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SPEAKERS

Andy McNulty, Senator John Cooke, Anthony Sanders, Laurent Sacharoff

Anthony Sanders 00:11

Hello and welcome to Short Circuit. Yes, this is Short Circuit live at Denver Law, at the Sturm School of Law here in Denver, Colorado. We are recording this on April 8, 2025, and we are very lucky to have a distinguished set of experts here to discuss qualified immunity. Now, for those listening on the podcast, you may already be a bit familiar with qualified immunity if you've heard a few episodes of Short Circuit. Some of the students here are, I believe, familiar with it as well. But for the sake of level-setting, I'm going to give a quick definition of qualified immunity. After that, we'll turn to our panel of experts, who I will first introduce. Colorado is a special place when it comes to qualified immunity because it is a state that has actually addressed the issue with legislation, which is not true in most states and, unfortunately, is also not true at the federal level. With me, to my right, is Senator John Cooke. He is now retired, but he served in the State Senate for eight years and, before that, was County Sheriff for 12 years and worked in law enforcement for 30 years. He was in the Senate when Colorado passed qualified immunity reforms in 2020- what was SB 2217. He's going to discuss a little about how that sausage was made and how that reform happened, and then we're going to have a bit of a discussion about it. He's also a graduate of the University of Northern Colorado. Next, we're going to hear from Andy McNulty. Andy is a civil rights lawyer here in Denver, Colorado. He's with the firm of Newman and McNulty. He's litigated all kinds of civil rights issues. We at IJ have partnered with him- we did an amicus brief in one of his cases. He's also a graduate of Northwestern Pritzker School of Law in one of my favorite cities, Chicago. And then we have a hometown hero here, Professor Laurent Sacharoff. He is in his third year here at the University of Denver, but before that, he taught at the University of Arkansas. He is a graduate of Columbia Law and clerked for the Honorable John S. Martin, Jr., on the Southern District of New York. We'll start with Senator Cook, but just very briefly, let's level set qualified immunity. You hear about qualified immunity a lot in the press- it especially became a big deal after the murder of George Floyd a few years ago. But essentially, what qualified immunity means is that if you are suing a government official and you prove that they violated the Constitution, that is not necessarily enough for them to be liable for damages. That's because they're only liable if the law they violated was "clearly established." So, to overcome qualified immunity, you have to show not just that the official was wrong, but that the law was clearly established in a way that made it obvious the conduct was unconstitutional. There's a lot more nuance to it, but that's the basic outline. Here in Colorado, reforms

were passed so that if you sue in state court under the state constitution, you do not have to worry about qualified immunity, and there is a cause of action to vindicate your rights. Senator, how did that all happen?

