# Short Circuit 201

**Anthony Sanders** 00:06
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 Wednesday, January 5, 2022. It is our first podcast of the new year. Happy New Year to everybody. I hope you all had a great holidays. We've been away for a couple of weeks. But we're back at it with some exciting judicial engagement topics for 2022. Starting with an old favorite, but in very much in new clothes, and that is qualified immunity in the Fifth Circuit. The states of Texas, Mississippi, and Louisiana always give us something to talk about when it comes to qualified immunity. And today, you might learn that it's maybe a little bit more complicated than you sometimes have been told recently. And so we're going to dig into that with our special guest. Her name is Easha Anand. She is Supreme Court and Appellate Counsel with the MacArthur Justice Center. She clerked for Judge Watford on the Ninth Circuit and for Justice Sotomayor at the Supreme Court. She has an illustrious rather resume otherwise. And she recently had a qualified immunity victory at the first Fifth Circuit, which itself is it's an illustrious resume. And we're going to be talking about that case in a moment. So Easha, welcome to Short Circuit.

**Easha Anand** 01:39
Thank you so much for having me. As you guys know, I'm a huge fan of both Short Circuit and the Institute for Justice, which has been a really wonderful partner in MacArthur's campaign against qualified immunity. So just really delighted to be here.

**Anthony Sanders** 01:52
Well, great. Well, we're going to talk about a little bit about that campaign in a moment. One of the warriors on that campaign is Anya Bidwell, who is an IJ attorney that probably most of our listeners familiar with, and she is the Elfie Gallun fellow in freedom and the Constitution at IJ. Anya, welcome back.

**Anya Bidwell** 02:12
Hey, that's the Crazy Russian lady. She's back. You're familiar with her. Hi Anthony. Hi Easha. Happy new year.

**Anthony Sanders** 02:21
You can define yourself however you wish. I think I think we'll take it.

**Anya Bidwell** 02:25
We're talking this case Villareal. She calls herself crazy fat lady. Lagordiloca. Right. So I'm calling myself crazy Russian lady. It all makes sense.

**Anthony Sanders** 02:34
All right.

**Easha Anand** 02:35
Oh, I didn't even get it. Thanks for explaining.

**Anthony Sanders** 02:37
I think that'll stick. I like crazy Kazakh lady.

**Anya Bidwell** 02:41
Kyrgyz.

**Anthony Sanders** 02:41
Sorry I get confused. But we'll go with Russian for now. So before we get to qualified immunity, I have an announcement to make for our Short Circuit fans, that I hope will make you want to engage a little bit with us at the Center for Judicial Engagement. So I was at an oral argument last month, I still do a tiny bit of litigation at IJ. And I was second chair with my a much better oral advocate Josh House, who argued a case at the 11th Circuit. It is our case against the city of Doraville, Georgia and their use of fines and fees to finance their budget. And so we get to this this courtroom. I hadn't been in court in a courtroom in a while because of the pandemic. But we get in this courtroom and in the federal courthouse in Atlanta. It's just a beautiful old, old courtroom in a beautiful old courthouse. And so I got to thinking well, this compares pretty favorably to the federal circuit courtroom that I'm most familiar with in Chicago where I used to practice and I've argued a couple times where it's a decent courtroom. It's not ugly, but it you know, it's very modern. It's very just kind of stated and the Seventh Circuit courtroom. And so I wonder what people think of other federal circuit courtrooms around the country. So here is your chance, listeners, if you have a favorite circuit courtroom. And I think the the way you

should think about it is not the most like functional, because that'd be boring. But the most beautiful, the most beautiful courtroom. That's a circuit. So not not a district court, not a state. Abraham Lincoln courthouse I get. There's there's many, many of those. But federal circuit courts of appeals, your favorite courtroom, not courthouse, the actual room where it's argued. Maybe the en banc room, maybe a smaller room for just the three judge panel. Please send in your nominations. You can you can write us. Me. You could write Anya too. Our bios are always in the shownotes. You can click on that and then get our emails. Or you can ping us on Twitter. You could ping me @ IJSanders is my handle and our Short Circuit handle, which will also be making this announcement, is @ shortcircuit_ij. Anya wisely stays off of Twitter. So please send in your nominations. I know a lot of course appellate attorneys listen to this show. Non lawyers listen to the show. You might have happened to gone to a courtroom sometime and just thought it was great. And I also know that current clerks do listen to this show. So if you're a clerk, and you're on a federal circuit, and you're like, Well, my courtroom is the best, then please let us know that. And send it in and we're going to analyze the results and come up with some kind of way of awarding the the most beautiful federal circuit courtroom in the country. So I'd like to turn to Anya, first for her nomination.

