

## Short Circuit | Episode 152

### *Election Law 2020 Special*

**Anthony Sanders** 00:04

Hello, and welcome to *Short Circuit*, your podcast on the Federal Courts of Appeals. And Whoa, Nelly, do we have some opinions from the Federal Courts of Appeals. It's our 2020 election law special. We are going to try and make some sense out of the cascade of election law cases spewing out of the courts the last few weeks, and we're guessing will continue to spew until Election Day itself, and God help us maybe beyond.

I'm Anthony Sanders, Director of the Center for judicial engagement at the Institute for Justice. Joining me today is Diana Simpson, an attorney at the Institute for Justice, a frequent guest on short circuit, and a frequent drafter of summaries of election law cases in the short circuit newsletter, which you should all subscribe to, if you don't already.

Diana, welcome back.

**Diana Simpson** 00:55

Thank you, Anthony. I'm excited to be here.

**Anthony Sanders** 00:57

We are recording this the afternoon of Tuesday, October 27. In a rapidly evolving, evolving litigation environment. So, my apologies if you're listening to this, say, three hours from now, and the list of important cases has completely changed, because that's what seems to happen every day. With all the litigation over the election and COVID-19, it's been pretty amazing time to watch the courts, both federal and state. And I'm sure and an even more amazing and intense and frustrating time, if you are an election law attorney. What we want to do today is something a little different from our usual format, we generally summarize and discuss two or three cases. Today, we're going to try and talk about a bunch more than that, we'll see how many we can actually get to. And we're going to start off with an overall summary of some of the issues being litigated across election law right now. If you're not familiar with the area, it can be immensely confusing. And I'll warn you that Diana and I are not experts on election law as a whole, but we know a bit about it, and we're going to see if we can all understand what's going on a little better together.

Now, first, a very important disclaimer, the Institute for Justice is a nonpartisan 501(c)3 organization, we don't have a quote "side," and we don't support candidates for office. We also don't litigate voting rights cases, we like voting rights, we just don't do that. We litigate in the area of free speech where it intersects with like, intersects with elections, and occasionally dabble in other election law issues if it comes up against an issue, we do litigate. But otherwise, we stay out of this area.

So, we will be discussing these cases not with any partisan axe to grind or even any litigation agenda beyond the need for judicial engagement, of course. So, with that neutrality in mind, I'm sure we'll make just about everyone listening, upset in some way--just get used to it.

In a moment, Diana is going to give us an overview of recent issues in recent cases. But first, I want to tell a story that set the stage for how it can be that all these cases happen so close to election. I'm sure a lot of people seeing all these cases come out news about what's going on the Supreme Court or state supreme courts and the federal courts of appeals are, you know, why do people wait until right before the election? to file all these cases? Why can't they figure it out ahead of time? Well, the truth is, you often don't know what the problems are until right before the election. Remember, in all of this, although there's many good people trying to make the polls work, they're run by the government. And so, they're going to work like you'd expect things work when they're run by the government, and there's only so good you can, you can make that.

My story is before I was an attorney at IJ, I was in private practice in Chicago. And I knew some people who were into a, an issue on the ballot in Illinois that fall, and this is fall 2008 when Barack Obama or senator from Illinois, was running for president. But also, on the bought ballot that fall was a question as to whether or not to hold a Constitutional Convention for the State of Illinois. This is something that Illinois and a lot of other states have where every 20 years or so, there's a vote on whether they have a new Constitutional Convention for the state, for a new state constitution. This is an idea that goes back to Thomas Jefferson that a lot of states still do. It was on the ballot that year, and I knew a couple people who were really into having a constitutional convention and so they were campaigning in favor of this. I myself could see both sides. I wasn't really into the issue itself that much. But one of my friends called me and he said that they just certified the ballots on what the questions was how it was actually going to be worded on the ballot for a constitutional convention. And he said they did it wrong. It, it tells the voter incorrectly what their vote means. And the reason for this is that the ballot question was one of these things, you get a ballot question sometimes where you needed a certain majority or super majority of the number of people who vote in the election, not just the number of people who vote on that issue. So, if you leave it blank that actually has an effect on the outcome. It gets confusing. And the instructions were even more confusing. And so, they, they were afraid that this would taint the outcome of the election.

Now, the state board that certified this language, did this like near the end of August. So, people didn't even know that the ballot was going to be wrong till near the end of August. This was like, early mid-September, I get a phone call from this guy. I say, yeah, look, this sounds wrong. I'll help you out. We get a complaint ready. We file it in court. I think it was September 19, so no more than three weeks after the board actually did this. It wasn't just us, the lieutenant governor at the time, Pat Quinn was involved, also the Chicago Bar Association, so, a bunch of us realized that this was messed up. We go to court, and the Attorney General's Office says to the court, 'Well, look, maybe the ballot isn't quite right, but it's too late. The ballots have been printed; they're sent out everywhere. Early voting is going to start in just a few days. And there's no way we can fix this.'

