ShortCircuit381

Thu, Jun 26, 2025 11:49AM 1:11:08

SUMMARY KEYWORDS

First Amendment retaliation, qualified immunity, police shooting, parental rights, Pierce v. Society of Sisters, Meyer v. Nebraska, Fourth Amendment, excessive force, Ninth Circuit, Eighth Circuit, sovereign immunity, government contracts, public hospital, social media, legal news.

SPEAKERS

Daniel Cragg, Michael Bindas, Anthony Sanders

A **Anthony Sanders** 00:11

"The law I said, which is the sequel of all this and all that has preceded, is to the following effect: that the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child, nor any child his parent." Those words are from Book Five of Plato's Republic. They were quoted in a famous Supreme Court case a little over 100 years ago. Thankfully, the Supreme Court did not follow its advice, nor does really anyone follow it today, but they pertain. Those words pertain to an issue we're going to discuss today that just came up at the Ninth Circuit, about parents and their children. All that this week here on Short Circuit, your podcast on the federal courts of appeals. I'm your host, Anthony Sanders, Director of the Center for Judicial Engagement at the Institute for Justice. We're recording this on Tuesday, June 10, 2025. So once again, we come to June. June is the time when there's all kinds of legal news buzzing around- often because of what's going on at the U.S. Supreme Court. But here on Short Circuit, we don't care all that much about the U.S. Supreme Court, because we're all about the federal courts of appeals, and we have some news from the federal courts of appeals for you today. We're going to be joined in just a moment by a special guest who's going to be talking about a case of his from the Eighth Circuit that came out a few months ago and has now been remanded, and is about to go to trial. So exciting news there. We'll hear about that in just a moment. But first, I want to introduce someone else, my friend and colleague here at IJ, Michael Bindas. Now Michael is head of our educational choice work. He's been on Short Circuit a number of times, but I realized I kind of let some things slip, and he hasn't been on in a couple years. So Michael, very sorry for the long delay, but we're very glad to have you back.

M **Michael Bindas** 02:18

Well, thank you for having me, Anthony. I think the last time we did it was the live recording at the law student conference a couple of years ago

A

A Anthony Sanders 02:25

That could be. Yeah, I think we had you on around that time, and then right after the Carson case came out, we did a little victory at the U.S. Supreme Court- so there was an exception with the Supreme Court. We'll get to Michael a little later about an unusual case for him. We're going to talk about a qualified immunity police shooting case, which you'd usually expect Anya Bidwell or Patrick Jaicomo to be on for, but it actually has this interesting parents' and children's rights angle that we'll be discussing. But first, I wanted to say something really quick before we get to our special guests. So many of you across the land- I know many lawyers listen, but people from other walks of life listen too- many of you probably work in places where you write reports. Maybe you run a department, maybe you run a small group, or you're the secretary for someone who runs a group, or something like that, and you have to write a report. Maybe it's a weekly report, quarterly report, whatever- to your superiors, to your board members. And these are things that are important, and I'm sure all of you put good time into them, but we don't think of them as classic works of literature. When you go into your public library and the old dusty shelves, you're not going to see department reports in there. But Michael is the exception. Michael brings a little bit of je ne sais quoi into his weekly report, and I can say- I stand for many of us at IJ- that we look forward to those every Friday. There's always a little something, like a pop culture reference that I've never heard of before, and I realize I'm even more uncool than I thought. But somehow, Michael knows about that. So Michael, how do you produce these amazing things?

M Michael Bindas 04:20

Well, first off, I have to double-check myself every week before I hit send, wondering, "Is Scott gonna fire me this week if I hit send on this?" I don't know. I've got this mind that's capable of recalling, you know, Charo being on The Tonight Show with Don Rickles as the other guest, but I can't recall what I need to focus on at work tomorrow. I just have this uncanny ability to remember late '70s and '80s cultural references that I, for some reason, think other people will be interested in or find entertaining. The fact that you often don't get them- I would not say that's a mark of you being uncool, Anthony. I think the one last week had to do with the song "Convoy" by C.W. McCall, and I played that for my wife and kids shortly after I sent out the weekly report. It's decidedly uncool, so you're not missing anything.

A Anthony Sanders 05:19

Well, maybe I won't Google that one, but I have had to Google a number of others over the years, and it's always kind of delightful, actually, when I do. So we'll see- maybe some listeners will have to Google something you say in a little bit. First, though, we're going to talk to Dan Cragg. Dan is a partner at a law firm called Eckland & Blando, which is in Minneapolis. He's going to be talking today about a case that involves some First Amendment discrimination and some Title VII issues. But Eckland & Blando's real bread and butter is suing the government when it reneges on its contracts- which is kind of a big deal. The government has a lot of contracts. Now, we don't do that work here at IJ, but we are fully supportive of the government being held to its obligations, whether they're in the Constitution or in a contract the government signs and promises to pay on. So Dan, could you just tell us a little bit about what that world is like- where you have all these clients who, to some extent, go into business with

the government because it’s so big and has all this money to spend. They have to do it. And then the government says, “Well, we don’t want to do that anymore, but you can sue us- and we have sovereign immunity.” What is that whole area of law like?

