, we definitely send our best on remand to the district court and hope that the this family gets some kind of justice out of this case. And we're also very happy to see a rational basis win in the 10th Circuit, because one of the most famous IJ losses over the years was a rational basis loss in 2005 called Powers v. Harris very different kind of case economic liberty case. But the court there essentially said the government can do whatever it wants. And that's okay for a rational basis. So, I'm glad that the buck at least stops with this set of facts.

Josh Windham 20:09
Yeah, I mean, to be to be clear about that real quickly. I mean, just to add one more thing on its the court in Powers v. Harris is saying the government's interest in economic protectionism is legitimate. Right. That's government interests. And here, the court says there's nothing legitimate about what the officers are trying to do.

Anthony Sanders 20:28

About protecting the police's back basically.

Josh Windham 20:31
Exactly. So, it's really important in any given circuit, or any given case, whether the courts are willing to say that what the government is doing is a thing that government should be doing at all.

Anthony Sanders 20:41
Exactly. Well, Josh, other things that some people argue the government shouldn't be doing is inspections without a warrant. So, in the Ninth Circuit, we have this this case Kilgore v. City of South El Monte. Tell us your knowledge. It's okay. If it's not very extensive about massage parlors in California, and how they're regulated and what the Ninth Circuit said,

Josh Windham 21:08
Well, I've actually been to one. And it was, it was totally on the up and up, you know, it was the sports massage therapists when I was a competitive swimmer growing up, but this is not about that. I'll tell you a bit of I think it's important to know kind of allowed the timeline of what went on here, because the timeline really matters for my understanding of the case. So, prior to 2014, you know, for a few decades in California, there were kind of state level regulations on massage parlors and massage therapists and things like health and safety, sanitation, regulations they all had to comply with. And in 2013, the plaintiff in this case, Killgore opens a massage parlor called like Lavender Massage or something like that. And so Lavender is operating under this prior state regulatory regime. And in 2014, the year after he opens, the state adopts like a whole new law that basically builds on and beefs up all the old regulations. And part of the part of the narrative around this act is we're trying to clamp down on human trafficking and prostitution. And so, we need to beef up all of these regulations. And as part of the Act in 2014, cities are authorized to kind of adopt additional regulations. And so, in 2015, the city of South El Monte adopted an ordinance that adds additional regulations and requires notably that all massage parlors get a conditional use permit in order to operate. And so, this is going to have to apply to Killgore, obviously, in lavender massage. A conditional use permit, for those who don't know, is basically just like, you have a permission slip from the government to operate your business under certain conditions that are effectively agreed to between you and the municipality. Right. So here in 2017, Killgore gets a conditional use permit from the city. And one of the conditions in the one that really matters here is that he asked to allow at least two inspections per year to ensure compliance with all of these different regulations. Now the kind of different layers of regulation. So that's 2017. And towards the end of that year, there is an officer who kind of shows up undercover and conducts

basically a sting operation of this parlor. I don't recall whether it's because somebody reported that there was something going on there because they just wanted to kind of go check it out. But any case,

Anthony Sanders 23:29
I think there were some reports

Josh Windham 23:31
Okay, yeah. So, he so he went and he says he was propositioned while he was there, and so a search warrant was executed. And I don't think they were actually criminally prosecuted as a result of that. But the following year, six months later, the city conducted three warrantless inspections of Lavender Massage, and ended up dinging them for some, some violations of the regulations and revoking their conditional use permit. So, the following year in 2019, Killgore sues under Section 1983, and seeks damages for violating his Fourth Amendment rights. And so, this whole case is about something called the closely or pervasively regulated businesses doctrine. And to kind of give you a just kind of overview of it, we can dig into different parts of it. In general, if the government's going to search commercial premises, it has to have a have a warrant to do that. They receive Fourth Amendment protection. But if you fall into this kind of closely, or pervasively regulated industries' box, then if the government's going to conduct warrantless inspections of your business, it can do that if it meets three factors or three prongs, and people call this "the Burger test" from like a late 80s case by the US Supreme Court. And the factors are basically the government has to have a substantial interest underlying the regulatory scheme, that the inspections are furthering, the inspections have to be necessary to further the interest, and the inspections and the regime that they're a part of, has to provide an adequate substitute for a warrant. So that would be things like notice and regularity and constraints on the discretion of the officers, that kind of stuff. So, the Ninth Circuit, you can think of it in terms of there are two kind of parts of the analysis. The first is, does this business or industry even fall into the closely regulated category? Right? Does it fall into this box? Because if it doesn't, the warrant requirement applies. And the government's going to have to prove some other exception as applicable. If it does fall into the box, then the question is, are the three Burger factors satisfied? And the court, I can kind of summarize the conclusion briefly, and then we can dig into different parts of it. But the court's conclusion on both is basically the business loses. So, under the closely regulated analysis, the court says, the fact that California is heavily regulating massage therapists and has done it for a while, means that Killgore and Lavender Massage have no reasonable expectation of privacy in their business. And therefore, they fall under this under this exception. And there's, I think there are a lot of problems with that way of thinking about the analysis. But once we get past that first part, we're in the we're in the box, right? And so we