So, we thought about that. And in the end, the, the court kind of split the baby in half, and said, "Well, how about polling places handout a notice that at least says that you know what the ballots wrong when you vote on the ballot.'

And so that was then sent out to two polling places, by the way I then voted early that year. And in my polling place, I saw that those notices that they were supposed to hand out to the voters and they were sitting on a window. So not exactly handing them out.

**Diana Simpson** 07:08

Good enough for government work.

**Anthony Sanders** 07:10

Yes. That's that's pretty much what we expected when we got that ruling. But the lesson is the government intentionally I don't think this was through malice. I think it was just through "Yeah, well, we'll do that next time. We'll do that next time." And finally, when it was the last possible meeting, they certified the language. And then they have the audacity just a couple weeks later to argue it's too late. That kind of thing happens all the times, all the time with elections. That's one of the reasons that we have these, these last-minute lawsuits doesn't mean the last minute lawsuits are all meritorious and it doesn't mean that there's not some value in you know, sticking to the what was planned ahead of time. But it does show you why this can be kind of crazy when it gets down to election time because you have these competing interests, which are all very important.

And Diana, tell us about those competing interests?

**Diana Simpson** 08:09

Well, sure. But you know, I think one of the reasons that it's even worse this year than in previous years has got to be the pandemic because what was happening in March was obviously very different than what's happening now. I don't know that anyone would have expected this kind of fall 2020, if you had asked in Fall 2019. So perhaps even more than usual, you have things actually changing at the last minute necessitating these kinds of changes, both at the state administrative level, executive level, the legislative level in courts and all of that. And so, you know, I think this is like the first election that I remember, as an attorney who's interested in the First Amendment issues related to all of these that there are very few campaign finance cases that I've seen. And yet all of them seem to be about voting rights. What is what does the right to vote mean? What, what provisions of the Constitution protect it? What rights do people have? What's a privilege, all of those things, and, you know, we're gonna get into quite a bit of those. And so that'll be, you know, that'll be kind of fun today.

There are a couple of topics that we do need to discuss before we dig in. And one of those is what's known as the *Purcell* principle. And this appears in a bunch of these cases. And it is essentially the presumption that courts should not make last minute changes to election procedures, which is, I think, a, as a general matter, something that's relatively sensible. The goal is to avoid confusing voters and to avoid creating problems for election officials. It doesn't get into why those problems existed. So perhaps Anthony's situation from, from his private practice days, you know, that may have been the government's fault in there. But--

**Anthony Sanders** 09:59

*Purcell* was cited in the case where we lost on appeal. So, it's not surprising.

**Diana Simpson** 10:04

Well, there, there we go. You know, and so that principle stems from this 2006 SCOTUS case called *Purcell v. Gonzalez*. And so, the *Purcell* principle, you'll see it in most of these cases, if not all of them, and it just continues to come back. And then there is another test that you'll see a lot of and that's called the *Anderson-Burdick* test. And it is a balancing test, who doesn't love balancing tests? And so, what it does is it allows courts to weigh the burdens that the government imposes on electoral participation and to weigh those burdens against the government's asserted benefits.

And so, this test comes from two SCOTUS cases in 1983 *Anderson v. Celebrezze*; in 1992, *Burdick v. Takushi*. And there's been kind of a running joke and some of the short circuit write ups that we've had lately about courts that are misspelling the case name of the *Anderson* case from 1983. So, I perhaps mispronounced it, I'm not sure. But in any event, this test has continuing validity. SCOTUS applied it in 2008, to Indiana voter ID law, and it resulted in a 3-3-3 court split, which I think is what perhaps many of us expect with a balancing test, that you're going to have these results that just kind of justify whatever the preferred result was. And that, you know, that's what makes it controversial. They have inconsistent outcomes. Balancing tests are always difficult to apply, they're difficult for litigants. And it's just, they're challenging. But this test is applied to all kinds of voting laws, including early voting provisional ballots, mail and voting, voter ID, just all kinds of these different tests. And so that'll pop up in a lot of these cases too. And so those that principle and that that test are really important, I think, to understand as you're reading some of these voting rights cases.

But I think a more fundamental question than that is what the right to vote means. What is the right to vote is, you know, sometimes that's, that's debated in some of these cases, but essentially, it boils down to the right to vote in person on Election Day. SCOTUS has held that there is no right to cast an absentee ballot by mail. That was from a 1969 case called *McDonald*, that was obviously not decided in the middle of a pandemic. And you never know what, what that kind of decision would result today or what that kind of case would result in today, but that's the, the lay of the land going into it.