D Daniel Cragg 06:43

Well, okay, so the one good thing is we do have a big, giant sovereign immunity waiver for contract claims. And we even have a specialized court- the Court of Federal Claims in D.C.- which is a national court. So it's one of the few trial courts that gives you essentially a national bar license to go and practice government contract law anywhere. But beyond the sovereign immunity issue, keep in mind that the federal government doesn’t actually negotiate any of its contracts. In fact, it has a whole code of regulations full of contract clauses, and the contracting officer just checks the boxes when issuing the contract. If they fail to check the correct box, the court will still deem that clause part of your contract anyway, if it finds it fundamental to federal government contract law. In terms of performance, you can run into issues where, as the contractor, you have a disagreement with the contracting officer about whether something is in scope. And unlike with a normal private contract, when the contracting officer says, “I think I’m right, go do it,” you don’t get to hold off and say, “No, we need to reach an agreement on this change order first.” You have to go ahead and do it- and then sue the government for the money afterward. In almost all contract issues, it’s on the contractor to actually submit a claim to the contracting officer, even to defend themselves. From there, you can go either to the Board of Contract Appeals- civilian or military- or to the Court of Federal Claims, which applies a slightly modified version of the Federal Rules of Civil Procedure, and then appellate jurisdiction goes to the Federal Circuit after that.

A Anthony Sanders 08:21

And with states, it's largely the same, right? But it differs a little, state by state. I know, Minnesota is a little unclear, like what rights you even have, but they just kind of go with it.

D Daniel Cragg 08:34

States are much less organized in many ways, to their detriment on this. But yeah, you sometimes run into these unclear issues of sovereign immunity waiver at the state level. My firm actually had a big hand in putting together the ABA 50-state guide to government contracting. And it’s amazing how thin some of the states are. I think part of the reason is that many state agencies understand they actually need these contractors to survive- and to show up next year to pave the roads again- so they can be pretty good about working some of these issues out. But not to get too off track, I had a case in district court in St. Paul involving a settlement agreement breach of contract, where the district court said there was no sovereign immunity waiver for the settlement agreement and dismissed it for lack of jurisdiction. And somehow, while it was on appeal, the judge ordered us to a settlement conference with her. I had to explain to the judge: if we enter into a settlement agreement again today, you've already held that you don’t have jurisdiction over this, and I can’t sue the state for it. So how is this going to work? I asked her to approve a consent decree to do it, and I honestly can’t even remember how we resolved that- I think we did- but I don’t remember if she actually entered

the consent decree. It was one of those moments where you're with the judge, without the other party, because it’s a settlement conference, and she realizes that her ruling doesn’t make any sense.

A Anthony Sanders 10:05

That's kind of a fantasy that so many lawyers have- but you actually got to be there. Well, let's talk about another ruling that doesn't make any sense, and that’s what you’ve been dealing with in the Eighth Circuit. So this is an opinion- we’re going to talk about an opinion and the rest of your case. It came out last December, but then there was a remand, and it’s going to go to trial soon. There’s a lot going on here, but it involves some First Amendment retaliation issues, which, of course, we deal with here at IJ, so we're very interested in what you have to say.

D Daniel Cragg 10:43

Okay, where do you want me to start? Should I start with the facts of the case in the trial court.

A Anthony Sanders 10:50

Maybe quick summary of the facts of the case, and then we can get to what the Eighth Circuit said. And you know what's happened since.

D Daniel Cragg 10:56

So my client was the chair of the OB-GYN department at what’s now called Hennepin Health Services. It used to be called Hennepin County Medical Center. Hennepin County is where Minneapolis is, and HHS is a very large public hospital. I think their revenues are at least 1 billion, maybe 2 billion. They’re what you’d regard as a public social safety net hospital for the area- a trauma hospital, teaching hospital, etc. The doctors who work there still make great salaries for public employees; I think they’re pretty competitive. But the type of doctor who wants to work there often has a social justice bent. My client, for most of her life, was totally on board with that; I think she would have described herself as a liberal. Then 2020 rolled around. During the lockdowns and all the changing processes, she started expressing some opinions on her personal Facebook page that became controversial in her department. Now, five years later, some of these are regarded as true statements. She said things like, “It seems like COVID originated in a lab,” and “The Chinese government is covering it up.” For that, she was called a racist, even though the FBI, CIA, Department of Energy, and others have made findings basically saying they think it originated in a lab. She also said, regarding the Minneapolis riots after George Floyd’s murder, that she was not in favor of defunding the police and didn’t think that was a good idea for the groups they serve. Of course, the younger doctors with two college degrees said that was really racist and that she needed to get on board with this.

A Anthony Sanders 12:56

And for context, some of these riots were literally around the hospitals that HHS runs

And for context, some of these riots were literally around the hospitals that HHS runs

