# Short Circuit 226

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**SPEAKERS**

Anya Bidwell, Nicholas Yoka, Eugene Volokh, Julia Yoo

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A Anya Bidwell 00:07

Welcome to Short Circuit Live at UCLA. I'm Anya Bidwell, an attorney with the Institute for Justice. For our podcast listeners, we just concluded rolling out a new civil rights tool that helps plaintiffs overcome the clearly established law requirements when they fight qualified immunity. If you want to go back and watch the launch of the study, which we called Constitutional GPA, it will be available on our YouTube page at the time of this episode being released. We will also, just this one time, be video recording this podcast and post a video of it on our YouTube page, in addition to our general audio recording, which is available wherever you listen to your podcasts. Because of this launch of Constitutional GPA, we are slightly modifying the format of this recording. Our general format for this live recording is to focus on a particular circuit court. For example, this April, we discussed three DC Circuit cases with Lisa Blatt, Paul Clement and Kelsi Brown Corkran. Eugene did one with us on the Ninth Circuit right here at UCLA. And this October, we'll be in New York discussing the Second Circuit's decisions. But for this particular episode, we are doing something different. We're focusing on three cases in three separate circuits involving the area's immunity doctrines. In addition, as we're going through these cases, we will be referring to the research tool that we just rolled out to see whether there is additional information we can glean from there, hence the video recording. Then, if you want to follow along, you can find this research tool on our webpage or just google Institute for Justice Constitutional GPA, and you should be able to find it. With this in mind, let's move on to introducing our participants. Eugene Volokh is Gary T. Schwartz Distinguished Professor of Law at UCLA. He teaches free speech law, religious freedom law, church-state relations law, and the First Amendment amicus brief clinic. Eugene is also a prolific author. His textbook, the First Amendment and Related Statutes, was just recently issued in its seventh edition. One of his latest articles was just published in the New York University Journal of Law and Liberty and concerns bans on political discrimination in places of public accommodation and housing. Eugene's blog, Volokh Conspiracy, needs no introduction. It is one of the most widely read and respected legal publications that is accessible to lawyers and non lawyers alike, and it will be relevant today. Eugene has blogged about First Amendment retaliation, and whether probable cause for arrest can immunize government officials from punishing you for speech. One of IJ's projects on immunity and accountability cases, Gonzalez v. City of Castle Hills, deals with that issue, in which a woman who petitioned her government was thrown in jail

as punishment. Eugene, we will discuss this when we talk about Novak, one of our cases, but could you tell us briefly how does this doctrine make it difficult for plaintiffs to prevail on their First Amendment claims?

E Eugene Volokh 03:27

Oh, sure. So let's say you're arrested for your speech. What do you do? Well, the first thing you want to do is not get convicted. So that would be really nice. And the First Amendment can actually do a lot of work for you as a criminal defendant. So, let's say you are acquitted, or perhaps the prosecutor realizes this case is not a good case and drops the charges. What if you want to sue saying you were wrongly prosecuted? Well, you can't sue the prosecutor because of absolute prosecutorial immunity, but you could sue the police officers for arresting you, and your argument may very well be that they arrested you in retaliation for your speech. But the general law doctrine says that a retaliatory arrest claim, generally speaking, will be defeated by the police officer defendants if they can show probable cause that you violated some statute. But courts say, and in fact, we'll see that come up in Novak, that constitutionally protected speech cannot serve as the basis for probable cause. So, there's a multi step inquiry here, but what it ultimately adds up to is that if you're engaged in protected speech, then you shouldn't be arrested for that speech. On the other hand, if you're engaged in unprotected speech, well then of course you could be arrested, presumably, if it's unprotected it may also be criminally punishable. And, as we'll get to shortly, if it's a close call whether your speech was protected or not, then the police officers may be entitled to qualified immunity in your civil lawsuit against them.

A Anya Bidwell 05:23

Thanks for that, Eugene. Julia, let's talk about you. You are a civil rights attorney with Iredale and Yoo, a civil rights and criminal defense law firm based in San Diego. Julia is also the president of the National Police Accountability Project, the country's largest civil rights attorneys organization. Over the span of her 24 year civil rights career, Julia has represented individuals fighting unconstitutional prison conditions, wrongful arrest, or the use of excessive force, as well as wrongful death. She won an important civil rights case right here in the Ninth Circuit, Brian v. McPherson, involving the use of tasers. One of our own IJ cases, Pollreis v. Marzolf, in the Eighth Circuit right now has relied on Brian to establish clearly established law. Julia, this case Brian v.McPherson makes for a fascinating read. You prevailed both on the underlying constitutional claim and also that it was clearly established. Could you briefly talk about this case and its significance and what it meant for the plaintiffs here.