**Anya Bidwell**

All right, I am going with the theme of this podcast. I'm going to go with the first of all, John Minor Wisdom courthouse in New Orleans, Louisiana and the West courtroom. That's what I am nominating right now. I generally speaking really like the architecture from the 1900s. So I do think that the courthouse is beautiful and the way the rooms are appointed. Just gorgeous. Plus, it's named after one of my most favorite judges, John Minor Wisdom. As our listeners know, that in the 1950s 1960s, he was, you know, one of those great circuit court justices who was a very important player in the enforcement of civil rights. And civil rights are beautiful. Therefore, the courthouse is beautiful. Therefore the West courtroom is beautiful, too. So there you go.

**Anthony Sanders** 06:41

Great. So the West courtroom not the -- is that the en banc courtroom or is that a three judge panel?

**Anya Bidwell** 06:47

It's a three judge panel.

**Anthony Sanders** 06:49

Okay, and Easha. I believe you have a special nomination.

**Easha Anand** 06:55
I have a nomination as well. It's much shallower than Anya's, though I like civil rights are beautiful. I think that's a good theme for this podcast. And I'm totally biased because I clerked there. But I'd have to say, probably the first courtroom in the Pasadena courthouse for the Ninth Circuit, so the Richard H. Chambers US Court of Appeals building. And this courthouse is in what was formerly the Vista Del Arroyo Hotel and Resort. And so it still has this kind of like Roaring 20s vibe. Like you can imagine it in a scene from Boardwalk Empire or something. It's also super Southern California. So think like stucco walls and like that sort of like terracotta tile roof and Spanish mission architecture. So Anya, you can keep your colossal statues and all marble everything. I would take Pasadena's rose covered walkway, fountain courtyards, views out over the canyon any day. So courtroom one in the Pasadena courthouse.

**Anya Bidwell** 07:57
Puts you in the relaxing mode.

**Easha Anand** 07:59
That's right. Exactly what you want for oral argument. To be really relaxed.

**Anthony Sanders** 08:03
Now, I love that nomination. How many courthouses does the Ninth Circuit have? Is it is it three? Or is it even more than that?

**Easha Anand** 08:12
It is many more than that. Because I personally went to a half a dozen during my time there.

**Anthony Sanders** 08:18
Wow. I didn't know it had so many.

**Easha Anand** 08:21
Yeah. So the four biggest ones I think are Seattle, Portland, San Francisco and Pasadena. But several the judges in Southern California aren't actually in the Pasadena courthouse. So there's a chambers in El Segundo, there's a chambers in downtown Los Angeles. And then there are also courthouses in Phoenix, Las Vegas, Honolulu.

**Anthony Sanders** 08:41
Now those all have rooms where they can have an argument?

**Easha Anand** 08:45
Yeah, yeah. When you're a Ninth Circuit clerk, the like big prize is your judge going to get to sit in Alaska or Hawaii during your time there. We got to sit in Alaska. It was a really, really big deal. And then we got a trip to Anchorage paid for by the federal government.

**Anya Bidwell** 08:59
What time of the year was it?

**Easha Anand** 09:00
It was in May. It was beautiful, Anya. I'll take Alaska in May.

**Anthony Sanders** 09:07
I think I would too, probably over Hawaii. Hawaii other times of the year. So that's great. We have two nominations so far. Please send them in. We'd love to hear from you. And we will announce the winner in due course. But for now, we'd like to hear about the winner of this last opinion from the from the Fifth Circuit that Easha was a part of and and that was argued last year and was just ruled on a couple of weeks ago. So take it away.