But I think a lot of folks know that constitutionally, you can lose the right to vote due to convictions. And so that is becoming, I think, very politically unpalatable. And they're starting to be this see shift. But this is something that I thought was interesting, and that just kind of the breakdown of what the different states do with convictions. And so, DC, Maine and Vermont are on one end of the spectrum, and felons never lose the right to vote, even when they are incarcerated. So, they get their mail in ballots, and then they just they vote. There are 16 states that have the felons losing their voting rights while they're incarcerated. But then they get automatically restored when they're released. In 21, states, they lose it while they're incarcerated and for some period of time thereafter. And they get it restored after the time period, but, typically, they end up having to pay any outstanding fines or fees or restitution before they get their rights restored. And then there are 11 states where felons lose their voting rights indefinitely for some for some crimes or require a pardon or they face an additional waiting period, or, or something like that. And so that's on the other end of the spectrum. And that seems to be shifting politically. But I suppose we'll just wait and see kind of how those how those unfold.

And so, one of the questions that that I think stems from all this or comes into play is when someone is challenging a law is restricting the right to vote, what comes into play. There are a series of constitutional

amendments that that apply, and a series of federal laws that we'll be talking about and potentially one state law, I suppose, about the about the right to vote later on.

But so, you know, the constitutional amendments: the 15th Amendment, of course, which gave African American men the right to vote in 1870; the 19th Amendment, which gave women the right to vote in 1920; the 24th Amendment, which eliminated poll taxes in 1964; and the 26th Amendment, which lowered the voting age to 18 from 21 in 1971. 26th Amendment plays a critical central role to one of the cases we're going to be talking about today, so stay tuned for that one.

And then in terms of federal laws, there are of course, a whole host of them. I think the biggest set are the Civil Rights Act, which is a variety of laws passed from 1870 to 1964. The Voting Rights Act of 1965, which generally prohibits racial discrimination in voting, including literacy tests, harassment, voter fraud, and then of course, there's all the provisions in there for historically discriminatory places. We're not really going to get into that too much, but that was a big deal at SCOTUS. Oh, gosh, 5-10 years ago.

**Anthony Sanders** 15:27

And a big asterisk on that one, of course, that some of that, at least how it's been enforced has been declared unconstitutional in recent years by, by SCOTUS, but that we're not going to get into that. And that's not what most of the cases this year have been about anyway.

**Diana Simpson** 15:41

Right. And then there's, of course, the Motor Voter Act, which was the National Voter Registration Act of 1993, which was a federal law that basically require states to make it easier to register to vote, and then a whole host of others about making voting more accessible for people who have a hard time getting to the polls. And so that's kind of the background that we'd like to provide before we just dig into the cases or dive into the cases, I suppose. And there are a ton of cases. So, we're gonna give that with the big caveat that we're only doing a really a sampling of them. There are so many right now, and it's tough to do, to do really even just a fraction of them. You know, I think some of that is because election law cases typically arise late anyway, but then there's also the pandemic. And then just, you know, beyond that, just general election law cases that are always brought right before an election,

**Anthony Sanders** 16:36

And it, and so Diana, that was wonderful summary of, of all of what is going on in these cases right now. And I think one thing, you know, that people, casual observers of voting rights cases sometimes don't quite realize, and that is, like going on in the background in a lot of these cases is that, although there are lots of provisions in the Constitution that protect the right to vote, there is no exact part of the Constitution that like gives you or guarantees the right to vote, per se, right. It's a different kind of situation.

So, the 14th Amendment, or the I'm sorry, the 15th Amendment protects the right to vote in a in a certain way. And there's even parts of the 14th Amendment, that that have equality of voting rights or, you know, you can take away state's representation if you don't protect them. But the actual, you know, platonic right to vote is that little bit of an unenumerated right, even though it's enumerated at the same time. And different judges will

kind of bring different backgrounds to how they value that in a way that maybe is a little different with, you know, an explicit right, like, free exercise of religion or free speech,

**Diana Simpson** 17:52

Right. And that, and that makes it hard, I think, for practitioners and for people trying to understand really what's going on. I mean, we're kind of hitting the highlights here today. And even then, we're not even touching a lot of the issues. And part of it is because there's just not a single test to apply. I mean, we mentioned some of the other tests, we mentioned some of the principles, but there's just so many different rights and sources of protections that you can invoke that the courts end up just kind of having this mishmash of rights that apply to your ability to go and cast a ballot in favor of, you know, representatives, and executives and, and all kinds of other issues. And so, you know, the concept of voting rights cases, and election law cases is broad and amorphous because that's what all of the insides are, too.

So. So yeah, so I think, you know, one of the chunks of cases that are coming out right now this is this is a really active area is the receipt of mail in ballots. And so, some people will tell you, there's, there's a substantive difference between absentee ballots and mail in ballots. For our purposes today, I don't know that we're really going to get into that, and so I, you know, you may hear us refer to it as a mail in or an absentee ballot, and there may be a substantive difference, but just forgive us please.