D Daniel Cragg 13:01

Yeah, and one of the things they really got mad at her for is that many of them joined a group called White Coats for Black Lives, which is connected to Black Lives Matter, and they were going to rallies wearing their HHS doctor uniforms. She said, “Whoa, we’re a public hospital- you can’t wear your uniforms to a political rally. You can do that on your own time, but you can’t make us associated with that.” That was partly about her on-the-job statements and partly about her personal Facebook posts. She also pointed out that the Black Lives Matter organization is a Marxist organization, according to its founders, and she wasn’t on board with that. The response from the doctors was, “Oh my God, she’s a terrible person; I don’t want to work with her.” Eventually, these doctors convinced management to act. It wasn’t pitched as an investigation, but HR people were brought in to do a climate survey. The survey came back recommending that she be removed, which was beyond their mission. The bylaws say a chair can only be demoted when the Medical Executive Committee- the other chairs- vote on it, and then the Board of Directors of the entire hospital has to ratify that decision, which is important to understand for our case. They asked her to resign; she refused. The issue went to the Medical Executive Committee, who reviewed a big 80-90 page packet including some of her personal Facebook posts, and they voted to demote her. Then it went up to the Board of Directors. In discovery, we learned that the board had a short, about 10-minute presentation- they didn’t have the Facebook posts, and it was kind of pro forma. Then something else happened after the case got to the Eighth Circuit, but I’ll go chronologically. I’ll also note the case was tough procedurally and for discovery, because the magistrate judge limited us to 10 depositions, maybe a few more. We had a group of 10-12 doctors in the department, another 10 people on the Medical Executive Committee, and 10 on the Board of Governors- all relevant to what happened and the decision. We couldn’t depose everyone; we tried, but the judge said no, you’re stuck at 10. So we had to make tough decisions, which makes the trial harder when you have transcripts for some witnesses and not others. That’s basically what happened in the trial court. We went in for summary judgment. The case was defended by the Hennepin County Attorneys, because HHS is a separate corporation but subordinate to Hennepin County. They moved for summary judgment on our First Amendment retaliation claims and on Title VII and Minnesota Human Rights Act discrimination claims. The Minnesota Human Rights Act is essentially the state version of Title VII. Judge Susan Richard Nelson dismissed the Title VII and MHRA claims on the merits, but on the First Amendment retaliation claim, she only addressed Monell liability. Anthony, for your audience, should I explain Monell?

A Anthony Sanders 16:32

Just real quick. I think most people out there know a little bit about it. But yeah, real quick.

D Daniel Cragg 16:37

Okay, so when you bring a claim under 42 USC Section 1983- this is the Civil Rights Act passed after the Civil War to enforce the new constitutional rights in the 14th Amendment, etc.- it specifically references that any person is liable. The Supreme Court has held that vicarious liability does not attach to Section 1983 claims. So, the only way you can sue something like a county or a government corporation is when the final policymaking authority, as defined by

state law or its rules, either commits the constitutional violation or approves and ratifies it. It was undisputed in our case that the Board of Directors is the final policymaking authority for HHS. We had taken a 30(b)(6) deposition where the representative for HHS said that the Board of Directors approved the decision by the Medical Executive Committee and the basis for it, which is exactly what we need to prove for Monell liability. The question and answer were perfectly lined up for what we need to prove. The Medical Executive Committee had the Facebook posts we argued she was retaliated against for, and Judge Nelson called our 30(b)(6) admission a slender reed upon which to base our case.

A Anthony Sanders 18:13

This is giving me flashbacks to so many IJ cases where we've had 30 (b)(6) of cities or whoever, saying basically the same thing. And, yeah, anyway, go on.

D Daniel Cragg 18:25

I've seen this happen fairly often in civil cases, where the judge doesn't like your case, you have some damning admission, and yet the judge dismisses it. We're under a preponderance of the evidence burden, so you have to say, "Judge, we convict murderers in this country beyond a reasonable doubt based on confessions- how is it that under a preponderance of the evidence standard, sworn deposition testimony is a slender reed?" Well, she dismissed the whole case, and we took it up on appeal. Of particular note for your listeners: during the case, my client and I were guests on the Megyn Kelly podcast to talk about it. Megyn asked me what I thought our odds were in the district court, and I said something like, "I think we'll have some trouble in the district court, but I'm confident the Eighth Circuit will go our way." The Hennepin County Attorneys actually quoted that in their summary judgment brief- saying, "I think I'm going to get my case dismissed." Then we took it up to the Eighth Circuit.

A Anthony Sanders 19:32

I'm not going to ask you that question-

D Daniel Cragg 19:33

I mean, it's basically the same answer. We went up to the Eighth Circuit and had an interesting panel led by Judge Loken- who has got to be one of the oldest judges on any federal circuit at this point. I could be wrong, but I think he might be around 90 or close. We argued the case in June of last year and didn't get a decision until December. What's perhaps most interesting about the opinion- I'll tell you the result first- is that we got a reversal on the First Amendment retaliation claim. (By the way, Judge Loken is 85, not spry- sorry, Judge Loken!) We got a reversal on the Monell issue, basically saying that with this record, including the admission, plus other points we raised in the brief- like that two members of the Board of Directors were also on the Medical Executive Committee, so at least two had seen the posts- they said this was a tribal issue. The court went further, invoking the Pickering balancing test for public employee retaliation claims, giving the district court some instruction. They went even further and said she was clearly speaking on a matter of public concern, and that a jury might need to be

impaneled to decide if there was disruption in the department, with special interrogatories. I can talk more about how this is playing out on remand. So the court gave us this great First Amendment retaliation reversal. Then we got to the Title VII and Minnesota Human Rights Act claims- and the court punted. They said, “We’ve already reversed on the First Amendment retaliation issue, so the rest is really interlocutory,” and declined to address those claims. Of course, the district court on remand can revisit its summary judgment decision- but we don't see any need to do any further review here. So, go back to the trial court.

A Anthony Sanders 21:40

So to be clear, the district court had addressed the merits of the Title Seven and the state claim

D Daniel Cragg 21:45

yes.

A Anthony Sanders 21:45

So they were just as addressed as the First Amendment stuff.

D Daniel Cragg 21:56

Correct. Actually, more addressed

A Anthony Sanders 21:58

Well, right. Because that was just Monell on First Amendment, right?

D Daniel Cragg 22:01

Right. Yeah, they were more addressed fully. It was at both sides full briefing, like we were ready to go on that the oral argument spent most of the time on the Title Seven argument

A Anthony Sanders 22:10

Right. So the quite, the delicate question is, how could the Eighth Circuit think that's interlocutory?