Senator John Cooke 04:17
Well, it happened because of what you mentioned- George Floyd, what happened up in Minneapolis. Legislators here asked if that same type of thing could happen in Colorado, and some wanted to come up with a comprehensive law enforcement reform package. What's introduced is often totally different than what the final bill looks like, and the final version was about 25 pages long with 19 different sections- very comprehensive. There were five pages on body cams, reporting by agencies and the Division of Criminal Justice, which had to post the information on their websites. There was a section on revoking peace officer certification after a conviction, another on law enforcement response to protests. One section was about civil action for deprivation of rights, and that was just one page, which addressed qualified immunity and the good faith exception- only about three lines. Most of that section, which you all would be interested in, concerned attorney fees. Other sections dealt with use of force, and the power and duties of the AG and POST board to decertify. Legislators have very few original ideas- most bills come from lobbyists or interest groups who know which legislator to go to. I was very pro–Second Amendment and pro–business, so those groups would come to me. The groups that wanted to do 217 were the ACLU and some pretty far-left groups who wanted to punish law enforcement. They actually wrote the bill. One of them even admitted to me, "We just threw everything up on the wall to see what would stick." I always had a good working relationship as a senator with groups like the defense bar, the Trial Lawyers Association, and the ACLU. And I am a Republican, so some of the things I might say might sound, not biased, but partisan. And the legislature is a partisan place, and so the Democrats wanted to have this comprehensive law enforcement reform bill. They sat around saying, "Let's do this, let's do that," to see where it would go." And I had a good working relationship with these groups. We didn't agree on much, but we could talk and work together to find common ground. When 217 came up, I don't think we even saw it until the day after it dropped, and it was going to committee right away. I was walking with someone from the ACLU, reading the bill, and the more I read, the more upset I got. I told her, "This is nothing but an 'F the police' bill." She said, "Don't worry, it's going to change- we're going to work on it." Legislators don't write their own bills. The two Senate sponsors came to committee, and when you present a bill, you answer questions from committee members. I was on Judiciary, along with Senator Bob Gardner- a Republican and attorney from Colorado Springs- and we started questioning the sponsors. It quickly became clear they had no idea what the bill actually said. After an hour and we were still on page two, the chair cut off the questions and moved to witness testimony. We went until one or two in the morning on that bill. Eventually, the Senate sponsors came to Senator Gardner and me and said, "Work with us- this isn't the bill we want. Help us make it better." At the time, the County Sheriffs of Colorado, the Police Chiefs Association, the DAs, and the FOP were all against the bill. Senator Gardner and I sat down with the sponsors and said, "This is what you have to do," and started working with them for days. One of the sections, like I said, was qualified immunity, and that was the hill we were going to die on. Not that we wanted to keep qualified immunity- we said, fine, you can get rid of it at the state level, but we were going to fight for the good faith exception. We were able to keep the good faith exception. On second readings, I ran Amendment 89- there were over 100 amendments to the bill that we debated on the Senate floor. And in the end, we got just about all of our amendments in. It passed the Senate on third

reading, 34–1. It went to the House, started the process over. The House had committee hearings, added amendments, had second readings. Then the House sponsors came to Bob and me and asked, “What do we do? How do we make this better?” So we worked with them again, which is unusual- the House and Senate don’t usually work that well together. We kind of look down on them, and they make fun of us. But we got the bill to a good place. When it came back for third reading, the Chiefs Association, Sheriffs Association, and DAs supported the bill. The FOP never did, because of qualified immunity- they said if that was going to be removed, they wouldn’t support it at all. When it came back to the Senate, it passed 33–2. One person dropped off. That’s how the sausage gets made. Senator Gardner and I fought for the good faith exception- and we won. The reason we didn’t really care about getting rid of qualified immunity is that it can go either way- sometimes it’s good, sometimes it’s bad- and the courts can figure that out. But the good faith exception was important because you need some protections for people who make mistakes. Cameron Westbrook and I emailed about it, and he gave me his opinion of my amendment, and he was spot on. He said, “As I read it, this was a reasonable change, which aligns with the broader goals of balancing accountability for government officials while ensuring that they have the necessary protections to perform their duties effectively. By removing the blanket prohibition on good faith as a defense, the amendment avoids overly punitive consequences for officials who act within reasonable belief that their actions are lawful. At the same time, it maintains the elimination of qualified immunity, which responds to calls for greater transparency and accountability in cases of civil rights violations.” I couldn’t have said it better- that was a perfect analysis of my amendment and what we changed in that section of the bill.

Anthony Sanders 12:59
And I should add, that's our very generous sponsor, Cameron Westbrook- a 2L here at Strum School of Law- for our event, which is sponsored by the Federal society chapter here. So that was great. Thank you, senator for a little bit of sausage making there, which, of course, is typical of legislation. But what is not typical of reform in this area is usually it doesn't amount to a bill, and everyone was able to pass the bill in this case. Now, Andy, you were there in the trenches, maybe the other side of one of those trenches in this case. How do you remember things?

Andy McNulty 13:39
I was one of the guys who the senator probably thought was writing an F the police bill. I like to call it a police accountability bill, personally- but, you know, potato, potato, I guess. It was a really interesting period. We tried to get this particular law, SB 217, passed in the previous session, and it failed. Then George Floyd was murdered, and as we were passing this bill, I remember being in the House and the Senate, and you could hear the protesters outside chanting in the chamber. It was a really profound moment, I thought, and that's what propelled this forward. It was a moment when both sides of the aisle realized that there needed to be more police accountability in Colorado, and agreed on that. It ended up being a bill that was passed with pretty much bipartisan support after a bunch of back and forth.