have to apply the three burger factors. And the court says, okay, preventing human trafficking and prostitution is obviously an incredibly important government interest, we're not going to question that. The warrantless inspections are necessary to detect that kind of illegal activity, because if you let people know, you're coming, they can cover it up, obviously. And then finally, and this is the I think the part of the analysis I have the most issue with, in terms of the Burger problems. The court says that there's a sufficient, it provides a sufficient substitute for a warrant for basically two reasons. Number one, the inspections have to occur during regular business hours, which means from 10am to 10pm, like sometime in that range. And the C.U. P, the conditional use permit says they have to be done at least twice a year. So, you're on notice that they'll happen at least twice a year. Of course, that's not a constraint because it could happen 1000 times a year, right? If it's at least two. And we can talk about all that. But in short, the kind of TLDR is that Killgore loses this case.

Anthony Sanders 27:26
It sounds like a lot of Fourth Amendment law where there's a bit of a circularity problem.

Josh Windham 27:30
Well, there is, right. I mean, there's a few things going on. Let's dissect the different parts of the analysis. Right. So, with this closely regulated part of the analysis, it there are a few things that I think are kind of going wrong here. The first one is that the court relies a lot on this notion that if it's heavily regulated, then you have no reasonable expectation of privacy. That is not the right question. The right because reasonable expectation of privacy goes to whether a search has occurred, right. That's like typically the way the court figures out whether a search has occurred, either that or it's a trespass right under the kind of Joelis Jardines' framework. So, it there's no question a search occurred here, there was an inspection, and they were looking for things in nonpublic parts of the massage parlor. So, I'm a little confused on why there's so much conflation in the opinion between reasonable expectation of privacy and, and whether a warrantless inspection is reasonable, right? And that's the kind of creep that happens in a lot of these cases between ever since that you've had that kind of creep from, "Do you have a reasonable expectation of privacy, and whether the search itself is a reasonable search or seizure?" The second thing that kind of bothers me about it is that it's a kind of ratchet game that's being set up here, where as long as the government decides it really wants to regulate you, sort of no matter, you could suppose that the business is totally benign, right. And there aren't illegal activities commonly associated with it. If all that's required is that the government heavily regulate you in order to water down your Fourth Amendment protections, then we're in a world in which like, everybody's subject to potential water down Fourth Amendment protections. I mean, one in five Americans have to

have a license to do their jobs. Right. Is that a sufficient basis for watering down their Fourth Amendment protections? It seems like under the Ninth Circuit's logic, here it is. And I guess my final issue with the analysis here is that if notice is really the way we think about this, if it's like, oh, I'm entering a heavily regulated business I should be on notice that I'm going to have inspections. Killgore opened this massage parlor in 2013, which was before the statewide act beefed up all these regulations, which is before the ordinance was adopted, and which was before he was required to get a conditional use permit, demanding him to have at least two inspections a year right. So, he opened his business well before the intrusions that were justified by these regulations were actually promulgated. So, it's, I don't think that notice really solves the problem or answer the answers the core question here

Anthony Sanders 30:02
Well one thing that really, I think the court gave short shrift to, and I was surprised by you know, whatever you think of the end result of whether massage parlors in California are closely regulated industry is this case from 2015 called Patel, which was also from California and was about hotels in Los Angeles. And whether the city, essentially the hotel owners could challenge, a request to look at their books and records, which, you know, a lot of cities have something like that on the books, but the hotel owners wanted to be able to, at least somehow administratively go before a judge or someone else and challenge, a search and enforce them to get some kind of warrant or administrative subpoena before they could show their books and records. And the Supreme Court said, Yeah, yes, you can challenge this, first of all, which was a big deal on the Fourth Amendment law, but also that hotels are not a closely regulated industry under the Burger test. And so therefore, you can't just demand it without a warrant, they do have to have some kind of a way to challenge that. And that surprised a lot of people at the time, because the lower courts have been doing what the Ninth Circuit did here and just running wild with everything's a closely regulated industry. I mean, the Supreme Court pointed out in Patel that I think it's only four industries it is ever said or closely regulated. And they're kind of all over the place. But I think liquor and auto parts is another one. But it drew a line at hotels, hotels are pretty regulated, all hotels are inspected in some way. And so, I thought that's, you know, that's a big sign to the lower courts. Hey, slow down here, not everything's closely regulated. And the Ninth Circuit just kind of like, well, it's not a hotel. So, it's fine.