**Easha Anand** 09:40
So on the evening of August 10th 2016, Tony Timpa calls 911. So he's seriously mentally ill. He's off his medication. He's terrified. He calls the police to ask for help. And by the time Dallas police kind of arrive on the scene, Tony's already been handcuffed. He's kind of on the sidewalk. A private security guard has put them in cuffs. And so you have these sort of five officers who show up there kind of standing around and encircling him. A couple times he kind of gets up or lurches in some direction or another and one officer with one hand kind of pushes him back down. Despite the fact that he's been totally contained, right. He's handcuffed. He's barefoot. Officers are surrounding him. They're kind of keeping in place. One of the Dallas police officers takes him, flips him onto his stomach and proceeds to kneel on his back. Now kind of taking a step back, important context here is that the law enforcement community has known for decades you do not keep someone handcuffed facedown. Let alone put weight on them. Right. So the Department of Justice has issued bulletins on the subject. The

International Association of Chiefs of Police has issued bulletins. There was an amicus brief filed in this case by a former police officer who's now a professor, Seth Stoughton, who basically says, Look, every cop in the country knows this. You don't keep someone face down once they're handcuffed. Dallas's own general orders, that is the regulations cops are required to memorize, says no fewer than a half dozen times: Don't keep people face down. It's dangerous. And Dustin Dillard, the officer who turned Tony Timpa on his stomach face down and kneeled on back had, within the past year, done a training specifically focused on the dangers of prone restraint. That is restraining someone in a face down position. Nonetheless, Officer Dillard keeps Tony face down, kneeling on his back. Keeps him face down kneeling on his back even after Tony's legs as well as his hands are cuffed. Keeps him face down, kneeling on his back even when all Tony can do is kind of turn his head back and forth and grunt. Keeps him facedown kneeling on his back while Tony's calling for help and saying he's gonna die. Keeps him face down and keeps kneeling on his back even after Tony's face turns purple, and he's laying so silent and still that the officers start joking about waking him up for school. They joke about making him rooty tooty fruity waffles for breakfast, still facedown, still kneeling on his back for more than 14 minutes. Tony Timpa dies. He suffocates to death. So his family does you know what, what some grieving families do and they file a Section 1983 civil rights lawsuit. And the district court granted summary judgment to the officers based on -- you guessed it -- qualified immunity, right. And so regular listeners know all the reasons that this is a totally bogus outcome. So I won't kind of rehash them here. I'll commend people to the Bound by Oath podcast to get the full litany. But you know, folks know that there's a real conversation about whether qualified immunity is a totally made up doctrine, whether it serves any policy purposes, whether it's consistent with what Congress would have wanted. And those concerns are about their zenith in a case like this one, because what the District Court did was it said, Look, we have some cases where we've said in similar circumstances, you cannot keep someone face down and suffocate them. But in those cases, the way someone suffocated was they were facedown and their ankle cuffs were tied to their handcuffs. It's called hogtied. That's the way that they suffocated. In this case, he didn't suffocate because of this tying thing. He suffocated because someone was kneeling on him. So there you go, qualified immunity. So the MacArthur Justice Center got involved in this case, when it was on appeal to the Fifth Circuit. And a few weeks ago, we just got a wonderful opinion authored by Judge Clement on the Fifth Circuit, you know, not necessarily someone who has staked out a sort of progressive position on qualified immunity or someone you think of as a liberal lion. And she says, no qualified immunity here. And you know, that may not be the end of the story. There's a petition for rehearing en banc pending, but we feel very confident that this opinion is right. And it's significant for a couple different reasons. So, first and foremost, of course, it's significant because there's finally a court saying to the Timpa family what happened to your son, brother, partner was

wrong. And you know, I think we we talk a lot about, you know, defenders of qualified immunity often say, Well, it's just money, but you know, when you've lost a family member, there's nothing that can bring them back. And money is the way in this country that we tell people what happened to you was really, really wrong. And this family has been fighting for so long. In fact, it took them almost a year to get the body camera footage of what happened, right. So this was actually recorded by four different body cameras from officers on the scene. And the Timpa family was initially told that Tony just overdose that police had nothing to do with it and they to fight for a year to get the body camera footage to find out what happened. So that's of course the kind of most important piece. Second, you know, it's important to have published circuit court precedent on cases like this. You know, there are a million reasons why this case and the killing of George Floyd were very different. But in one respect, you know, it's significant that people all over the country saw a video of someone kneeling on the back of someone who was unarmed and instinctively recognized that was deeply, deeply wrong. And so just to have a published opinion saying, yeah, that instinctive recognition everyone in the country had watching that. And you know, that matters, right? It matters that it matters, the level of we're not going to grant qualified immunity to someone who did something so obviously wrong. And it matters because, as we've talked about on this podcast, right, qualified immunity is so random. So whether or not something makes its way into public published circuit court precedent, that is whether someone hires a lawyer. And then the case doesn't settle. And then it goes up on appeal. And then something, you know, the court of appeals decides the question and publishes it, that's a very random path. And so even cases like the George Floyd case, won't matter for the qualified immunity purpose, even though I guarantee every officer in the country knows about that case. But it settled out of court so it's not going to be part of the qualified immunity analysis. And so it's really critical to have some of these cases make their way into the pages of the federal reports. The third reason I think this case is really significant is one of the problems with qualified immunity analysis is which details matter is totally in the eye of the beholder, right. Any judge can point to any difference between Case X and Case Y and say, okay, no qualified immunity. And this opinion really clearly articulates that at least one distinction doesn't matter. That is the exact mechanism used to apply force. That was sort of the district court's central error. It said, Well, you can only look at cases where someone suffocated because someone kneeled on their back, not cases where someone suffocated facedown because their hands and feet were tied together. And this opinion says no, you can actually look at cases about a dog bite, about someone being slammed into a vehicle. It sort of says, the lawfulness of force does not depend on the precise instrument used to apply it. And so now we at least have some precedent saying, Look whatever other differences you can identify between Case X and Case Y, don't tell us Case X doesn't apply here, because the person used pepper spray instead of a taser, or used a dog bite instead of a