J Julia Yoo 06:34

So Brian v. McPherson is an emotional roller coaster. What had happened is, in the beginning, the use of the taser actually happened years before the decision which happened and came out in 2010. The use of the taser in that case happened in 2006. So it was a very new technology, and, at the time, we had some concerns, when we first took it that we're going to have problems with qualified immunity, because there was not a lot of case law on how and when you could properly use it. In that case, we received this incredible opinion that was so inclusive in the way that you could or could not use the taser, because at the time people were just using

it indiscriminately on pregnant women on children and vulnerable people, people standing in water. Under so many circumstances, people were just using it instead of actually engaging the citizen. In this case, people who are mentally disturbed were having a difficult day and they really just needed to be spoken to, but the police just immediately resorted to use of force. So, what Brian first decided was that the this was excessive force and that the officer was not entitled to qualified immunity. Then they filed for petition for rehearing and on banc, then there was a superseding opinion about four months later, that said, essentially the same thing in really beautiful language about people who need help, people who might be mentally ill, where you cannot use the taser. But at the end of the opinion, it's it however, because there was not a case clearly on point, the officer was entitled to qualified immunity. So we did end up losing the second round when there was a superseding opinion.

A Anya Bidwell 08:30

yet, going forward...

J Julia Yoo 08:32

That's right. Going forward as of that day, it was clearly established that you could not use a taser under those circumstances.

A Anya Bidwell 08:41

Yeah, and that kind of will come up in the case that you will introduce Rivera were ended up being in a very similar posture. And in contrast, you were also involved in the Frazier case out of the 10th circuit. Could you briefly tell us about that case and what qualified immunity is all about? They always say that when officers are plainly incompetent or knowingly violating the law, that qualified immunity wouldn't shield them.

J Julia Yoo 09:09

Yeah. So in Frazier, the plaintiff was a bystander, and he sees the Denver Police Officers using excessive force what he thinks is unreasonable use of force on another citizen, so he is taping it on his iPad. The officers see this happening. They approach him. They want to confiscate it. Words are exchanged. They detain him. They take the iPad, and he claimed that they deleted the video of the incident. He later sues. What the 10th circuit did was so interesting, because there was an admission by the Department and the police officers that they knew that the officers knew that what they were doing was wrong. They had been trained on policies which ensured citizens have a right to record the police, and they knew that as an officer you may not confiscate devices or detain people for videotaping police officers engaging in in this kind of conduct in public. They knew that, and they admitted to that. But Frazier said that the officers were entitled to qualified immunity anyway, because the fact that they knew that they were violating the law was not relevant for purposes of qualified immunity, because the standard is an objective officer, not what these officers knew at the time.

A Anya Bidwell 10:33

And then what do we make of the phrase of plainly incompetent and knowingly violate the law?

J Julia Yoo 10:40

It's completely meaningless, at least in the 10th circuit, so that when you are knowingly violating the law as an officer, you're still entitled to the shield. So the question then is what's the reasonable officer? Isn't the reasonable officer one that has been trained to not do that? But they do not go into that analysis. And what is really troubling is that the 10th circuit does not then say, like Brian, that as of today, it is clearly established that you can't arrest people for filming officers in public.

A Anya Bidwell 11:07

Yes. So there is not that important victory for plaintiffs going forward.

J Julia Yoo 11:11

There's never going to be a robust consensus of cases in the 10th circuit because they have not taken that step.

A Anya Bidwell 11:16

And the supreme court denied review. And that brings us to you, Nick. Since you practice in state courts, maybe you can illuminate for us an alternative way to do this. But before I put you on the spot like that, let me introduce you, Nick Yoka. He is a civil rights and personal injury lawyer with Panish Shia Boyle Ravipudi LLP, here in Los Angeles. He has handled a number of high profile cases since joining the firm, including against the Los Angeles County Sheriff's Department and its deputies. The New Yorker recently wrote an amazing article on this very Sheriff's Department. I recommend everybody read it. And Nick, could you tell us more about that case, Guardado v. LA County Sheriff's Department, and then tell us what you're doing there and where you're pursuing those claims.