Like, like Anthony said, this isn't really an area that, that we're actively litigating. And so, I think for a lot of people, like a lot of people, you know, we just use the phrases interchangeably. But anyway, so a lot of states are changing how long the states can have to receive ballots in terms of counting those, those votes in time for this November election. And that is, it's interesting to read the cases because you think at least it occurs to me that a lot of it is just the results are based on what the judges think the results should be, and in some ways allows them to reason backwards. And my position is always that judges should reason and be engaged. And I mean, that's why we're all here talking about judicial engagement with *Short Circuit*. But it's interesting to kind of read these different cases and see how judges have approached the issues based on their own kind of background and beliefs and the laws and changes at issue. And so, one of the cases comes out of the Fourth Circuit, and this is kind of a procedurally weird case that I'll circle back to in a second.

**Anthony Sanders** 20:32

Most of these are gonna be procedurally weird.

**Diana Simpson** 20:35

They're all procedurally weird. Yeah. So, it's not just us that we're not the only ones that have procedurally strange cases, I suppose. But anyway, so in North Carolina, there was a state laws, a state court lawsuit that was filed in August of 2020, and it was challenging the requirement that made mailed ballots or received within three days of Election Day. These folks challenged and said we needed to be longer. So, the state board changed the rules in September to extend the receipt deadline to nine days after the election. And so there the state lawsuit ended up having a final judgment entered, that was a consent judgment, and so everyone agreed that it was going to be nine days. Well, right after that, right around that same time, I suppose I should say a federal lawsuit was filed, basically trying to collaterally attack that state court judgment, saying that they didn't have the

power to do this, that had violated the equal protection clause that violated a bunch of the different provisions. And so, they took it up on a, the district court entity, a TRO, and that went up to the Fourth Circuit on an emergency expedited basis. And while the panel was considering what to do, the they had already voted, and the judge who was in dissent was unhappy with the situation and so alerted the en banc court, and so the entire en banc court voted and basically took the decision away from the panel. And so, there are a few judges who are not happy about it.

**Anthony Sanders** 22:10

That doesn't happen very often.

**Diana Simpson** 22:12

It doesn't I, in fact, I don't know that that's really happened before, it was I've not seen a case in which that's happened before. But you know, the, the upshot of this is that the Fourth Circuit is not going to change it. And so, there are nine days after the election to receive the balance,

**Anthony Sanders** 22:30

Although I do believe a petition has been filed at the Supreme Court, but we'll see if they take action the next week on that one.

**Diana Simpson** 22:41

I do not envy them their docket at the moment, I will say that it is full. But one of the interesting things I thought about this case was that the Fourth Circuit kind of went out of its way and or at least in the order part of the of the case, to say that what they defined as the status quo. And so, they invoke the *Purcell* principle and say, "Look, we don't want to change things. We just we see the status quo as the nine days post-election for receipt of ballots."

But why did they choose that? Like, you know, they just decided that the status quo was this rule change that was agreed to in September. But why wasn't the status quo the one proceeding the state court lawsuit being filed? I you know, I think courts have a lot of power in defining what the status quo is to then go from there. Because if the status quo is that September 15 rule change, then, okay, the *Purcell* principle would say you can't change that again. But if the status quo is the September 14, existence of the three days for receipt, then doesn't the *Purcell* principle suggest that the court should go the other way?

**Anthony Sanders** 23:53

Right. And a lot, a lot of the, you know, the, the very heated and principled argument we're hearing from, from all sides these days about courts getting involved in elections, courts not protecting the right to vote, a lot of it, I think, comes down to defining what the status quo is. Because many of these cases we're talking about are a district court enters a judgment for the, the plaintiffs who are challenging what the state law is, and then, you know, the maybe the appellate court changes that. And then maybe it goes to the Supreme Court and along the way, and then of course, maybe there was an administrative process before that along the way, the status quo keeps changing. And to tell you the truth, it's hard to, to know exactly what the status quo means, like you say, and so depending on your point of view, you're going to see the status quo differently.

**Diana Simpson** 24:49

Right. And I think that's really one of the fundamental issues underlying a lot of these voting rights cases. And not just voting rights, I mean, this this happens in IJ cases too. What is the status quo that you're trying to enjoin? And what stems from that? And it can be a difficult question. I'm not I'm not saying that this is just a partisan issue, I think it can be very difficult in in defining it, especially when you're changing the rules in light of a pandemic. You know, we haven't been here before.

**Anthony Sanders** 25:20

It's very much not status quo, or at least I hope it doesn't become status quo. So, another, another case, is, is the full name, when not the full name of the parties or *Texas League of United Latin American Citizens v. Hughs*. This is a case some of you may remember from a couple weeks back from the Fifth Circuit, where the, the Governor of Texas had issued an order about these polling boxes, where you could drop off your absentee ballot, but had a limit of only one per County. So, a lot of a lot of what the judges were talking about in this case is, is what is the status quo. So there, there was a case, I mean, the case was in Texas, that you could vote early, you could vote absentee, but there, there was, there, there weren't these, these other ways to drop off your, your absentee ballot. So, the governor comes in and says, "Okay, we're going to have these boxes where you can drop them off, but we're only gonna have one per county." Which maybe for some small rural counties makes sense, and, you know, for counties where Houston or Dallas are really doesn't seem quite right. But that was the rule that that the Governor came up with, and it's not the rule that the legislature put down.