baton. So I could go on and on. But I think those are sort of some of the pieces of this opinion that I kind of wanted to pull out for listeners to highlight why I think it's such an important and critical development of the Fifth Circuit.

**Anya Bidwell** 17:51
Yeah, and you have a unanimous opinion right. All three judges agree on this. And you have Judge Southwick, as well as Judge Willett on the panel. And Judge Southwick actually is on a different panel in a case that you guys did as well, Harmon versus City of Arlington. And there it's sort of a very different decision. And it kind of contrasts with this one, right, especially in the ways that you identify, Easha, in terms of like, here's a case. You guys provided a case in Harmon as well to say, here's a case where similar situation happened. It is slightly different. Right. But to a large extent, it's about, you know, shooting a moving vehicle. And the court in that decision also unanimous with Judge Southwick here being for you guys. And in that other Harmon case being against you, saying that no, we're actually looking specifically for something where, you know, a case is there is, you know, asked for a case where a law enforcement officer was holding on to a car as the car was driving away. Right. So there, you know, just two months prior to this decision, you have another panel with one of the judges overlapping asking for very specific case on point. So what do you think is going on in the Fifth Circuit?

**Easha Anand** 19:18
Oh, what do you think is going on the Fifth Circuit? An evergreen question Anya. Yeah, you know, I am this is a great segue, because one of the things I wanted to make really clear is like, let's not be sanguine here, right, like this opinion, doesn't mean all is well, on the Fifth Circuit. Um, you know, you pointed to Harmon, a case that my colleague Devi litigated that had a really different outcome. Judge Clement was on the panel of another recent case called Tucker versus City of Shreveport, a case where, you know, Justice Sotomayor wrote a sort of paragraph at the tertiary stage basically saying, Man, this was really wrong, where I kid you, not the distinctions from the other case were the guy was taller than the victim in the other case, the officer was in a high crime neighborhood and the victim was wearing baggy sagging pants. Those were the distinctions. That was opinion.

**Anthony Sanders** 20:15
I think that's the saggy pants clause in the Constitution.

**Easha Anand** 20:20

That's right, exactly right. I missed that in my constitutional law class. And that was a case with Judge Clements, who again authored this really great opinion in the Timpa case was on was on the panel. And you know, you've talked on this podcast about some of the other cases that have come out of the Fifth Circuit recently, Ramirez versus Guadarrama where officers get qualified immunity despite tasing a man doused in gasoline and setting him on fire. Cope versus Cogdill, our guard literally watches a pretrial detainee strangle himself with a phone cord and doesn't intervene. Those latter two are also cases that the MacArthur Justice Center is involved in supporting at the certiorari stage. So, I think that this this collection of cases highlights something really important about qualified immunity, which is, it's really in the eye of the beholder, right. There's not really a ton of guidance about what details are significant enough to say this is a big change, grant qualified immunity, this is too small change deny qualified immunity. And that's why I sort of say that the kind of like, meta precedent part of this opinion, saying a different weapon is not enough is sort of the most is in some ways, the most important piece of the puzzle here. What we need is more opinions saying this kind of detail matters. This kind of detail, doesn't. Not just well, in this case, I can identify a difference. So you know, I don't have a grand theory here of what's going on. I do think after we talk about the case, Anya, you are going to spotlight, it's worth discussing whether there is some sort of rough sorting of cases into the sort of what the Supreme Court would call the split-second decision kinds of cases versus the not-so-split-second kind of decision cases. It's something that Judge Clement mentions, in this opinion. It's something that Judge Ho mentions in the opinion you're about to talk about. And I do think that there's some sense that has happened over 14 minutes. The guy's handcuffed and ankle cuffed. And this officer had 14 minutes to change his mind about what he was -- how he was going to handle this situation and didn't do so. So maybe after we talk about your case, we can kind of circle back to the theory. I don't know that that's a good development, if that's what's happening. But that's one potential way of sort of roughly sorting a lot of these cases.