D Daniel Cragg 22:18

I think this is a quirky idea that Judge Loken has, that we only if we're doing a middle of the case appeal, even from a final judgment-

A Anthony Sanders 22:30

But it's not the middle of the case, it's final. It's a case that could have gone further. It could have gone to trial, but it didn't. It's over. If you hadn't filed the Notice of Appeal, it would have been history.

D Daniel Cragg 22:43

You think Judge Loken is wrong on this, but in an effort to steel man the argument, he is taking a view that if you are appealing from summary judgment and not post trial, and we find one issue to reverse on, we're not going to touch the rest until after trial. And so to be clear, the Title Seven and MHRA claims we still get to appeal when we get to the next final judgment. Those are those are still happening-

A Anthony Sanders 23:09

But are they going to trial?

D Daniel Cragg 23:11

No.

A Anthony Sanders 23:13

So when you appeal, say you lose at trial. You will be appealing First Amendment trial judgment and summary judgment on the others. And so in theory, you could lose on first amendment on appeal, but win on the others and be remanded for another trial.

D Daniel Cragg 23:29

Correct?

A Anthony Sanders 23:31

Well, that sounds efficient.

D Daniel Cragg 23:32

It’s very efficient, and you know, remember the rule against piecemeal appeals that we’re trying to deal with here. That’s why I think Judge Loken is, frankly, wrong. Maybe this is an unwarranted inference, but this is a 12-page opinion- it didn’t take from June until December

unwarranted inference, but this is a 12-page opinion. It didn't take from June until December just to write it. I imagine what they were really fighting over was the interlocutory part of the appeal, and eventually they gave up trying to convince Judge Loken otherwise and just wanted to get the decision out.

A Anthony Sanders 24:04

Okay, so it's remanded, and now you've done a little more discovery, and it's trials coming soon?

D Daniel Cragg 24:09

We haven't done much more discovery, but one big thing happened that was really interesting. When we were talking about trial witnesses- especially on the Monell issue- and saying we might have to call the whole board, the Assistant Hennepin County Attorney reached out to check availability. In talking with the General Counsel at HHS (all public record now), the General Counsel apparently said, "Why do you need them to testify? Can't you just use the video?" The county attorney asked, "What video?" We then learned that this so-called pro forma meeting, where they were supposed to testify and didn't really talk about my client's views, was actually a 30-minute portion of a Board of Directors meeting recorded on Microsoft Teams. In that meeting, they were clearly aware and concerned about my client's political views. At least one member asked, "Why are we just demoting her? Can't we terminate her?" To which the president of medical affairs, who presented at both the Medical Executive Committee and the board, responded, "She's a fantastic doctor with five pages of accomplishments. This isn't an HR issue where we can terminate her; it's a leadership issue." Really, the other doctors were essentially staging a coup. This video was produced to us, and I give full credit to the Hennepin County Attorneys for doing the right thing- disclosing it and taking responsibility. But we moved for sanctions against their client, HHS, because if the General Counsel knew this video existed, it should have been turned over in discovery, and they didn't properly collect it. What's worse is that one of our 30(b)(6) topics was their ESI (electronically stored information) collection activities, but Magistrate Judge Foster blocked us from discovery on discovery and entered a protective order. So the court prevented us from getting to the bottom of this. And lo and behold, here it is.

A Anthony Sanders 26:31

Okay, is that now in the record, so it'll be introduceable at trial, or you got motion eliminate on that.

D Daniel Cragg 26:37

Okay, so here's the most interesting part of the remand for your listeners. Under Pickering, the First Amendment retaliation claim mostly involves a question of law- the court balances the public employee's right to free speech against disruption and efficient government operation. The Supreme Court has held that's a legal question for the court to decide. However, subsidiary factual questions still go to a jury because of the Seventh Amendment. So Judge Nelson bifurcated the case: the first trial, starting June 23, will focus solely on the Pickering issues, with

the jury answering special interrogatories about disruption and related matters. Then, assuming she doesn't dismiss on causation or damages, there will be a second trial. In my view, the decision to demote her isn't relevant to the Pickering analysis, which is about disruption within the department. That video won't be part of the first trial but will be part of the second. I don't think there will be any dispute- it's evidence of Monell liability, right? It's about the decision.

A **Anthony Sanders** 27:58

So yeah, Pickering is a case we've talked about before- it's from the early '70s when the Supreme Court ruled that the First Amendment applies to public employees and their speech in some way. It's interesting because we just did a couple episodes about Tinker, which is a case from just a few years earlier, about the First Amendment applying to public school students and their speech. In some ways, this might be a bit of a sidetrack, but it seems like the issues are kind of similar: whether they're students or public employees, they have First Amendment rights and can say certain things, but if what they say- especially at school or work- causes disruption, that's when we have to pay closer attention, and the government gets a bit more leeway or hands-on control.

D **Daniel Cragg** 28:54

Yeah, I agree- Pickering is definitely worth discussing because we've preserved the issue of potentially overruling it. The way I see it, Pickering basically functions like a heckler's veto- but flipped the wrong way- and the context is very different between students and public employees. Public employees are adults; they can be told to get back to work and not cause trouble over something like this. In my case, we have medical doctors, mature professionals, who basically threw a tantrum because their boss posted on Facebook things they didn't like. If that caused disruption in the department, I don't think it justifies overriding her First Amendment rights. Saying junior employees can stage a coup and threaten to quit just because they dislike what their boss says on her own time- that's exactly the heckler's veto. With kids, sure, they have less agency and are required to attend school; they're not hired or paid employees, so the dynamics are different. But public employees should be told to be professionals, focus on their work, and not police their boss's private speech. In my view, strict scrutiny should apply here rather than the looser Pickering balancing test.