Senator John Cooke 14:32
Actually- and you're right, maybe not tomato, tomato- but it was introduced in a way that was totally different than how it came out. And you're right that law enforcement agencies were in support of the bill when it came out because we were able to work together. The Republicans and the Democrats were able to work together, and when I say fix the bill, I mean that it became more of a police

accountability bill, which I was all for. Most sheriffs and police chiefs are for more accountability because, well, sheriffs are for it because they want to get re-elected, and police chiefs want to keep their job because they report to a mayor or city council. So chiefs and sheriffs do want police accountability because it's transparency, and we have to show that to our public.

Anthony Sanders 15:21
Andy, I'm curious. So it's now been five years almost since the bill was passed, I think four years since it's it went into effect. Have you seen changes in civil rights? And so, but what this means now is you can sue under the Colorado constitution for a civil rights violation and not have to worry about qualified immunity. Has there been a change amongst the bar? Have you noticed of your cases that you approached them differently because of this?

Andy McNulty 15:49
Definitely. I think there has been a shift in the mindset of whether you'd go to state or federal court to sue for these things. Before, a state court wasn't even an option - and now it is. The Colorado Constitution is uniquely Western, uniquely Colorado. It's more protective of rights than the federal Constitution, so rights that maybe you had as a Coloradan but couldn't enforce before, now you can under this law. So it's changed that practice. And then also, we're going to talk about a couple cases where someone had their rights violated but had their case dismissed because it wasn't clearly established. Now lawyers are looking to see- hey, we know this is a constitutional violation, it might even be super egregious, but there's no case on point. So we need to bring it in Colorado courts under this new law, because otherwise it might get dismissed because of qualified immunity.

Anthony Sanders 16:38
Right. Well, let's move to one of those cases. So I asked Andy, what case he would like to do. And it's actually a case he litigated, and it didn't come out his client's way, at the 10th Circuit. But he litigated it a few years ago. It is Surat v. Klamser, and it raises this thing we talk about with qualified immunity all the time, which is, what level of generality to define your right and what level of generality to define the case law that defines what a clearly established right is?

Andy McNulty 17:13
Yeah, this is- you know, you have some of those cases throughout your career where you're just like, man, and you shake your head because you feel like it's a miscarriage of justice, and this is one of those for me. So I want to talk about it here, because what better case to talk about qualified immunity than a case where your client was severely wronged and nothing happened at the end of the day to the officer? My client was a young woman, Michaella Surrat. She was out for her 22nd birthday at a bar in Old Town, Fort Collins, with her boyfriend and a bunch of their friends. Her boyfriend got kicked out of the bar- for I don't know what reason, but I'm sure it's 22-year-old reasons, of course- so she went out to find him. He was standing outside talking to a police officer. She didn't want him to continue talking to that officer, so she approached and was trying to get him to leave. He said no, he was going to stay. Another officer came up and said, "You can't talk to your boyfriend right now." She wasn't happy with that and responded, "No, we're just going to leave." The officer said, "No, you're going to stay right here," and grabbed her arm. She wasn't excited about that either, so she started to pull away from him, tried to kind of pull his hand off her arm. He wasn't excited about that, and he grabbed her and

slammed her face-first into the concrete- gave her a concussion, sprained her spine, really messed her up. The video went viral. You can look it up- if you Google “Michaella Surat bar stool,” unfortunately, that’s what comes up. You can see the video of her being slammed face-first into the ground. We brought this case on Michaella's behalf- obviously excessive force. This isn’t something you can do if you’re an officer. Someone is minimally resisting, just pulling away, and you slam them face-first into the ground? It doesn’t seem like a rational use of force, and it would be excessive under the law- in our opinion and, ultimately, in the opinion of the courts too. A couple other things to know: Michaella is very small- about 100 pounds- and this officer was 6’4”, about 220 pounds. So big guy. And he just manhandled her. We litigated the case and got to summary judgment. We won. We were going to go to trial, and then they appealed to the Tenth Circuit Court of Appeals on the basis of qualified immunity. The lower court found there was a constitutional violation and that the law was clearly established- you can’t just slam someone to the ground, give them a concussion, simply because they pull away. So the city and officer appealed. We filed what’s called a motion to certify the appeal as frivolous, which is rare. The district court granted it and said, “Yes, this appeal is frivolous.” But that doesn’t strip jurisdiction from the Tenth Circuit. It’s a weird quirk in the law. The Tenth Circuit essentially said, “Yeah, we don’t care what the district court says.”