**Anthony Sanders** 22:37
Let's go to the case, you're going to talk about Anya. Villarreal versus City of Lorado. It's a case that a couple months old, but it really points out a similar trend, we might want to call it, in the Fifth Circuit when the qualified immunity decision is not what we call a split-second decision by the government official.

**Anya Bidwell** 23:03
Right, and just as Easha mentioned, just like in Timpa, they are basically saying it's very important for the court right? They say this is not a split second type of situation. Where you know, in Harmon at that

we talked about earlier, it's more, you know, more of a split second type of a scenario. And the court basically says we're not going to second guess. Look at Kisela v. Hughes and we have to apply it with very, you know, granular level of specificity. So, in Villarreal you basically have this woman Priscilla Villarreal, she's amazing. She's a citizen journalist in Laredo, Texas. She goes by the name of Lagordiloca. As I mentioned earlier, it's the crazy fat lady. That's how it's translates and that's the name she came up with to call herself. And she what she does is she reports on police misconduct in Laredo. She's probably the most popular news source in Laredo. Her Facebook page has a ton of followers, and she is becoming a celebrity with Starz producing a TV show about her apparently. So this is going to be something. But in any case, Lagordiloca has been a thorn in the side of the Laredo police department, and an officer once took her phone from her when she was recording a crime scene while letting other reporters continue recording. And the district attorney once told her that he did not appreciate that she was criticizing him. And in 2017 Lagordiloca basically identified a man who killed himself, right, that was part of her news gathering situation. And the man was a CBP officer. To make sure that she got this right, she actually called Laredo police departments and confirmed it with them. And then a month later she again published a name of somebody who was involved in a fatal car crash and she again called Laredo police department to confirm. And they did confirm both times, right. Six months later, she gets two arrest warrants issued against her for soliciting information from the police department when when she called them to confirm. And they cited a statute that basically said, you know, you actually can't do that. She turned herself in the Webb County jail, where the officers proceeded to mock her and laugh at her -- while she was -- and taking pictures of her. She, after being jailed, filed a habeas petition, which was granted. And in addition to having her petition granted, the judge also declared that the statute -- that allowed them to arrest her because she contacted members of police department to confirm her story -- unconstitutionally vague. Right after that, Lagordiloca filed a 1983 lawsuit, and she sued the municipality and she also sued individual officers for violations of her First Amendment, Fourth Amendment and Fourteenth Amendment rights. What's fascinating about this case, for our purposes, is the way the court went about analyzing qualified immunity for First and Fourth Amendment claims. Right. Judge Ho, basically begins their opinion by saying and I quote: If the First Amendment means anything, it surely means that a citizen journalist has the right to ask a public official a question without fear of being imprisoned. Ho goes on: If that's not an obvious violation of the Constitution, it's hard to imagine what it would be. Ho then says that the First Amendment violation cannot be shielded by qualified immunity, even though and that goes to Easha's point, right, there isn't a case that specifically says you can't do that. And Judge Ho, cites to Hope versus Pelzer. I think that that your case Easha, Timpa, also Judge Clement, and she cites to Hope as well. And usually when we see cites to Hope versus Pelzer, we think this is going to be a good one. So he cites to Hope versus