A **Anthony Sanders** 30:33

Well, Michael, you've done a few First Amendment cases in your time. You've also, I know, had some remands and re appeals in various areas from time to time. So curious, your response to this?

M **Michael Bindas** 30:47

Yeah, I want to get back to this kind of philosophical and maybe theological question of when you assess an appeals, interlocutoriness. So if I'm understanding this correctly, the appeal, the actual thing you notice was not interlocutory, because there was a final judgment disposing of

all claims, but at some point during the pendency of the appeal, perhaps when the panel authored the penultimate paragraph of the opinion. It then became interlocutory based on what had preceded the penultimate paragraph. I want to make sure I'm getting this correctly.

D Daniel Cragg 31:29

You are. Except I think it's a little worse than that, like you're right that it was a fully final judgment dismissed case. But the First Amendment analysis is not the penultimate paragraph, okay? But as I read this, and I not to be too flippant here, I'm assuming they were writing in Microsoft Word, what they're basically saying is that when they finish the paragraph on First Amendment retaliation and click the Return bar, the case has now become interlocutory.

M Michael Bindas 32:01

I don't know what rule of appellate procedure is it that we may need to revisit and light up this is,

A Anthony Sanders 32:09

Yeah, that’s a common scenario- courts often affirm or reverse on one claim and then say they don’t need to reach the others because that claim is enough to resolve the whole case, usually when the case is over and no further relief is available. But here, since the remedy is a remand for the case to continue, it does seem odd not to address the other claims now. Normally, when a case goes back for further proceedings, the court would at least give some guidance on the remaining issues so the lower court knows how to proceed. So I get why you’re puzzled- ignoring the other claims at this stage, when the case isn’t fully resolved, feels unusual.

D Daniel Cragg 32:50

You would and also these claims all get different relief, you know, so it matters.

M Michael Bindas 32:57

So you could have a series of non interlocutory appeals that become interlocutory and kind of go through an endless cycle until you exhaust the six or seven claims at issue in the case?

D Daniel Cragg 33:09

Yes, we could have like seven appeals to get to the actual finality in this case. And there is a fee statute for all of these claims. So I guess if we do that it's-

A Anthony Sanders 33:32

Well, we have a lot going on here. We have with Pickering. We have the retaliation itself, and then we have this interlocutory-ness. What is the timeline you have the trial just about the start on the first issue and then is the next one even scheduled yet?

D Daniel Cragg 33:51

The court wanted to schedule it in August. And the attorneys did say, "Please, Judge, can we not go to trial every other month" and have requested it in the fall. Yeah, please don't take away two of our summer months judge, and she's considering that so far, I think hopefully we go to October or November on that. Between you and me and your audience, I think she's going to dismiss the case again. So I'm not sure she intends to get to the second trial only if by accident, because you're given a calendar, and that's the panel for your calendar, right,

A Anthony Sanders 34:22

Yeah. Well, you know, Judge Loken standing by for when you get back to the Eighth Circuit. I don't know if it would be the same panel or not actually-

M Michael Bindas 34:38

Right. I was gonna say, but the meter is running on your fees the whole time, so it's all works out to to your advantage.

D Daniel Cragg 34:45

If I win

M Michael Bindas 34:48

We'll know in seven years. Yeah, Judge Loken will be 92 at that point.

A Anthony Sanders 34:54

Well, that’s some great stuff happening in the Eighth Circuit- definitely complicated. But, of course, one rule of appellate procedure is that it gets even more complicated in the Ninth Circuit. So that’s why we’re turning to Estate of Daniel Hernandez v. LA, which is going to be a big deal in a moment. This Ninth Circuit case, as I said, reads at first like many of the qualified immunity cases we’ve talked about on the show and some we’ve even litigated at IJ, but it takes an interesting angle in one of the concurrences. Michael is going to tell us how it does that.