N Nicholas Yoka 12:09

Of course, Anya, thanks for having me. The case is Andres Guardado v. the Sheriff's Department, County of Los Angeles. A little over two years ago, Andres was 18 years old working at an auto body shop as a security guard when two deputies pulled up, and proceeded to chase him down an alley where he was shot in the back five times and killed. Each of those bullets, through independent forensic pathologist findings, were independently lethal. Any one of those bullets could have killed Andres. And so an important part of the question here, because you brought up the sheriff's department and the New Yorker article, is the fact that there are gangs known to exist throughout LA County, and that there is a gang culture within the LA Sheriff's Department, too. This really went to the heart of our concern against the

sheriff's department, that they harbor a culture of violence, and they haven't done enough to over the many years to stop this. We found out through whistleblower information in the sheriff's department and sworn testimony that these two deputies were, "chasing ink," which means that when you do a high profile killing as a deputy, you actually become a member of one of these gangs within the sheriff's department, in this case "The Executioners," which is known to be in Compton. And you get inked, a rite of passage within the department. And these police gangs are known to exist. And so that's where the case is. So, as you said, we decided to file it in state court, which is the opposite of what many civil rights litigators do, so it wasn't a decision that we took lightly. And we do file many cases in federal court. However, we often do favor state court for a number of reasons. It's very case specific, I think. And you really do need to look for what's best for your client. We have the fortune here, of being in California, so we have the Bane act, Civil Code section 52.1. Murray, could you maybe pull up the California 50 Shades of Government Immunity so people can see the Bane Act. Yeah, so if You were to go to California, it gets a relatively high grade for this. Go ahead. Yeah. So the Bane act is what you could call our baby 1983 claim. And it allows for claims when there is an attempt to interfere with constitutional rights. And we don't have to deal in state court with everything that you've been talking about lots of times in terms of the 1983 qualified immunity cases. And that's a big benefit. We also have the benefit of not having to deal with interlocutory appeals on those issues. One of the hardest things when you really deal with clients that are going through this, which is the loss of loved one, a child, a spouse, is that litigation is painful,

A Anya Bidwell 15:56

Explain to listeners what interlocutory appeal means and why it's so bad, of course.

N Nicholas Yoka 16:02

So when you have a 1983 claim, and motion dismiss is brought against the federal and state claims within a complaint. And let's say it's denied as to the federal claims, and granted state claims, they have the right on the 1983 claim in federal court to immediately appeal that to the appellate court. And so that causes a delay in litigation, appellate courts take a long time. And this really does hamper the process. So then you have to go explain to your clients, "Hey, I don't know how long this is going to take. But we're going to have some backup here. And we'll see what happens." That's terrifying for clients. I think in California, we have great justice system with qualified, competent judges that we believe are capable of handling these, plus we can also bring all the state law claims that are generally in federal civil rights cases. As is.

A Anya Bidwell 17:00

That's fascinating. And Julia, you generally practice in federal courts.

J Julia Yoo 17:04

I do, which is ironic, because we love the Bain Act. I actually served as the technical legal expert for S.B. 2 last year, which served to take away some of the governmental immunities under the Bain Act. And yet I'm still tethered to the federal court for some reason. It makes

zero sense, but Nick is absolutely right. Absolutely. Right.

A Anya Bidwell 17:25

So maybe if you're in California, for plaintiffs out there, you know, try your luck with the Bane Civil Rights Act before you have to find qualified immunity at the federal level, at least food for thought. All right. On that note, let's get straight to the cases. And let's begin with Novak out of the Sixth Circuit. It touches on many issues, first man retaliation, qualified immunity, even state law. So Eugene, could you introduce the case for us?

E Eugene Volokh 17:55

Sure. So the city of Parma, Ohio is part of a long but regrettable American tradition of deceptively naming towns that have nasty unpleasant weather after a balmy Mediterranean places, like my people, people who go to Cornell in Ithaca, New York, I hope they're fully aware that there's a large gulf between that and the original... Nontheless, the city of Parma, Ohio, the name for residents is, at least according to Wikipedia, Parmesans. It was in fact named after Parma, Italy by an early leader who thought Parma was beautiful and that Parma, Ohio should be as beautiful. In any event, for reasons probably unrelated to his name, Anthony Novak decided to put together what he characterized probably accurately as a parody of the Parma Police Department page. Now, one thing to keep in mind with parodies, or satires, depending on how you define it is, you want to be close enough that it seems plausible, at least at first, it seems like this is the real thing. But you don't want to be too close. Right? Let's just step a step away from the prosecution and police officers in Section 1983, and look at how a situation where this comes up not infrequently is libel law. If I put up a webpage copying your web page with enough in it that people looking at it think, "Oh, yeah, okay, I get the joke," then that's not libel. On the other hand, if it's really totally deadpan, or there are other signals, maybe you have yourself a funny page and I put up a funny page based on your funny page and it puts words in your mouth that will diminish your reputation if people believe them and people do believe them. And maybe then I am liable for defamation. So there's always a difficult line to I shouldn't say always sometimes it's perfectly clear, but there but there, there is often a difficult line to draw on their cases. There's a Texas Supreme Court case involving involving a parody called New Times v. Isaac's, which is actually a pretty prominent precedent that comes out pretty much in favor of the speakers there. But it's something that that comes up not infrequently in libel litigation, and it comes up not infrequently in trademark litigation as well with trademark parodies. Well, so here Novak put together this webpage and it published half a dozen posts advertising, this is in quotes ,of the department's efforts including "free abortions in a police van," and "a pedophile reform event featuring a 'No Means No' Learning Station." So apparently, some people's reaction was that it's funny. Other people didn't fully grasp that it was fake, and apparently that alerted the police department. And at least some of them seem to have been potentially confused. It should also be noted that some of them posted comments on his page, saying it was fake, and then he deleted those comments. And you can understand why because the comments might kind of ruin the fun in some respects. But also deleting the comments makes it probably somewhat more likely people will be confused. And on top of that, the department once had heard about this, posted a notice on its actual page confirming it was the official account and warning that the fake fake page was being investigated. And then Novak copied the post on to his page, allegedly "to deepen his satire." So he was prosecuted, he was prosecuted under a statute that actually makes it illegal