Pelzer for this proposition that there are certain constitutional violations where you don't need to find a case exactly on point, because they are so clearly unconstitutional. Some call it an obviousness exception, but I think it's a little more complicated than just like an actual obviousness. But, you know, the kind of case where an officer would know that what they're doing violated the law. And he also cites to Taylor versus Riojas, a case from the Fifth Circuit where the Supreme Court GVR'd, right, basically saying that their analysis of prisoner mistreatment was wrong. Those are again, Hope and Taylor are prison condition cases. And also Ho cites to Sause versus Bauer, a Supreme Court case involving religious freedom. So again, nothing to do with, you know, members of the press, nothing to do with the First Amendment rights to free speech. And Judge Ho does all this despite -- that's the amazing thing, right? He does this, despite there being a statute, right, the officers actually technically acted within the confines of this statute. The other thing that's fascinating is that he also says that the Fourth Amendment violation was obvious. And he said that, even though there was a warrant issued by a neutral magistrate judge and it when it comes to Fourth Amendment cases, usually these kinds of warrants are a death knell. So that's kind of what's fascinating about the case, he again comes back saying that it's not a split second decision type of a situation. So we shouldn't be worrying about cases like Kisela versus Hughes that asks for very specific degree of cases being on point. And he essentially invites the government to challenge it in the US Supreme Court the way I read kind of the last paragraph. And Texas did intervene after the decision was issued, and we are indeed expecting a petition for certiorari challenging this decision. Again, Ho, Southwick, and Judge Owen were on the panel. And Judge Owen is saying that she is planning to write a dissent, but we still haven't seen it yet. And that actually it wasn't Southwick it was Graves who was on the panel. But yeah, that's it. That's a fascinating decision. Right, Easha?

**Easha Anand** 29:52
Wait, Anya, you didn't say the most important part of this decision. Can I read a direct quote? I have honestly never seen anything like this in a published circuit court opinion.  Yeah, I am happy to. So not only does Judge Ho quote extensively from the brief that Anya and some of her colleagues at the Institute for Justice authored, but he, in order to buttress one of his points, he says, well, the Institute for Justice, quote, a respected national public interest law firm thinks there is a big difference between split second decisions, and premeditated plans.

**Anthony Sanders** 30:01
I think it's best if Easha reads this quote.

**Anya Bidwell** 30:09
Yes, we do. We did say that.

**Anthony Sanders** 30:25
And I normally wouldn't get into judicial biography, but I think we should an absolute full disclosure say here, that thank you very much for Judge Ho for saying that. But he did clerk at IJ, a very, very long time ago as a law student. So he has a little bit of self interest in saying that. But of course, judges have worked all over the place, and not all of them say things like this. So we appreciate that.

**Easha Anand** 30:53
And not all of them give shoutouts to their former employers in these opinions. I mean, in all seriousness, I think this is really remarkable. And I think it's a testament to the sort of campaign that the Institute for Justice has been waging for so many years now to get qualified immunity to be sort of front and center on the minds of judges. And I think it's a really important testament IJ, even if I disagree with the sentiment about split second decision making, which we can talk about it in a minute.

**Anthony Sanders** 31:22
So let's, let's get to that. So you guys are much more immersed in the qualified immunity universe than I am. But from my understanding there, although some of the justifications for qualified immunity at the Supreme Court have been this split second decision rationale, it's not really part of the doctrine itself. And it seems like if there is going to be some some kind of reform in qualified immunity, I mean, there's all kinds of things of course, the Court could do to make qualified immunity more coherent and better than just getting rid of the doctrine, which we would ask it to do if if we had our druthers. Is this, you know, maybe making qualified immunity less of a thing when it's not a split second decision kind of case? Is that something that might be bubbling up at the Supreme Court? Or is this more a circuit court phenomenon? We'll have to see where it goes.

**Easha Anand** 32:26
So I can go first Anya, since I think we probably disagree a little bit about this. So you're right. There's no doctrinal hook for saying split second decisions, get some kind of different treatment than other kinds of decisions. Now, maybe that's not a problem, right? We've talked about how qualified immunity was made up in the first place, right? And so if you're gonna make it up, you can make up the contours of it. I do think that one thing that's kind of critical to think about when we talk about split second decision making, is that the Fourth Amendment itself, right, so the Fourth Amendment prohibits