So then, there's a challenge to this, that and by the way, there's concurrent cases going on in state and and federal court, we'll just talk about the federal court litigation. And there's a challenge to say, "Well, well, well, no." I'm sorry, I got part of the facts wrong, the governor made this change, then they put these boxes out there, but a few counties put more than one, and the governor didn't like that, so he changed the rule to say, well, you can have these boxes, but no more than one per County. So, the challenge was to the change that said no more than one per county.

And that was so the Fifth Circuit said no, that that is a lawful order, that that does not violate your right to vote under the relevant standards that Diana was talking about because there's no there's no constitutional right to have these boxes in the first place. They're just a way to make things easier. And so, if you only have one per county, then that that in itself isn't, isn't a violation in a concurrent, Judge Ho, goes beyond this and says, you know, the governor shouldn't done this in the first place, because the Legislature has pretty clear rules about how voting works. And so, he shouldn't have allowed these in the first place, let alone this lawsuit we have here where they tried to they, they, they tried to have more ballots than the Governor allowed. You can see lots of arguments on different sides. On this one, you can see lots of status quos. But at the end of the day, that's how the Fifth Circuit tried to, in some ways, I think, tried to split the baby on this one.

**Diana Simpson** 28:39

Yeah. And one of the things I found interesting, both in this case, and a lot of the others is that the district court entered this injunction that was pretty broad. And so these like broad aggressive injunctions that district courts are entering, I don't know if they're doing it, anticipating that it won't go up on review, or anticipating that they'll get a particular panel on review or what the situation is. But Judge Ho's concurrence was, made me



chuckle a little bit because he's sitting in one breath, he's chastising the Governor for, for taking these aggressive steps that that he may not be constitutionally entitled to do. But then the other thing well, the Governor is not as bad here as the district court, so I will grudgingly concur, because I am not interested in in all of these aggressive steps being taken but shame on all of you basically. You just feel like it's, you know, your Aunt yelling at you for, for doing something that that you shouldn't have done in the first place.

Moving on, from the Fifth Circuit to the 11th Circuit, we'll come back to the Fifth Circuit on a bunch of other issues. As you'll see a lot of these cases are coming out of the Fifth and Sixth circuits. You know, I will not editorialize as to why that is the case, but I'll leave it to our fair listeners to, to contemplate why.

**Anthony Sanders** 29:59

I'd say that there's another principle that the more likely you are to be a swing state, maybe the more likely you are to have litigation.

**Diana Simpson** 30:06

So, the 11th Circuit brings us a dispute over Georgia, and so Georgia's law has long said that they will evaluate ballots and count ballots that have been received by Election Day. And a district court entered an injunction expanding that an extra three days, and the 11th Circuit has put that injunction on hold. So, Georgia is going back to its original version, or at least its pre-litigation version, in which the in which ballots have to be received by Election Day. And so, one of the other tests that you'll see in a lot of these cases is whether parties are entitled to a stay under a case called *Nken v. Holder*, which is a 2009 SCOTUS case. Basically, they just go through it's a four factor test, a party is entitled to a stay if they will succeed, if they're likely to succeed on the merits; if they will experience irreparable injury absent the stay; that the stay will not substantially injure the other interested parties; and that it stays in the public interest. And so really, that first prong is always the most important one. If a party is likely to succeed on the merits, it's likely that they're going to meet the other three prongs, or at least in these appellate decisions that we've seen. And here the 11th Circuit decides that Georgia is likely to, to, to succeed, that they're going to win, but of course, there's a dissent. But that, you know, there's the court just doesn't see a burden on the right to vote by requiring ballots be delivered by Election Day, as opposed to several days later. It is a decades old law, it's reasonable, it's not discriminatory, and there's a bunch of reasons why it exists and why it will continue to exist, according to the 11th Circuit.

**Anthony Sanders** 31:57

Yeah, and, you know, absent from from this opinion, and a lot of others is exact, is that kind of the weight of what the impact of, of the pandemic is, is it I'm seeing a lot of these cases where that this relief is denied will say that there's all these other options: there's early voting, there's you just bail you're your, your ballot back early. And then mostly in dissents where we're seeing on the other side, there's the wait of the mail seems really slow right now; there's experts who are saying it is slow. And that that statistically, there are going to be a lot of ballots that don't get there in time. And so it's weighing those two values together is how these cases come out.