to disrupt or impair police functions using a computer, so it wasn't specifically an impersonation statute. Some states have criminal impersonation statutes. But this is a more general statute. And the warrants were issued, and so he was arrested, he was prosecuted, indicted, and then acquitted. So before we complain too much about him losing his case, he was a winner in some measure. Now, you know, you never want to be even prosecuted and acquitted. But still, the good news at least is he was acquitted. So the jury, probably on the facts, concluded that indeed, this wasn't disruptive enough, because a reasonable person would have recognized that that it was it was a parody. And of course, the the standard in a criminal proceeding is proof beyond a reasonable doubt. So maybe the jury just said we have a reasonable doubt. So then he turns around and sues for retaliatory arrest, he says in violation of the Fourth Amendment. And the first step, as we discussed, to make a retaliatory arrest theory claim, you have to show that there was no probable cause for the arrest. In First Amendment cases, protected speech cannot serve as the basis for probable cause. So it came down, at least in theory, it came down to whether the speech was in fact constitutionally protected, or whether it might fit into an exception to First Amendment protection. The law on that question is not completely clear. But it is pretty clear that at least certain kinds of knowing falsehoods that are sufficiently harmful are punishable, and classic examples are a libel, perjury, and fraud, but also courts have generally said that impersonating government officials, if it is likely to be seen as serious impersonation, is punishable. And of course, that makes sense. I mean, imagine people could really impersonate police officers or impersonate the IRS or whatever else, either in person or online. So you get this difficult First Amendment question. The law is not completely resolved. How the law would apply to these facts would not be completely resolved. "Aha!" says the Sixth Circuit, "Qualified immunity to the rescue." While probable cause here may be difficult, qualified immunity is not. That's because qualified immunity protects officers who reasonably pick one side or the other in a debate, the debate here meaning the question as to whether this is punishable, where judges could reasonably disagree. That's just what the officers did. They reasonably found probable cause in an unsettled case, judges can debate it. So good for the police officers, maybe also good for the judges here, right? Because it means they don't have to then go through and do more of a complicated analysis, so this makes it an easier case for the judges. And it makes it a winning case for the police officers. Now note one other thing, which was hinted at a little bit earlier on, is that Novak loses. Because there's a reasonable question as to whether under the current, not fully settled state of the law, this is a parody. But also, the law doesn't become any more settled. Because the Sixth Circuit just said that reasonable people can disagree on this hard question. It didn't offer its own answer to this hard question. So here's one thing that someone can worry about when it comes to qualified immunity, besides the question of whether police officers may win a particular case. My worry is that qualified immunity can interfere with the development of the law and with new precedents being set. So back, let's say 20 years ago now, in a case called Saucier v. Katz, the court tried to deal with this problem by saying, Look, we're all for qualified immunity, but courts should generally decide the substantive question first. So in this situation, the court should have decided the question "Is this or is this not constitutionally protected speech?" And then once they decided that, set a precedent going forward, establish the law going forward, then they asked if it is protected speech. So if the police officers' actions were unconstitutional, should they nonetheless get qualified immunity? And if that's so then they're not liable, but at least future officers who act the same way in a similar situation would be. Then in 2009, in Pearson v. Callahan, the court changed course. And it said, you know, we've experimented with Saucier v. Katz. It hasn't really proved to be that that successful, so the courts held that the Saucier procedure should not be regarded as an inflexible requirement. You shouldn't always as a lower court judge feel that you have to go through the substantive analysis first, and then go through the qualified immunity analysis. It's okay. If you think that the qualified immunity case is very strong, and the other, and the substantive thing is quite difficult, it's okay. In some