M Michael Bindas 35:38

Sure. To start off, Anthony, I have to correct you on the caption of the case: it's not Estate of Daniel Hernandez versus MLH but rather Estate of Daniel Hernandez and MLH versus the City of Los Angeles. This distinction is relevant because MLH is the minor daughter of Daniel Hernandez, which will matter as we get into the case. This case involves the shooting and killing of Daniel Hernandez by a police officer, and the lead claim here is a Fourth Amendment excessive force claim, which we'll talk about shortly along with qualified immunity. However, that's not the main reason I chose this case today. Just this past week, we celebrated the centennial of Pierce v. Society of Sisters, a canonical U.S. Supreme Court case, along with Meyer v. Nebraska, which recognized the fundamental right of parents to direct the upbringing and education of their children. Since I do a lot of work in educational choice, Pierce is one of the most significant cases we advocate around, supporting school choice programs and empowering parents. So listeners might wonder how a police shooting case in the Ninth Circuit connects to Pierce and *Meyer- *we'll get there. But first, let's briefly recount the facts: two LAPD officers arrived at a multi-car collision scene where about 25 people were screaming and yelling that there was a "crazy man" armed with a knife threatening self-harm. The officers got a radio call describing the suspect as armed with a knife. They saw the suspect rummaging around the center console of a truck, and then he exited the truck and briefly hid behind it. One officer repeatedly called out to show his hands. The suspect emerged shirtless and sweating profusely, which led the officer to believe he was on meth, which turned out to be true. The suspect then began walking toward the officer; the officer backed up about 10 feet and continued yelling multiple times to drop the knife. Instead of dropping it, the suspect extended both arms and kept approaching. After one final command to drop the knife, the officer fired two shots. The suspect fell but quickly rolled over and partially stood up again; the officer fired two more shots, causing him to fall again. The suspect crawled into a fetal position and rolled away, prompting the officer to fire two final shots that were fatal. The entire encounter lasted barely over six seconds. Daniel Hernandez's parents and his minor daughter filed lawsuits against the city, the LAPD, and the officer who fired the shots, alleging Fourth Amendment excessive force, municipal custom and policy liability, various state law claims, and importantly, interference with their right to familial integrity under the Fourteenth Amendment. Specifically, the parents alleged deprivation of companionship with their son, and the daughter alleged deprivation of companionship with her father. This last claim is where Pierce and Meyer tie in. Regarding the excessive force claim, the district court granted summary judgment to the officer, holding that the force used was reasonable and that even if it violated the Fourth Amendment, the officer was entitled to qualified immunity because the law wasn't clearly established. A three-judge panel of the Ninth Circuit partly affirmed and partly reversed: they held the reasonableness of the force was a triable issue for the jury but agreed the officer was entitled to qualified immunity. The family petitioned for en banc rehearing, leading to a divided decision that came out just last week.

A Anthony Sanders 41:37

Which, as I always, like to say, is en banc. The Ninth Circuit is not actually en banc, but is 11 of the 29 active judges of the Ninth Circuit.

M Michael Bindas 41:45

So a little over a third of the en banc judges agreed- so it's basically en banc-ish. The majority agreed with the panel decision that there was a triable issue of fact regarding the reasonableness specifically of the fifth and sixth shots, while agreeing with the officer and LAPD

that the first four shots were reasonable. The shots came in three volleys of two rounds each, and the majority said the first two shots- and, although closer, the second two- were reasonable because the suspect was standing and moving toward the officer with the box cutter, and even after the first two shots, he was trying to get back up and orient toward the officer. The majority concluded the force was reasonable up to that point. But as for the third volley- the fifth and sixth shots- the officer or jury could reasonably find that the suspect no longer posed a threat and that the officer had a duty to reassess as the situation unfolded, whether the suspect was incapacitated or still posed a threat. This question, they said, should go to the jury: should the officer have known, based on reassessment, that there was no longer a threat? The en banc majority also held that if the officer continued shooting when the suspect no longer posed a threat, she would not be entitled to qualified immunity because it is clearly established in the Ninth Circuit that an officer cannot reasonably keep shooting a suspect who is on the ground, wounded, and showing no sign of getting up. Judge Collins, concurring in part, concurring in judgment, and dissenting in part- who authored the panel opinion- agreed there was a triable question about whether the last two shots were unreasonable but believed the final shots did not violate clearly established law and thus the officer was entitled to qualified immunity. Finally, a third opinion authored by Judge Nelson and joined by Judges Bress, Bumatay, and Bade agreed with Collins that there was no violation of clearly established law, so the officer was entitled to qualified immunity, but went further, arguing there was no Fourth Amendment violation at all, as no reasonable jury could find such a violation. They reasoned that in this intense, 6.2-second encounter, the officer had no obligation to reassess between each shot and that the duty to stop firing arises only if an objectively reasonable officer would view the suspect as clearly incapacitated. Here, since the suspect had just tried to get back up and was still moving after the fourth shot, that duty had not yet arisen. They also slightly disagreed with the majority's factual view that the suspect was curled in a fetal position, instead seeing him as repositioning- bringing his knees to his chest- to raise himself on his forearms.

A Anthony Sanders 46:00

There's this video too. So it seems like one of these cases we've talked about before, where the judges read the video differently, which to me, means, well, it seems like that's a question for the jury, because they disagree on the facts. But that was their take.

M Michael Bindas 46:18

Judge Nelson also pointed out what he sees as a perversity in the en banc majority's reasoning, stating, and I'm quoting him here, "It discourages any reassessment; when in doubt, the officer should now continue shooting or risk liability. Not a great message." Basically, he's saying that if, as the majority holds, there is an obligation to reassess between shots four and five, the incentive for officers will be not to pause but just keep shooting until, for lack of better words, the deed is done and the suspect is terminated. It's an unfortunate factual circumstance, but the Fourth Amendment and qualified immunity issues are not why I chose this case; rather, it's the tie-in to the centennial of Pierce. When you invited me, Anthony, I thought, let's look at great parental liberty interest cases, so I did a quick Westlaw search, and the most recent case wasn't a parental liberty case but this Ninth Circuit excessive force case. So how does Pierce tie in? The parents brought, as a wrap-up claim, an abridgement of their right to companionship with their son, and the minor daughter of Daniel Hernandez brought a claim for loss of