Josh Windham 31:59
Yeah, you're right about Patel being important here, because I read Patel as a signal by the Supreme Court that lower courts should stop ballooning, this doctrine kind of out of control. And the courts analysis of what qualifies is closely right. First of all, it said this is a narrow exception, right? So by

definition, if it's narrow, and it has to be the exceptional case, you have to think okay, well, most businesses that are regulated are not going to fall into this box. And yet, under the logic of cases, like, like Killgore is, it seems like most businesses would fall under, or at least come pretty close to falling under this box. And the thing that I think is interesting about Patel, and useful here is that Patel's analysis was pretty objective in the sense that it turned on things like the nature of the business, for example, is it inherently dangerous, such that like, notice, free inspection should be required, you can imagine like, if I have a gasoline tanker, or I run a nuclear power plant, like you might think that's inherently dangerous. And therefore, notice, free inspections are kind of necessary to keep everybody safe. So, looking at the nature of the business is a really important part of Patel. And then also just sort of like looking at whether historically, this is the kind of business that like, has always been subject to notice free inspections. And so, a lot of the times courts will like an Patel, the courts looks back at the founding right. Now, I'm not saying you have to do that every time. But there are kind of objective things the court is looking at to figure out the answer to this question. In the Ninth Circuit's decision. It's looking at, again, the business's reasonable expectation of privacy, which it is a pretty subjective inquiry, because it turns out like what people think is a reasonable thing to expect privacy for. So just a squishier analysis. I think, and I don't know, I think the Ninth Circuit's decision is in tension with the signal the court was sending in Patel. But again, the courts had brushed it away by saying, well, there's a long line of U.S. Supreme Court cases protecting the fourth rights of hotels, and therefore, something about hotels is special, even though that didn't show up at all, in the Patel decision. So, but I think it's also worth talking a little bit about the second part of the analysis because even if we assume massage parlors in California do belong in this box. There's a kind of issue that happens a lot, I think in these in these cases, which is and we were talking about rational basis review earlier, when courts see kind of police power regulations on businesses, things that are like health and safety regulations or licensing schemes, and inspections kind of come with those. My sense from reading a lot of these opinions is that the courts view these regimes as all part of one big pot. And they think okay, like, ordinarily, this is a this is a police power regulation of an economic liberty and therefore we're going to apply the most deferential form of rational basis review, we're going to stack the deck kind of in the government's favor and almost placed the burden on the plaintiff to kind of prove their Fourth Amendment rights are being violated here, which is not how Fourth Amendment law ordinarily works.

Anthony Sanders 35:24
Yeah, it's a see it seems like it's creep of the rational basis test into the reasonableness standard.

Josh Windham 35:30

It is it is. Yeah, it is a creep. But I think that you can see it in the third prong the most, even though I think there's something suspect about the way the court analyzes the second prong here. But the third prong, I think, is the most obvious because the court basically says, like, ordinarily, if you're trying to prove as an adequate substitute for a warrant, and you're the government, you would have to show things like this regime supplies, notice, or it supplies regularity. Or it constrains the discretion of the officers over what they can search and where and when. Right. So, this is the function of a warrant. It's a constraint on the discretion of officers in the field, right. And so, the idea is that these regimes can kind of do the same thing if they're specific enough. And I don't see that here at all. I mean, this says the court says, “Look, they have to do it between 10am and 10pm. And they can do it at least they have to do it at least twice a year,” at least twice a year is limitless, right. And that's not a real constraint. So, I see this as kind of an inversion of the way this analysis is supposed to work. And I think it's only happening because it's happening in the context where the government has already decided, California has already decided the city has already decided we need to heavily regulate this business, and that has downstream effects for the Fourth Amendment rights here.

Anthony Sanders 36:50
Well, one thing that is not heavily regulated, is Short Circuit. So, we thank our freedom loving listeners to hearing what Laura had to say, what Josh had to say we again wish Laura the best with the rest of this case, and then the rest of her practice. We hope when you guys go to New Mexico and need a lawyer that you look up her firm, and for the rest of you, I would ask, as I do every week, that all of you get engaged.