Anthony Sanders 20:19
I think of that as a red flag.

Andy McNulty 20:21
It should be a red flag. The Tenth Circuit blew right through it. And then they said, “Yes, this was a violation of your client’s constitutional rights. This was excessive force. But it wasn’t clearly established.” There’s a case in the Tenth Circuit that says using force like this against someone not resisting is unconstitutional- but she was resisting a little bit, so that’s different. Other circuits have cases saying similar force against someone resisting slightly is unconstitutional, but not exactly this fact pattern, so not good enough. There are unpublished cases in the Tenth Circuit that say this is unconstitutional- but they’re unpublished, so they don’t count. So, not clearly established. And not egregious enough. It went viral, there was national outrage, but just not egregious enough to violate clearly established law. So our claim against the officer was dismissed. We ended up settling with the city- qualified immunity doesn’t apply to municipalities- but for significantly less than the claim was worth, especially if the officer had stayed in the case. It was just one of those incredibly frustrating cases, and a real illustration of the dangers of qualified immunity: a case where anyone would look at what the officer did and say, “That was wrong”- but the law didn’t.

Anthony Sanders 22:03
Professor Sacharoff, in some ways, this is going to align with the case you have coming up. But what are your takeaways from from Andy's?

Laurent Sacharoff 22:13
Oh yeah, well, one of them is in my case, which I'll get to. But on a particular point, the government cited an unpublished 10th Circuit opinion and relied heavily on it to show that the law was not clearly established. So it's interesting that not only the government but the court was arguing that unpublished cases can't count. Are they right? Is there binding precedent that unpublished cases don't count?

Andy McNulty 22:43
Yeah for qualified immunity purposes, there is.

Laurent Sacharoff 22:46
So, the thing too is, in 2025 unpublished versus published is such a meaningless distinction- every case is available on Lexis or Westlaw. It's not like anyone can't find these cases. The other thing to think about is: are these officers actually sitting down and reading every single decision that comes out? I just don't think that's true. I think they get trained on Graham, they get trained on the big precedent-setting cases, but they're not reading *Morris v. No-One's-Ever-Heard-of-It- *which is the case the court said wasn't close enough in our case. They're not reading those niche, in-the-weeds decisions. And honestly, a lot of lawyers aren't either- until they get the case that makes them go look it up. So I think that whole published versus unpublished distinction is kind of meaningless nowadays. And the idea that officers are keeping up with these cases on a daily basis, or tailoring their split-second decisions based on subtle distinctions in Tenth Circuit jurisprudence?

Anthony Sanders 23:30
Well, this is a good opportunity to remind our listeners that we have a sister podcast called "Unpublished Opinions," where, amongst other things, sometimes we gripe about unpublished opinions. Because it doesn't make a lot of sense to me. I know judges like them because sometimes the more routine stuff you just don't have time for, so you don't spend the time on that and it don't circulate it maybe to the entire en banc court, like they do published ones. Like I get that, but still, it's law and it should be treated as law. That's my opinion.

Senator John Cooke 24:05
Yeah, you're right. Officers, don't sit down and read these kind of cases. At least at Weld County, we had legal updates training- but those mostly consider, what did the state legislature pass to do to us now. So we would sit down and we'd have our county attorney or the district attorney go through the new laws that were like passed in the state. But as far as when it came to federal cases- no these published decisions. And one of the biggest issues with 217 with law enforcement was, "oh, with the qualified immunity we're going to lose officers, or, that's going to hurt us." But the thing was, it's like you said, it only applies to state court, it didn't apply in federal court. And I don't blame the line officers for not knowing what qualified immunity is, because they heard "Oh, if you do something wrong, you get qualified immunity." So they go in to federal court and the county attorney says, "Oh, don't worry, we're going to fight this on qualified immunity." And that's all they know about it. So you're right, they don't sit down and read these kind of court published or unpublished decisions.