companionship with her father, both claiming this liberty interest under the Due Process Clause of the 14th Amendment, invoking substantive due process. The Ninth Circuit panel and en banc majority disposed of this claim by saying that even if such a 14th Amendment right exists, the officers' conduct did not "shock the conscience," which is the typical test for substantive due process claims involving executive actions like police conduct, and therefore ruled against the family. Judges Nelson, Bress, and Bumatay would have gone further, questioning whether the parents even have a liberty interest in companionship with an adult child or whether a minor child has a liberty interest in companionship with a parent at all- not just whether the "shock the conscience" standard is met but whether the liberty interest exists at all. Judge Nelson criticized the Ninth Circuit for "stumbling into recognizing these substantive due process rights" without properly applying the Glucksberg test, which is the Supreme Court's framework to determine whether a claimed right is fundamental and protected by due process. The Ninth Circuit had never done a Glucksberg analysis on these companionship claims, and Nelson urged the court to reassess earlier decisions recognizing a liberty interest in companionship with an adult child or a child with a parent. The Glucksberg test involves two steps: first, a careful, specific description of the asserted fundamental liberty interest, not a broad generalization; and second, an assessment of whether the right is deeply rooted in the nation's history and tradition and implicit in ordered liberty. Nelson acknowledged that parents have a liberty interest in the upbringing and education of minor children, citing Pierce and Meyer, but noted most circuits reject extending that right to companionship with adult children. As to a child's right to companionship with parents, Nelson explained Pierce and Meyer rest on the historical tradition of parental authority and duty in child custody and care, emphasizing that parental liberty is based more on duty than on rights. He argued it makes little sense to transform those cases about parental authority and duty into cases about children's rights, highlighting a key quote: "If children do not have a duty to care for their parents, why would they have the corresponding right to enjoy their parents' companionship?" Nelson urged the Ninth Circuit to reassess recognition of these rights under Glucksberg, which is interesting for several reasons, including that Glucksberg was decided in 1997 and requires this particularized analysis. Yet Meyer itself never tried to precisely define the liberty protected by due process, instead describing it broadly as encompassing "not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home, and bring up children to worship God according to the dictates of his own conscience," and generally to enjoy "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." This broad approach from Meyer seems to stand in stark contrast to Glucksberg's narrower, more myopic focus on defining rights at a very specific level. I find Judge Nelson's opinion in the Ninth Circuit very interesting because it attempts to apply the Glucksberg test to what the court has long called one of the oldest liberty interests recognized under the 14th Amendment. Historically, the cases recognizing this liberty interest, like Meyer and Pierce, took an approach almost antithetical to Glucksberg's; they broadly presumed liberty rather than narrowly defining a claimed right with exacting specificity. Another fascinating point is that Meyer and Pierce, while now understood as landmark parental liberty cases, were actually brought by educators- Robert Meyer, a teacher, and the Society of the Holy Names of Jesus and Mary, a religious order running private schools. The Court in those cases was as much concerned with protecting the rights of Meyer and the Sisters to provide educational services and contract with parents as it was about parents' rights, reinforcing the idea that liberty can be abridged in various ways and implicate multiple rights. This creates a striking contrast with Glucksberg's narrower approach. Also, Judge Nelson's provocative line- that if children do not have a duty to care for their parents, why would they have a corresponding right to enjoy their parents' companionship- is curious because if the law imposes a duty on parents to care for their children, it could reasonably be argued that children have a correlative right to receive that

care and to claim against the state when that care is interfered with. It's surprising to see these issues arise in a police shooting case, but it nicely illustrates the uncertainty among lower courts regarding the true scope and meaning of Meyer and Pierce, the rights recognized there, and the level of scrutiny applied to claims of their abridgment. After a century of these landmark cases, there remains significant confusion about their scope, and it seems inevitable the Supreme Court will have to clarify their meaning at some point. Whether either party plans to petition for certiorari here is unknown, but the need for clarity is clear.

A **Anthony Sanders** 59:06

So Dan, you have children who I would hope feel duty towards you. Any any thoughts you have about this issue or otherwise of this case?

D **Daniel Cragg** 59:19

Let me say first, I'm fully on board with the idea that parental rights and duties predate government and that when the government interferes with the family, there should be constitutional scrutiny. But I think the Ninth Circuit has lost the plot here because what they're really discussing is a derivative type of loss of consortium claim, which is way too far afield. To put it another way, if they're going to recognize such a claim under Section 1983 or the Fourth Amendment, okay, fine- I'm sure there's some support that American common law recognized such claims in the late 19th century- but those claims are not independent. You typically need to prove the underlying intentional tort or negligence for the spouse or children to recover, and in many jurisdictions, loss of consortium is treated more as an element of damages rather than a separate cause of action. In a shooting case like this, I assume that the interference with familial relations claim would still require proof of the underlying Fourth Amendment violation. Michael, can you weigh in on whether the opinion addressed this? Specifically, if a cop shoots your family member, can you bring a standalone claim for interference with family relations, or do you have to prove the Fourth Amendment violation first?

M **Michael Bindas** 1:00:56

Yeah, I don't think the opinion really got into that, though I'd have to double-check, but I believe part of the reason for dismissal was that the state law claims were intertwined with the Fourth Amendment claims and failed along with them.

A **Anthony Sanders** 1:01:14

But wasn't it at the panel level that they said there was no substantive due process claim because it didn't shock the conscience?

D **Daniel Cragg** 1:01:24

Yeah, but even without the opinion, we know the test is shocks the conscience when you haven't defined the right at all, right?

A **Anthony Sanders** 1:01:32

Even if Mr. Hernandez had survived and brought a substantive due process claim related to his own rights, it would still come down to whether the officer's conduct shocked the conscience. So I think what this is really about is that the officer's conduct has to shock the conscience as to the direct violation of the substantive due process right, and then the question becomes who else- like family members- can benefit from that right, which is its own substantive due process issue.