cases like that, to just go to qualified immunity, even though that means no more precedent is going to be set in this case going going forward. Certainly, this is what happened to Novak. The court says, "Oh, we're just gonna skip right to qualified immunity." They basically reject the Saucier procedure and just say, look, the easiest thing to do is resolve the qualified immunity, then we don't have to say anything more about the substance. And I can see the value of that, as it ties into the argument that the courts ought to resolve questions on as narrow basises as possible, especially constitutional questions. They ought not reach the constitutional question when they've got some other way of resolving the case. But the downside is, precedent doesn't get set, and in future cases, likewise, some police officers say well, there's no clearly established law, because of these previous cases. The law wasn't clearly established, since they went just straight to qualified immunity, and that troubles me. Maybe it troubles me a little too much, because I'm not a practicing lawyer, and certainly not a city side practicing lawyer. I am an academic, and as an academic I want lots of legal decisions, and I and I have faith in the ability of precedent to help guide people. Other people say, on balance, having more of these precedents isn't really that useful. And it's just extra time and effort for judges and extra risk of error and such. But I am inclined at the very least to think that one cost of the current qualified immunity system isn't just that police officers might win in cases when they acted unconstitutionally, it's that we get less law settled as to what is and is not constitutional because courts just skip straight to qualified immunity and don't resolve the substantive issue for the future.

A Anya Bidwell 29:41

And we see that in some circuit courts, right. For example, the Fifth Circuit very often would say it is the practice of this court to answer the constitutional question first. So judges do see the problem with the Pearson standard where they say at the very least what we can do is go on to the constitutional question, so going forward, kind of like in your case Julia, with Brian, everybody knows tasing somebody is excessive force rather than punting the issue like they did in Frasier, or like they did here and not establish a constitutional right going forward. But Eugene, in the earlier round of this case, judges actually said that qualified immunity did not protect the officers on the motion to dismiss.

E Eugene Volokh 30:29

Right. So on motions to dismiss early on in the process before, before any any fact finding before any discovery, courts are often inclined to allow the case to go forward sort of understanding that we'll have another shot later on at the summary judgment stage, let's say, to try to figure out if if the case should be should be dropped. And that's what happened here. It happens often enough that the court denies the motion to dismiss but then later grants the motion for summary judgment. Thankfully, at the motion to dismiss stage, there actually was an opinion that actually provided some signal going forward that at least government officials ought to be careful in going after things that might be parody, because if it's clearly satire then it is constitutionally protected, but not much was resolved there. Which is one reason why in the later stage, later phase of the case, the court just said, "Look, this is still a difficult question. So we're going to grant them."

A Anya Bidwell 31:34

And it kind of goes to what you were talking about, Nick, with interlocutory appeals. Because here, you basically have a case where defendants can take it up on appeal at the motion to dismiss stage, then plaintiff prevails there, they go back down, and they have a second shot at it at the motion for summary judgment stage where again, they freeze litigation in place and go back up on appeal to find qualified immunity at motion for summary judgment, and this time they prevail. So plaintiffs would have to go to the Supreme Court to fight this.

E Eugene Volokh 32:06

Yeah, one thing I should say is interlocutory appeals are often quite difficult to obtain. Generally speaking, in part precisely to avoid delay, the court system does say, you know, you've got to wait until there's a final judgment and then appeal everything once. Of course, the downside is if you don't get an interlocutory appeal, then you might have to spend a lot of time and money and effort. And then to get the the judgment had go through perhaps even a whole trial, and then do the appeal. And the court says, you know, it should have been dismissed as a legal matter in the first place. And in fact, when it comes to anti-Slapp statutes, which are there to protect speakers as defendants against unfounded libel claims and various other speech torts, these advocates of liberty are usually big fans of interlocutory appeals because it's important to protect the speaker and allow the speaker to get the case dismissed as early as possible, rather than putting the speaker in the position of having to defend the case all the way through trial and after and then perhaps winning an appeal. So in certain situations, like under the anti-Slapp statutes when it comes to Speaker defendants or qualified immunity when it comes to government official defendants, courts do allow interlocutory appeal and trade off some of this delay. In the final resolution of the case, if the appeal ends up not dismissing the case, they're hoping that the benefit corresponded to that cost is that maybe the case would end up being dismissed early as a legal matter and save the legal system and the litigants time, money and effort.