unreasonable seizures, that's usually the hook for an excessive force claim. It's, it's treated as a seizure. And the question is, is it reasonable or not? This Supreme Court has said in case after case, what is reasonable, makes allowances for the speed at which officers have to make a decision, right. There's constantly these opinions saying, under the Fourth Amendment itself -- so forget about qualified immunity -- you don't violate the Constitution if you make a reasonable mistake, right? Hindsight is 20/20. Officers get a lot of deference when they're making decisions in fast moving and dangerous circumstances. And so the Fourth Amendment already incorporates that amount of deference to split second decision making. And so when we talk about well, in the qualified immunity case, we should give even more deference, we're only even reaching that qualified immunity level in a case where something was found unreasonable given that you know, that unreasonableness determination already incorporates this tremendous amount of deference to the difficulties of policing in making these fast decisions. And so I guess my objections are threefold. First, it's even more made up right 1983 puts all constitutional rights on equal footing. It doesn't sort of let you pick and choose which ones get more and less qualified immunity. Second, it's unnecessary, because the Fourth Amendment already does the work of making sure that officers aren't penalized for making the wrong decision in the face of something really fast moving and dangerous. And third, at you know, it's not totally clear to me that on the sort of policy level, it's sort of the way you want it to work, right? I mean, do you really want to incentivize officers to make decisions really quickly, because they'll get more protection that way? And conversely, you know, I think a lot of the circumstances where I feel the most sympathetic to qualified immunity are kind of these big policy decisions in the face of, for instance, governors who are trying to pass new laws in the face of a novel pandemic that we haven't seen in our lifetime and maybe they'll get it wrong and maybe they won't. You know, I think there's as much of a case to be made, that that's sort of where you want qualified immunity kick in, in these kind of considered policy decisions, rather than kind of necessarily line officers where you tell them if you shoot fast enough, then you'll get qualified immunity. So those are kind of my objections. Anya. And to be clear, you know, again, I don't think there's a doctrinal framework that this is kicking in with when we talk about the split second versus not split second decision making. I think we're talking descriptively. Like when we look at the cases in the Fifth Circuit, a lot of the ones where the Fifth Circuit is starting to do a little better on qualified immunity happen to be ones where someone had more time. And a lot of the ones where the Fifth Circuit's doing pretty terribly on qualified immunity happened to me once where an officer had less time. We have even fewer tea leaves from the Supreme Court. But there too, you know, Anya mentioned Taylor versus Riojas, which is a case about someone being housed in a cell covered in human feces. That's not a split second decision. But then this fall, we saw two summaryreversals in favor of officers, both of which were much more kind of fast moving circumstances. So we're talking descriptively. I don't

think anyone has come up with any sort of theoretical or doctrinal justification for this, but just sort of looking descriptively at what's happening in the case law. I do think that the sorting mechanism that seems to be doing some work.

**Anya Bidwell** 36:18
Yeah, I absolutely agree with this. I think that when you just look at real life approach by the courts, you know, to these kinds of cases, it seems like even the US Supreme Court, as well as the lower circuit courts, they kind of have much more sympathy for split second decision making and feel like they can justify qualified immunity less when you don't have that kind of spur of the moment decisions. And I also agree, Easha, that the Fourth Amendment already has a protection for these kinds of cases, right? Graham versus Connor, everybody always uses this case, because it's kind of the one that outlined it really well, where the Court specifically says we are not going to second guess police officers. We're not going to look at it with the 20/20 hindsight vision, right? They're out there on the frontlines, and we're gonna give them all the space they need. It's not about qualified immunity when they say that. It's about the actual merits of the Fourth Amendment case. So actually, each I totally agree with you on the split second decision making. It's just a matter of when you know, when you are telling something to the court like with Lagordiloca, right, one of the things that you can actually tell them is, guys, you don't have to worry about this other thing that we know you worry about, the split second decision making, because this is really different. But at the end of the day, when push comes to shove, you know, we would also file a brief in support of petitioner in a situation involving split second decision making, because just like MacArthur, we fundamentally believe that the split second decision making aspect of it is very much included in the Fourth Amendment analysis itself. And qualified immunity is not at all needed there to protect the officer.

**Anthony Sanders** 38:07
So finally, it would, I would be very remiss if I did not invite Anya to talk about an oral argument she had just a couple days after the case she presented came out, which has some of these non split second decisions. So just give us a tiny taste of that Anya. People can read about it on our on our website, of course, but there may be a decision coming soon in that case that we may talk about at that time.