**Diana Simpson** 32:47

Right. Although they all do make me wonder, just kind of generally, what, how hard it is to vote when you have all of these different options, and I suppose the answer is it depends on who you talk to. You know, I think I am

the only person I know who hasn't yet voted. Literally everyone I've talked to is either has voted in advance, they've already mailed in their ballots, or they voted advance in person. I haven't done that yet--I will, I promise--but

**Anthony Sanders 33:16**

We'll hold it to it Diana.

**Diana Simpson 33:19**

Okay. You know, and so it seems to me at least in areas where there's this big expansion, that you can go in and drop off your ballot, you don't even have to rely on the USPS. Maybe you do in some places, maybe you don't. But in in perhaps this is just a difference on how each state kind of regulates it. I live in Fairfax County, Virginia, and I think Fairfax County is trying to do everything they can to ensure that people have the ability to vote. You know, it's a week before the election, I still haven't voted and so perhaps that's shame on me for not taking that opportunity yet. I will, I promise again, I'm just gonna keep saying that. But you know, it's I, I'm not sure.

**Anthony Sanders 34:00**

And yeah, and part of it, too, is you know, and especially when you talk to Libertarians like, like a lot of fans of IJ how you weigh the right to vote, how you weigh, maybe not the right to vote, but how you weigh your actual act of voting can vary very differently, depending on, on how someone values that act. So, one individual if whether or not they vote, almost never right, not always, but almost never actually makes a difference in the election. So, is your own act of voting, how important is that really? But overall, of course, if you have a say a material impairment, voting rights, that's going to affect a lot of people say, you know, the lines are so long that lots of people just, just don't line up. That's going to have an effect on, on the election and it's also going to have effect on that individual, being able to exercise something that may be very important to them. These are hard values to weigh against each other, especially when we have this other consideration of efficiency, which I think sometimes is, is one that has a lot of salience and sometimes is a smokescreen.

**Diana Simpson 35:15**

Right. And I think contemplating how important the right to vote is is, it's not just the question of who like, does your single singular vote have an impact on the outcome of the election?

For president? likely not do 540 of your friends' votes have an impact? Perhaps, if you live in a particular county in Florida in 2000.

You know, it's always unclear, but there are more reasons than just that to vote. You know, there's, there's the symbolic experience, there's the historical experience that this is not something that that people had been able to do for a very long time. And, you know, so anyway, it's just it's always interesting to me to read kind of when they're talking about burdens. You know, you have in Texas, for example, that Fifth Circuit case we talked about a moment ago, they had 40 days to hand deliver absentee ballots, and so in, in addition to mailing in the ballots, and so that is quite an amount of time to, to vote at a time when, you know, historically people didn't used to be able to do that you didn't have secret ballots, you couldn't you had to vote in front of all of your friends and neighbors and tell everyone exactly who you were voting for. And perhaps that was a different experience, of

course, a lot of things have changed since then. But it's just interesting to read the different takes on what is a burden on the right to vote, and what is not a burden on the right to vote.

**Anthony Sanders** 36:34

Speaking of Texas, should we move on to the the, the age-related case?

**Diana Simpson** 36:40

Age-related case, let's do it.

**Anthony Sanders** 36:43

That I believe is *Texas Democratic Party v. Abbott*. If you could tell us what happened there.

**Diana Simpson** 36:49

I will do that. So, this is the case that I previewed earlier about the 26th Amendment. And it is an exciting case. So, Texas, and I will say that this was once again from a long time ago in election law, this is from September 10<sup>th</sup>, 2020. So I mean, that was a lifetime ago. You know, but so this case is about voting age restrictions on mail in voting. And so, Texas has allowed mail in voting for anyone who's 65 years or older. And so, back when this case was filed a lifetime ago, the district court enjoined that requirement, and added to it that all voters, regardless of age, should be allowed to vote by mail. And the Fifth Circuit said, "No thank you, we will not be doing that." The plaintiffs said that this law violated the 26th Amendment, which prohibits laws that deny or abridge the right to vote on account of age. However, the Fifth Circuit does not believe that this case, or that this law, that is designed to make it easier for older people to vote, people who may have mobility challenges, people who have a hard time getting out, you know, even just regarding completely the pandemic, you know, older votes, older folks have a harder time voting. But in any event, a law that makes it easier for them to vote does not abridge the rights of any other people. Fifth circuit ended up demanding it and allowed the plaintiffs to pursue other theories on remand. But this was an interesting case that really talked dives deep into the history of the 26th Amendment, which frankly, I didn't know much about. And I found that to be a very interesting discussion.

**Anthony Sanders** 38:35

It was, it was a basically because of the Vietnam War, that we had it right? Because there was this argument that you can be 18 and drafted and sent to die on a foreign land, but you can't vote,

**Diana Simpson** 38:46

Which is legitimate. And so now you can be drafted and die on a foreign land but not have a beer.

**Anthony Sanders** 38:53

Right, right. But--

**Diana Simpson** 38:54

I suppose that's, that's for the, the next amendment.