Anthony Sanders 25:12
One interesting thing about the your case, kind of a silver lining, is that the court did actually address whether her rights were violated. And said, "Yes, jolly well, right- they were." But then went on to how it's not clearly established. And of course, federal courts have been told by the Supreme Court they don't have to do that. They can say, "well, even assuming blah, blah, blah, blah, blah, it's not clearly established." Do you know if the 10th Circuit is maybe better at that, at addressing so at least it's clearly established for the future, than other circuits or how it normally works here.

Laurent Sacharoff 25:47
I think this Court's decision was the exception rather than the rule. And you're right- it is great that they did this. Because I've talked to two lawyers since that case is handed down, and now they're bringing lawsuits because of this, and I've said, "Hey, listen now it's clearly established that if your client's minimally resisting and they get really messed up by the police with excessive force, you can sue." And so they are now are relying on this case- it's been precedent setting. And so it is a silver lining in that sense.

Anthony Sanders 26:16
Well, I guess you didn't need a silver lining for the plaintiff in the next case, because although it went up on qualified immunity, it was held to be clearly established. And this is Luethje v. Travis Kyle. And apologies to to the plaintiff, if I am not pronouncing his name right. Now, this is a recent case came out March 19, 2025, also from the 10th Circuit, and Professor Sacharoff is going to tell us about it.

Laurent Sacharoff 26:48
Yeah, great. This is a published decision, and as we've been discussing, for qualified immunity, the facts really matter. Often they'll compare the facts of this case almost fact-for-fact to find if there's some previous case where almost are the plaintiffs names the same- that's how close sometimes.

Anthony Sanders 27:12
Not quite as bad as the Bivens doctrine. If your name is Webster, Bivens, but close to that.

Laurent Sacharoff 27:18
So critics of qualified immunity will often say that the problem with the doctrine is, if the facts aren't almost exactly the same, qualified immunity is available and the law is not clearly established. But this case is a great counterexample- and maybe a new trend, maybe not. Let me go into the facts, because they are so important. This was February of 2022, in the evening around 6:40 p.m., and it was dark. A 911 call came in. The caller said that some man had broken the outside window of their neighbor's house and then fled. That was the 911 call. The officers arrived at the place where the window was broken and saw that the window was slightly damaged, but the screen behind the window was still there. The officers decided they needed to do a search of the interior of the house. They finished breaking the window, removed the screen, did not announce themselves or say anything, and certainly did not get a warrant. But what they did have was a dog named SIG, and the officer who was the handler, Travis Kyle, instructed SIG to enter the house and bite- the first person SIG encountered. You might think this is made up- how can you order a dog like that? It's complicated, but to quote the court, Mr. Kyle ordered SIG to "find and bite whomever it found inside the residence," meaning the first person, whether child or adult, whether lawfully there or not. I don't know if that was part of the instruction to SIG or just an editorial comment by the court, but apparently, handlers can order their dogs to do these kinds of tasks. They dropped the dog into the house through the now open window, and SIG went in and bit the first person it found, the plaintiff, Mr. Tyler Luethje, who was asleep in bed. He lives there; it's his house. The dog bit and grabbed his arm with its teeth and held on, later described as throwing him around like a rag doll. The officers came into the bedroom where Luethje was on the bed being torn around by the dog, yelling, "I live here, I live here, I live here." To quote the

court, the officers did not say anything like “SIG, down boy,” or a cease command, instead they let the dog continue to bite and throw him around while they questioned him for a full minute, asking if he really lived there. Finally, the dog released him, but they nevertheless arrested him, brought him outside bleeding and in pain, with his arm numb, and eventually…

Anthony Sanders 31:31
And no shirt on, right? Just PJ bottoms.