**Anya Bidwell** 38:34
Yeah, we actually argued very close in time Timpa and Gonzalez vs. City of Castle Hills. So when your decision came out, I'm like, oh. But the case is Gonzalez versus City of Castle Hills. Our client, Sylvia Gonzalez, she organized a petition to fire the city manager. And the mayor and the chief of police who

were very close to the city manager, threw her in jail for it. They did get a warrant through a magistrate judge because Sylvia by mistake took this very petition that she championed from the dais and there is a statute similar to Lagordiloca that actually allows arrests for tampering with a government record. Here it's a little different because the statute actually is alive and well and being enforced very often. But it's for you know, driver's licenses, green cards, social security numbers. It's not about taking pieces of paper from a dais those pieces of paper that you actually yourself champion. So the mayor and the chief of police invoke that statute and they obviously invoked qualified immunity. The oral argument was absolutely fascinating. Judge Oldham, Engelhardt, and Barksdale seemed very skeptical of the qualified immunity defense. And Oldham right out of the gate used a municipal liability case, Easha, from the Supreme Court called Lozman versus City of Riviera Beach to ask how doesn't that case involving municipal liability actually doesn't defeat qualified immunity since it really is very much in broad principles about what these people did to our client, Sylvia. We don't know what will happen in the case. But the court was, you know, the panel was very engaged, and and not at all ready to just sign off on the defendants' qualified immunity arguments, and I will take that. Tat's amazing. I love that, you know, just having a panel that's asking a lot of questions of the government and their lawyers and, you know, telling them you can't just use qualified immunity as a magic, you know, magic talismanic phrase that makes everything alright.

**Anthony Sanders** 41:02
Well, we'll be looking for that case, in due course, I'm sure our listeners will hear about it in various ways. And we may talk about it on Short Circuit. You definitely will hear about it in the Short Circuit newsletter. Easha any cases we should be watching that, that you've been working on in the in the coming months of our new year.

**Easha Anand** 41:22
Yeah, I would love to spotlight one case where IJ came in as amicus support for us. It's a case on the Eighth Circuit on behalf of one of the Dakota Access Pipeline protesters, Marcus Mitchell. And the allegations in the complaint, which again, at this point we're accepting as totally true, right. The allegations in the complaint are, he is standing in the middle of a peaceful protest. He's raising his hands in prayer. And officers see him, recognize him as one of the protest leaders, hate the water protector movement, and therefore, target him by shooting him in the face with a lead filled beanbag round, and then arresting him.

**Anya Bidwell** 42:02

And he's shielding women and children essentially, right?

**Easha Anand** 42:07
That's right. He's putting his body -- he's raising his hands to make clear he's unarmed -- but he's putting his body between the police and women and elderly protesters. So a lot of similar themes to the Castle Hill case that Anya just talked about. A lot of themes around retaliation, and and sort of how you establish that. One thing in particular, I want to flag about this case, and this is the sort of piece that IJ came in and supported us on and where IJ has done just really tremendous work. Marcus was arrested and charged with trespass and obstructing justice. And then the prosecutor comes to him and says, You know what, we'll do this kind of pretrial diversion agreement. If you stay out of trouble for two months, we'll drop the charges. Marcus says yes, stay out of trouble for two months. Charges are dropped. There's literally like if you go search Marcus Mitchell in the case files, there's no case about him because the charges are dropped. It was as though it never happened. But the district court said that that sequence of events, that agreement with the prosecutor, nonetheless triggered something called the Heck bar, which precludes folks who have a conviction or sentence from filing a civil rights suit that would imply the invalidity of that conviction or sentence. And that's wrong for a whole host of reasons. But one of the things that IJ did a really spectacular job of highlighting is the policy consequences of finding that this sort of agreement, that doesn't require proof of any sort of wrongdoing, makes it as though your conviction as if you were never charged in the first place, that this could trigger a bar to a civil rights lawsuit. So we argued that in the Eighth Circuit a few weeks ago, we will keep an eye out for that decision to come down. And as always, we are so grateful for IJ's support in this campaign to hold law enforcement accountable.

**Anthony Sanders** 43:49
Fascinating cases to watch. Well, we'll make sure we watch what MacArthur is doing. Talk about some of their great opinions on their cases on this podcast. Of course, we will follow what Anya is doing in the new year, as should all of you. But also I want to say, we'll end by, if you are a law student, and you are looking for something to do this summer, and you haven't yet, you still have time until Friday, January 7. So like another week after this podcast comes out to apply to be a summer fellow at the Institute for Justice, a summer clerk. You could go to our webpage and look for opportunities for students and apply and we may interview you and we may hire you and pay you.

**Anya Bidwell** 44:31

Pay you. I want to register a complaint. When I was a clerk nobody was paying anything. Okay. So who do I take it up with?

**Anthony Sanders** 44:41

No comment on what I got for compensation. But thanks so thank you both for coming on this week. This is a great way to start to the new year in 2022. And I hope you -- best of luck in your cases. And all of you listening. I hope that all of you will get engaged