**Anthony Sanders** 38:57

That that'll be down the road. The case that I find very interesting is out of the Sixth Circuit, it's *Priorities USA v. Nessel*. This came out on October 21, so not too long ago, and this concerned a long standing law in Michigan that does not allow for the hiring, someone to pay to hire a vehicle to bring you to the polls, so someone can volunteer to drive you to the polls, but say that your local party, party, couldn't, couldn't pay for a bus to go and pick people up and bring them to the to the polls. And so this was this was challenged. It's such an old law that used to say carriage until it was updated about 40 years ago, it's from 1895. And so--

**Diana Simpson** 39:57

Can I hire a carriage to go pick up people now?

**Anthony Sanders** 39:59

I, I, that's a good question.

**Diana Simpson** 40:02

A horse-drawn carriage, you arrive in style,

**Anthony Sanders** 40:04

Maybe that's a way around it. But so, there was a challenge to the law and saying that look in light of our current experience and people being unsure about how they're going to get to the polls, this, this law is unconstitutional. And the, the issue came before it before the Sixth Circuit--it was split. And the I mean, to read the two, the two opinions is to read two different worlds about how voting rights are viewed. What it was actually was, was, was under a federal statute as to whether there was a preemption it's actually a campaign finance law, part of the the Federal Campaign Finance, Federal Election Act. And anyway, Judge Boggs for the majority came, ruled that there was no preemption here. And but there was there was a sense by Judge Cole, who had some pretty, pretty strong language in that this dissent, as well. And so even there, even when we're talking about, you know, a preemption issue, not a constitutional issue we get we, of course, are getting these very strong feelings on, on either side and different, almost a different set of values coming at how to adjudicate the case.

**Diana Simpson** 41:29

Definitely. And another case out of the Sixth Circuit that that has this really vehemently unhappy dissent that is extremely opposed to the majority is one of these cases about signature verification requirements. And so, a boatload of states require that voters who vote absentee by mail have to sign the application, they have to sign their ballot when they send it in. And then officials compare the one on file to ensure that it matches. Some of the states allow other allow the officials to compare to previous signatures. And this just seems like an area rife with, rife with the potential for abuse. Whether or not it is actually abused is I suppose a separate question. You know, my signature looks quite different than it did you know, even 10 years ago, and so I don't, I don't actually know what it looks like on my voter form, though I won't be voting by mail.

But in any event, so the Sixth Circuit said that, you know, it is that the plaintiffs failed to show that they would be harmed by the law. So, they are not going to address the question of whether this signature verification

requirement infringes the right to vote. And I think that's something that that IJ often ends up having to deal with is courts that say that you don't have standing to challenge the law, that you're standing there that you're that you've sued about because who knows if you'll be harmed by it in the future. And, frankly, it's very frustrating, because like, you wouldn't have filed the case in the first place if you didn't anticipate being harmed by it. But this is just one of the ways that courts get out of answering difficult questions is just by deciding that the plaintiffs don't have standing, or that they didn't include a specific enough phrase and their complaint to get away with it. And so, the Sixth Circuit dissent here was very unhappy that the Court would not answer the question of whether the signature verification resulted in disenfranchisement, which that particular word suggests how that judge would have come out.

**Anthony Sanders** 43:39

And it is interesting in this case that the two different views of associational standing about, you know, the there are certain rules that we don't need to go into about when that association of individuals has standing but in the likelihood that you know, someone in the association will be affected by this rule, or that an individual himself would need to have standing to challenge it. But of course, the, the chance of it happened to any one individual is a lot less. So, anyway, interesting analysis to check out there at Memphis *A. Philip Randolph Institute v. Hargett*.

We are don't want to keep everyone all day, so we will try to wrap up with a couple cases now. Well, I think what we'll do is go to the, the hottest stuff out there I believe in voting rights that this the case is most likely to anger listeners one way or the other--whichever point of view you have. One's from Wisconsin in through the Seventh Circuit and one is in Pennsylvania.

Diana, you want to talk about what's going on Wisconsin?

**Diana Simpson** 44:50

What isn't going on Wisconsin? Oh boy.

**Anthony Sanders** 44:57

Well, the Packers are doing well.

**Diana Simpson** 44:59

Are they? My beloved Broncos are not doing well right now.

**Anthony Sanders** 45:02

That's true, we don't have to talk about Colorado.

**Diana Simpson** 45:04

I'm very I'm very sad about it.

Anyway, so Wisconsin mail in ballots. You know, they had they had this pretty lengthy decision, and then SCOTUS kind of got involved or didn't get involved as the case may be. And so that's your neighbor. Right?