Laurent Sacharoff 31:33
Yeah, oh, I missed that fact. Okay, thank you for that. You see, it just gets worse and worse. Now, if the earlier case did not involve pajama bottoms, sometimes we’d be out of luck. So he is then arrested, and only when they’re outside do they manage to look at his driver’s license to see that he in fact lives there. He sues under Section 1983, a civil lawsuit for damages, seeking account for unlawful entry and search of the house in the first place, unlawful arrest with no probable cause to believe he committed a crime, and finally use of excessive force. I’ll talk about the use of excessive force, but for all three, the district court and the 10th Circuit found there was a constitutional violation. For all three, the police raised qualified immunity, saying even if there’s a constitutional violation, it’s not clearly established that we can’t enter under these circumstances, it’s not clearly established that we can’t arrest somebody under these circumstances, and it’s not clearly established that this was excessive force. The court held first there was a constitutional violation- it was excessive force- and it used the three Graham factors from the U.S. Supreme Court on excessive force: how serious is the crime, was the person resisting, and are the officers in danger. It admitted burglary could have been the crime, so maybe it’s serious, but the main factor was he was in no way resisting, and there was no imminent danger to the police because he was in his house. So for excessive force, it’s pretty clear that using a dog to bite somebody you don’t even know, or if they’re supposedly the person who broke the window, is excessive force. But when we come to qualified immunity, that’s when we have to start looking at whether there’s a similar case. I would have thought, maybe I’m paranoid or something, but I always think courts in qualified immunity cases will say yes, there’s qualified immunity unless there’s the same situation. And the same situation I would have expected is a dog case where the dog went into the house and bit someone before the police got in there. What’s surprising about this 10th Circuit case, which I like, is that the court was willing to act on a much higher level of generality. It couldn’t find any dog cases involving excessive force pre-arrest- before the police themselves got in there- there was a dog case for post-restraint, but no case for pre-restraint, no dog case, not even a similar case. Nevertheless, the court said it was clearly established that this violation was unconstitutional, citing Graham itself. By citing Graham, it basically said the same inquiry for whether there’s a constitutional violation is practically the inquiry for qualified immunity- meaning if someone’s not resisting and you’re not in imminent danger, it’s excessive force. That’s just the Graham case, whether there’s a constitutional violation. So the 10th Circuit almost collapsed those two inquiries, which is interesting. Another case it used was about a taser, where police tased someone unnecessarily. But again, that just went back to the idea that if someone’s not resisting and you’re not in danger, excessive force isn’t justified. How did the court do that? I’ll finish with the legal principle they recited, which was a little different from what you often see. The court said we need to find an earlier case that’s on point showing it’s clearly established. But “on point” can mean not just similar conduct in the earlier case, but the earlier case applies with obvious clarity, meaning a general statement of the law can be enough, and it’s not a scavenger hunt for prior

cases with precisely the same facts. So when you put together the statement that a general statement of the law can be enough, with how it did it here, and also with the other counts, I think it's a positive development for qualified immunity. It's a real contrast with the Surat case, because I think if this panel had been deciding the surrogate case, they would have said "yeah, general principles of excessive force against someone who weighs 100 pounds and is clearly not resisting in any way is clearly established." So I'm happy about the case.

Anthony Sanders 37:09
So, Senator Cooke, you were, you were saying in the green room earlier that you worked law enforcement for 30 years, but these would not have been officers you would have been proud of.

Senator John Cooke 37:18
No, not at all. I mean the circuit court, the appeals court- they don't look at things with 20/20 hindsight, because things happen so quickly in law enforcement. You might get to a scene and have a split second to make a decision. So the court looks at things based on what the officer might have been presented with. But reading this case, it was bad from the beginning to not announce yourself just because there's a broken window. They could have put a deputy in the back of the house and set up a perimeter if they really thought a burglary was happening. I think that's what they were thinking- that there must have been a burglary- but there were a lot of things they could have done, like announce themselves, try to wake the guy up, call the residents to see if someone's in there, before sending the dog in just to bite the first person it sees. So it was bad from the very beginning. I had like 8 K9 officers at Weld County, and they really wouldn't still be deputies if this happened there. And I'm not saying anything because I wasn't there, just going off what the 10th Circuit or appeals court said- but the facts are pretty bad, and those officers wouldn't be working for me if the same facts occurred in Weld County.