D **Daniel Cragg** 1:02:14

Yes and no, because the Supreme Court, in other Section 1983 contexts, has been fine with importing state tort law. For example, it imports state statutes of limitations and wrongful death statutes. So I think it would be consistent with Supreme Court precedent to allow a loss of consortium–type claim under Section 1983 that borrows from state law in a particular jurisdiction, similar to wrongful death claims.

A **Anthony Sanders** 1:02:44

True, although I think there are nuances, you would have to analogize it to let to some kind of constitutional claim which I think you're getting at.

D **Daniel Cragg** 1:02:57

And to state it a little more plainly, I think if there were no Fourth Amendment violation and a police officer shoots a family member, that can't possibly be a constitutional tort. They didn't shoot the person intending to interfere with familial relations. They probably had no idea he had a family. And which is why I think, again, Ninth Circuit is just way, way too attenuated in its reasoning.

M **Michael Bindas** 1:03:21

Well, you could come to that conclusion in two ways, right? Either ask whether there is a constitutionally protected right implicated at all, or apply whatever level of scrutiny is appropriate to assess whether the officer was justified, for lack of a better word, in shooting. So, I think you could defeat the claim by either approach.

D **Daniel Cragg** 1:03:47

But again, it seems to me, it just comes back to this is a derivative type of damages. That's how you solve this, without creating a brand new constitutional right.

A Anthony Sanders 1:03:58

I think for the parents of Mr. Hernandez, that seems pretty clear to me. Like, if anything happens to an adult, can the parents of the adult, if they're still around, have a claim for loss of consortium, as you put it? That really seems like a state law tort issue and doesn't seem like Meyer or Pierce, to put it that way. But the big issue is the daughter's claim. So put it in a different context: say she's living at home with her dad and the state comes and takes him away with no due process, no charges, they just disappear him. Say he's a U.S. citizen and they just vanish him. Would she have a substantive due process claim for her rights being violated, in addition to whatever claims he would have against the state? That's where I think there's a problem because if he's taken away, that seems to fall in the Meyer and Pierce zone. If he's taken away, doesn't she have some kind of corresponding constitutional right to have the state not make it so she effectively doesn't have a parent? I get the line Judge Nelson uses about duties, but that really rubbed me the wrong way. This is why I opened with the lines from Plato's Republic- by the way, probably not exactly what Plato thought, but in the Republic, the argument put at this point by Socrates is that no one will have their kids, the state will raise them, everything will be great, no one will know who their parents are, so no one will have duties to their children. But what if in modern America you know who your parents are, but the law says you have no duties to your kids? You don't have to provide for them anymore; you can just give them up to the state if you want. And I say, I like my kids and I'm going to keep providing for them regardless. So I have no duty, but I still provide for them, because that's just natural prior to the state. At that point, do I not have a constitutional right to direct my kids' upbringing just because I no longer have duties? That seems absurd. So that's a thought experiment, but it seems to me on the flip side the child has a right to have the parent around, to have the state not interfere with the parent being there, even if the parent has no duty. Maybe that's too many levels of philosophy, but if this becomes more of an issue in another case, and I know this was just a few paragraphs and not really briefed much in the concurrence, I think there are other considerations that would be worth looking into.

M Michael Bindas 1:07:27

It certainly involves philosophical questions as deep as the interlocutoriness issue that we were discussing before. I mean, I don't know if Plato had anything to say about that, but

D Daniel Cragg 1:07:38

Let me try to answer your question this way, Anthony. I think you have a good thought exercise there, but what I keep coming back to is that the right of the family, or its independence from government, must be defined with enough specificity because everyone is somebody's family member. That status alone can't give rise to a tort claim against the government. There must be actual government action targeting the family unit- like a law that takes kids away and sends them to boarding school without due process, or something along those lines. Simply saying you injured my dad in the course of something, and who cares if he's a parent, doesn't make sense as a basis for a claim.

A Anthony Sanders 1:08:29

Understood. Another way to think about this, and I think this might be along the lines of what

you're saying, Dan, is that in Meyer and Pierce, we talk about the rights of parents, but really what's going on is the right of the child. Of course, the child doesn't have the will or the capacity to stand up for that right, so the parent is guiding the child, saying, "No, you're going to a school where they teach German, and that is my right I'm trying to protect." It's not the kid who's actually saying, "I want to go speak German," but at the core it's for the good of the child. So we defer to the parent for the good of the child, not to the state, and that's the right we're talking about. So in another context, maybe we're really talking about the right of the child, and anything else is just layers upon layers that are not best addressed by the Constitution.

D **Daniel Cragg** 1:09:28

Let me try to reframe what you said just a little differently. It's not actually about the rights of the child. It's a recognition that recognizing the power of the parent to direct the upbringing is, on the whole, going to be better for the child than the government doing it, but it's certainly not guaranteed to work out that way in every instance. It's a system where, not to be too utilitarian, kids are generally going to be better off with parents making the decisions. There will be some bad parents, and the kids with bad parents suffer, but it's not that their rights are being infringed. It's just the way humans should operate in a system of ordered liberty.

A **Anthony Sanders** 1:10:06

And we do that- the Constitution recognizes what we call the rights of parents. But I think there are other rights involved as well. I'm also aware that we've gone on a bit long, but I hope the audience has found our discussion interesting. Thank you, Dan. Good luck with your trial(s), as they may be happening soon. Thank you, Michael. We should raise a glass to the 100th anniversary of Pierce, just as we did a couple years ago for the 100th of Meyer. And to everyone else, please be sure to follow Short Circuit on YouTube, Apple Podcasts, Spotify, and all other podcast platforms. Remember to get engaged!