A Anya Bidwell 33:56

And the thing about interlocutory reviews with qualified immunity. As you guys know, it's pretty much that as a matter of right interlocutory appeal is always available. And not only does it bring in qualified immunity issues, it also bring in issues of suing federal officials in the first place, for example, the Bivens question or in the Novak situation it brings in the question of whether probable cause existed to kind of bring it up to appeal. Let's move to how Novak would go about using this study of hours to try to find some sort of clearly established constitutional law. So he's in Ohio, and it's in the Sixth Circuit. So speech, religion, assembly, government worker did something because of something I wrote or expressed and then let's do the retaliation, so even though in this case, the court did not choose to look at some of the clearly established law, is there something that a plaintiff could potentially hang on to? Like in this Kennedy case, for example, where the court says that Kennedy's right to be free from retaliatory arrest after insulting an officer was clearly established. Motivation may be difficult to ascertain after the fact. But once the Fact Finder determines that protected speech motivated the arrest, the illegality of the arrest becomes readily apparent. So this is something at least to get you started on a case like this, where you could go and look at the facts of the case, look at what the court is saying, look at how it's dealing with a motion to dismiss versus a motion for summary judgment, and see if that can get you to at least make a persuasive argument in your

brief, that qualified immunity should not protect the officer at that stage. All right, let's talk about Rivera, Julia. And, and kind of we'll touch on Pierson there as well, but do tell us about the facts.

J Julia Yoo 36:16

Sure. So, Michael Rivera is incarcerated and he files a lawsuit related to his condition of confinement. His case is meritorious enough that it is set for a jury trial. So Mr. Rivera gets transferred to another facility where he is supposed to have access to the mini Law Library. The Law Library has no books in it. The Law Library does have two computers that do not work. So Mr. Rivera makes a request from the Law Librarian for the Federal Rules of Civil Procedure and Federal Rules of Evidence. And the librarian says no, and they don't fix the computers, and they give him no books. So obviously, because he is not a trained lawyer. He cannot establish foundation for the documents and evidence that he needs at trial. The evidence does not come in and the jury finds against him in the underlying case. Undeterred, Mr. Rivera bravely filed this lawsuit, saying that he was denied access to courts because he was denied any any form of books or any material that would have assisted him in his case. What is really interesting in this case is that they start out great. The premise is that prisoners have a well settled constitutional right to access the courts to challenge their convictions and conditions of confinement. So, that's the first sentence. There's additional language in this case, which I think is amazing. So the Third Circuit wrote, "because we recognize that a prisoner has a constitutional right of access to the courts in order to file a lawsuit concerning the conditions of confinement, it is ludicrous to hold that the right of access stops once the complaint has been filed. So the Third Circuit recognizes there is precedent that obviously Mr. Rivera has a right to access the courts. He has that right before he files a lawsuit. So how do we frame that issue? Does that right stop once he has already filed the case? Does that go away just because he's preparing to try the case that he was entitled to file to challenge the conditions of confinement. The third circuit also says, Indeed, it would be perverse if the right to access courts faded away, after a prisoner successfully got into court by filing a complaint or petition. They say it would be perverse, and yet, the Third Circuit does exactly that. It finds that there is qualified immunity and that Mr. Rivera may not maintain his lawsuit against the deputies, or the law librarian that denied him access to courts. So that is it. But the Third Circuit does say from that moment on, moving forward, they find that it is clearly established that there is law that you cannot do what these defendants have done, which is deny access to courts past the date of the filing of the lawsuit.

A Anya Bidwell 39:39

So, what's fascinating to me there is that you do have a Supreme Court case, Bounds v. Smith, and it specifically says that prisoners have a constitutional right of access to the courts. That's what it says. It doesn't just say, right of access at the complaint stage, correct. So why is that not enough to put reasonable officials on warning that what they're doing is unconstitutional?

J Julia Yoo 40:05

I think the Third Circuit, as in many other courts, really tried to dissect it for no reason. I don't know why. It was on paper sufficient to say they have a right to access the courts. Bounds did not say, "Oh, but only on Tuesdays." It did not say "It only exists until you have your stamped

document of a complaint." It doesn't stop there. There was no qualifier under the Supreme Court precedent that said, the right to access only exists until the day you're able to file the complaint. It was silent as to that. But then it sort of created a problem for itself and now there's a split. You know, the Ninth Circuit says something else, and so we really sort of created an excuse, even though it found that it was ludicrous to do so, but they went there anyway, on purpose, to give qualified immunity. And then to rein it in a little bit, on balance, I suppose to say from today on, though, that there is no clear dividing line of when you can access the courts and when you can't.

A Anya Bidwell 41:17

And that goes to the district court decision, where the district court actually said, Eugene, to your point about Pearson, "We're not even going to get into talking about whether there is a constitutional right for accessing courts. But we will say that that right is not clearly established." So at least the court here is reaching and saying "We will affirm, but we will also say that there is a right and going forward plaintiffs have that right."