Laurent Sacharoff 38:43
Yeah, I'll just say one thing procedurally, which was that this was on a motion to dismiss, not summary judgment motion. So the facts are completely one sided, completely the facts of the plaintiff. So to make you feel better about your former colleagues, if we get to summary judgment and there's no settlement, it may be that the facts are much more complicated and that there are more positive facts for the officers.

Anthony Sanders 39:08
And there's no mention of body cams- maybe that it just weren't any or maybe they haven't been introduced at this point. Which probably means they're not very good, I have to say, because often on a motion dismiss, if it's mentioned in the complaint, the defendant will try and introduce that, because it gives a more full story.

Laurent Sacharoff 39:30
Well, that's why they played the 911 calls.

Senator John Cooke 39:31

And 217 required every law enforcement agency in the state- local and state officers- to have body cams. And I believe it was by 2023 is that correct? So that they were required to have it. And I'm not sure when this case was

Laurent Sacharoff 39:47
February 2022

Senator John Cooke 39:48
Okay, so it was a year before it took effect- to have to have body cameras.

Andy McNulty 39:54
I have to say, as a practitioner, this case is one that really- I mean, it just frustrates you, right? Because you don't know what the test is now. In some way, it's a great case, right? But I've had ten other cases that have been dismissed on qualified immunity, cases that I feel had obvious facts, and the Tenth Circuit hasn't collapsed the test like they did here. And so it just creates this climate where you don't really know what is going to be clearly established at the end of the day, because you draw one panel and it's one way, and you draw another panel and it's a different way- and that's not the way the law should be.

Anthony Sanders 40:29
Yeah, absolutely. Do you think there is any reason this might be en banc worthy in the 10th Circuit, or just kind of add it to the pile, and we'll see what keeps coming out.

Andy McNulty 41:19
I mean it could be one of the two cases that they take en banc per year. They don't take many in this circuit. It's very, very limited, so I would be surprised if it went en banc.

Laurent Sacharoff 41:29
I mean, the 10th Circuit pointed out that motion to dismiss is a bad posture for the government, so they might decide, let's go back and wait for summary judgment and get some of those better facts in first before we make really bad law.

Anthony Sanders 41:49
Right. So earlier this morning, I was talking with Professor Sacharoff and some others about the 10th Circuit. And so some listeners will remember this. We had a competition about three, four years ago about the most beautiful courtroom in the United States in a federal appellate court, and we had a lot of readers write in with suggestions. I think we did a poll on Twitter about who the winner was. Anyway, the Fifth Circuit en banc courtroom was high up there. There were a couple in the ninth circuit, one of the ones in Sacramento, I think it is. And then the Portland's historic courthouse, a lot of people liked. But the winner of all of them was the library courtroom at the 10th Circuit here in Denver. Have you ever argued in there?

Andy McNulty 42:09
It was my first oral argument ever.

Anthony Sanders 42:11
Oh my goodness.

Andy McNulty 42:12
The 10th Circuit was in that courtroom. And I'll tell you, it's a little intimidating. You're surrounded by all these books, all these learned folks, and you're up there trying to make your case. It's tough.

Anthony Sanders 42:22
So one, one question I've always had about that court, because it's full of books. I am sure there's not a lot of echo, because the sound goes into the books.

Andy McNulty 42:37
Oh yeah, it's dead silent, and you're up there talking, and you're wondering, "Am I saying something that's insanely stupid?" It's not a good environment for someone who's up there for the first time. I'll tell you that.

Anthony Sanders 42:50
A little intimidating. Well, great. Well, I'd like to thank the panel for coming today for Short Circuit. I'd like to thank the students here at Strums School of Law for coming to this live recording. And also thank the local federal society chapter for inviting us. Please be sure to follow Short Circuit on YouTube, Apple Podcast, Spotify and all the other podcast platforms. And remember to get engaged.