J Julia Yoo 41:45

That is correct. And that is a dangerous trend that we tend to see across the board, no matter which circuit, I mean, district courts are shy and hesitant to say "I'm going to find that this was a constitutional violation." It's much easier just to go to the second step of Pearson to say there isn't another case exactly on point. I think there's a danger to that, because really the standard that we have to show is a robust consensus. We're never going to get there if the judges are not saying "Hey, this is out of bounds." Because there's no case law, we can't ever get there. And that's precisely what we were discussing about Frasier.

A Anya Bidwell 42:28

Yes, that's exactly right, and Debbie Rao of MacArthur Justice Center litigated this case in the Third Circuit, and I just want to quote from what she said about this, when I asked her she said, "It's a tragedy that qualified immunity prevents the judiciary from redressing constitutional wrongs, like this one, the first time it encounters them." But that kind of goes to the point of the obviousness exception, though, right, technically, we have this exception for obvious violations of the constitutional rights, that even if you encountered the first time, probably because it is such an outrageous violation, for example, and there hasn't been precedent on point, it doesn't mean that the lack of precedent on point should necessarily prevent you from overcoming qualified immunity. And this case seems like a good candidate for that exception, though they don't take advantage of that. And I want to highlight more for people, just because this is a very new case, Rivera, it just came out two weeks ago, and it's not in our database. So here's how if you see a case that you want to let us know about, so we keep updating this thing. Can you show them where they would go and just scroll down, and here's the case information, just a little thing, just give us the name of the case, we're going to collect all of them, we're going to look at them. And if they fit the criteria, we're going to include them this way, we have this situation on point and Rivera is going to be a very important case to include, because now in the Third Circuit, there is clearly established constitutional law on access to courts post the

complaint stage. Now, Nick, let's talk about your case, and it is kind of is a complement to the other two that we talked about. Because even though it's coming from a Federal Circuit Court, it's really about state law and alternative doors of litigation. Can you tell us about R.A?

N Nicholas Yoka 44:32

Yes, as the state law guy, I'll just jump right in. And also as a complement to that case, because it really does show how rights without remedies means meaningless rights. And so G.A. is a very sad set of facts. In this case, G.A., who has autism and difficulties communicating functionally, starts first grade in North Carolina elementary school and is assigned to a teacher by the name of Robin Johnson. Immediately, certain childhood abuse allegations come to light, including a trashcan incident in 2017, where G.A. is placed in a trash can and the cover is put over it. And for a period of time, he's not let out while the teacher, Miss Johnson, states that "If you act like trash, we will treat you like trash." More of these allegations come about but really important for that specific instance was that another employee of the government witnessed that incident and reported it up to the principal. At this point, it's alleged in the complaint that the principal along with three other government officials for the school district knew about this and failed to report it or take further investigative action. More allegations continue and G.A. goes on to second grade, where unfortunately, he's left again with this same school teacher Robin Johnson. During that time, a few more things come to light, including at one point, she spills the grease from her hot lunch on G.A.'s head, that he has a she puts her hand over his mouth at one point to stop him from being disruptive. She refuses to replace a broken desk, forcing G.A. to stand for prolonged periods of time in second grade. Fortunately, he has a new teacher in the third grade. And he at that point communicates to his mother about some of the incidents that have occurred. The mother, obviously, as any parent would do, immediately looks into it and finds that there is another parent that actually had similar allegations against the same teacher. This teacher ends up pleading guilty to two counts of misdemeanor for abuse or assault of a disabled person. And then at this point, R.A., as the guardian ad litem T.G.A, files suit in federal court based on federal constitutional violations and state law violations. What happens next is that immediately a 12(B)(6) motion is filed for the government individuals, the individual defendants here saying they have qualified immunity. The district court grants the qualified immunity as to the federal cause of action, but not as to the state cause of action. So that's where we come to this opinion in the Fourth Circuit, where Judge Wilkinson in the Fourth Circuit looks at this and the state law cause of action and has to analyze it under state qualified immunity rules.

A Anya Bidwell 48:08

Let's pull up North Carolina and see what Judge Wilkinson is looking at as he is analyzing this opinion. So scroll down, where it talks about employees versus public officials. What is the heart of their opinion and heart of the matter for Judge Wilkinson?

N Nicholas Yoka 48:34

Yeah, the heart of the opinion is he looks at well, what is the rule in North Carolina. And really, if qualified immunity will apply if the official is using lawful exercise and lawful judgment and discretion and doesn't act with malice or corruption. And so that really becomes the heart of

the opinion. And the plaintiff says "Wait, hold on here. They definitely didn't, the discretion and judgment shouldn't apply here, because there's actually a mandatory reporting statute for child abuse." And he says, "No, no," Judge Wilkinson says, in any sort of teaching environment, there's so much discretion that we're going to allow this. If you asked me, my personal opinion, that mandatory reporting act doesn't sound very mandatory. And so that's definitely something that pokes or sticks out to me in the sense that, well, why even have a mandatory reporting act? But he says, nope, these are difficult jobs. And of course, teachers and school officials do have very difficult jobs, but we're going to grant discretion there, then he looks at malice or corruption. And this is according to judge Wilkinson, more of a procedural issue, that there was no actual specific malice or corruption in the complaint, which you say, Well, what about all these acts that you just named? Well, he says you really need to specify malice or corruption. But even if they did that, it doesn't really apply here because under state law reckless indifference isn't enough for intent. And so that's kind of where the ruling comes down, which I think kind of in a sense, the ultimate rule is, and maybe people would disagree, but that, under, under North Carolina law, individual public officials, who allegedly know about child abuse, or allegations of child abuse should, I should say, have for those state law claims of mere negligence, qualified immunity shielding them? And I think that sets a dangerous precedent, possibly for future decisions there.

A Anya Bidwell 50:36

Yeah, and it's really interesting North Carolina, it scores pretty high. As far as states are concerned, C+ is a very good grade. But really, the reason it scores so well is because first of all, they have an implied cause of action under the Constitution. So if you violate constitutional law under North Carolina, you can go to court, and there isn't qualified immunity, that's codified as an extra step under North Carolina constitution. And second of all, they do allow suits against employees. Right. So this teacher, she is an employee and claims against her are continuing to proceed. But these other officials, right, like the superintendent, and those folks are officials, not employees. And because they are officials, they are exempt from that negligence statute. So it's kind of interesting. In that case, I think it showcases also kind of difficulty between what does it mean to be an official versus what does it mean to be an employee? Right? Hard line to draw? And what is, as you mentioned, adiscretionary act, versus a ministerial act, which is also a hard line to draw. One thing I wanted to ask you guys, and that's kind of to all of you, is this idea of alternative remedies. Right. And Eugene, you kind of talked about Novak and you said not everything is bad for Novak, right? He was prosecuted, but he was acquitted. So there's some sort of indication there. And with this teacher, she had to go through administrative proceedings and other things that kind of try to hold her to account. So what would you say to people who say, you know, well, you know, it didn't work out that badly for them? Why do they need, you know, a way to sue for violations of civil rights? What is so special about being able to do it that way? What would you tell them? Why is an individual remedy for civil rights so important, rather than just being able to, frankly, maybe hold somebody criminally accountable, or also be acquitted yourself if you're being tried?

J Julia Yoo 53:03

Well, I could briefly address that. I think that a lot of times in situations, particularly with police excessive force cases, they aren't criminally charged. And sometimes the only route to get justice for that client against certain government officials and individuals is through the civil

justice system, which is why we have a civil justice system altogether. So there are only three different ways in which a constitutional violation like this can be remedied, right, which it's not just about the individual that has been wronged. But it's a wrong against the entire community, when there is kind of a breach of trust by law enforcement. So one is criminal prosecution, and that so rarely happens. I think one of the studies revealed maybe less than 1% of cases where an official is charged with the crime. The Second Avenue is internal affairs or some sort of an internal discipline. And that also is exceedingly rare, but even more problematic than rarity is that lack of transparency. The public is not entitled to see what happens in those sort of, you know, behind the scenes, secretive proceedings, and it is not a way in which an officer can be publicly held to account for their actions, because it's all secret. So it offers no remedy to the greater community for wrongs that have been committed. So really the only thing that is left in which the victims themselves feel empowered, because they also are making decisions about how a case proceeds, is in a civil matter. It really is the only way is to have available a remedy in civil court. That's the only thing, we can't give people their lives back. The only way we can give them a sense of justice is a proceeding that is public. Yeah, and go ahead, Julia.

A Anya Bidwell 55:03

Yeah, I think that's a great way to a great note to end on, and something for people to really think about the importance of vindicating your rights in civil courts, and how qualified immunity among other doctrines stands in the way of it and sends a message to the other officers. I think that's the strongest that was really the driving reason for why our clients want to do something. It's not really about them as much as they don't want this to continue. They don't want other victims in the community.

N Nicholas Yoka 55:39

Totally. It ensures government accountability when nobody else is.

A Anya Bidwell 55:46

Excellent. Well, thank you all so much, Eugene, Julia, Nick, it's been an honor to have you and thank you for celebrating this launch of the Constitutional GPA research tool with us and I encourage everybody listening, watching and being here with us to play around with it. It's actually a lot of fun. Thank you for being with us. Thank you. Thank you.