**Anthony Sanders** 45:23

Right. Just a few miles from, from my house, in fact, in Wisconsin. Here, we have a situation where the district court entered an injunction to have a few extra days to get mail, mailed in ballots in. The Seventh Circuit vacated that and then the Supreme Court just last night from when we're recording this refused to, to vacate the, the, the stay, which essentially means now that that there, there won't be that, those extra days for, for mail in ballots in Wisconsin. And interesting exchanges between the justices in their support, there was no opinion for the court, but the in, in supporting or dissenting from the decision to not vacate the state. Justice Kavanaugh is, is one of the more the lengthy of the opinions, but it's also worth reading Justice Kagan's--they have some exchanges on a whole bunch of issues. And one of those issues is one that I find especially interesting and is also going on in the case in Pennsylvania.

So, let's, let's close in Pennsylvania, which some people are saying is the Keystone State, of course, it is the Keystone State for, for this year's election, depending on, on who wins for President. So, the, there we have a case from the Pennsylvania Supreme Court, not the, the Third Circuit, so, this is state litigation. And the Pennsylvania Supreme Court--and this case, by the way, we talked about on *Short Circuit* a couple weeks ago and was talked about at our state forum on the Pennsylvania Constitution that the Center for Judicial Engagement had a couple weeks ago. There the, the Pennsylvania Supreme Court said that, that the rules and we don't need to get into all what the what the rules are, but that the rules for administering the election are unconstitutional under the Pennsylvania Constitution under the protections for the right to vote, and elections under the Pennsylvania Constitution, which often get a higher level of protection, or more judicial engagement, then under the Federal Constitution. So state, state constitutional question. The, the parties who are on the side of the Legislature and against these, these rules making for, for a little easier to vote in the election this year ago to the US Supreme Court. The US Supreme Court divides 4-4 without an opinion as to whether to take the request for, for a stay on that order, and that was just what it was that a week ago.

And now there's a new request for a state now that we have a full court with Justice Barrett joining the court just today. The, the questions in the petition are pretty interesting. Well one is interesting, one I think doesn't have a lot of salience, and that's that, that having days to receive ballots after Election Day violates federal law about defining when Election Day is. I don't really think anyone thinks much of that argument.

The other argument, though, is that when the state Supreme Court changes the rules, so to speak, based on the state constitution from what the Legislature has set forth, that that violates the US Constitution because the Constitution says the Legislature sets those rules, not the state--the language is not the state, it is the Legislature. And in fact, it's it's in Article I of the, the Constitution. The word *legislature* is used in a number of places about how election law his election laws are set forth. One used to be about the house senators were chosen, so that's now obsolete in light of the 17th Amendment. But the same word legislature is used in the Elections Clause about how, how the times, places and manner of electing senators and representatives are our use are set, and also in how electors for president are selected. So, the argument is legislature means legislature. It doesn't mean legislature as then reviewed by the state Supreme Court under the state constitution or however you, you want to say. It's an intriguing argument, it was used in *Bush v. Gore*, if some of you remember that case from 2000, and it was part of Chief Justice Rehnquist's concurrence in that case. This argument is in a lengthy footnote of Justice Kavanaugh's from just last night in the Wisconsin case, which people

thought was probably the reason why he and three other justices wanted to take this Pennsylvania case when it, but when it when it was denied as a divided court whenever that was a few days ago. And so, by the time you hear this podcast this, this may have gone up again based on this legislature argument. I think it's an intriguing argument, Diana, I'd be curious to your thoughts. I think it kind of proves too much because does this mean that when the legislature passes a law that you know, governs when polls open, that the governor can't veto that law, because it's says legislature not, you know, legislature and state? Does it mean that the people when they hold a constitutional convention, for the state can't put certain rules and regulations in there? They have to leave that to the legislature when the Constitutional Convention is over.

The Supreme Court has kind of addressed these issues, most recently, in a case in 2015 on, called *Arizona State Legislature v. Arizona Independent Redistricting Commission*, where they said look based on some old older case law, legislature in some parts of Constitution means the legislative process, which includes a gubernatorial veto and what happens at a state constitutional convention, perhaps even. And so, legislature doesn't literally mean legislature in those parts of Constitution, it might in other parts, such as the old part, were about selecting senators. I don't exactly know who's right, I think it's just an argument that perhaps proves too much. But we might learn very soon, whether this argument will prove enough for five votes of the Supreme Court.

**Diana Simpson** 52:19

Potentially. I mean, it just seems strange to me to demand that it be each state's legislature as, as narrowly defined, because each state runs their legislative processes and their executive processes and everything a little bit differently. And to require that it be a single legislature and not impacted by anything outside of that seems like that's just going to lead to headache. I mean, you know, does, like you said, does it remove the ability for a governor to veto something? If the answer is yes, then doesn't that impinge on the governor's right, the governor's state constitutional rights. You know, of course, the Federal Constitution always supersede state constitutions. But, you know, it just, that seems very challenging. You know, hopefully, well, hopefully, that's probably not the word I want to use here. But, you know, *Bush v. Gore* is always an interesting citation, because should you really be citing it when they specifically said we're not creating precedent, never cite this again. Please and thank you. You know, that was, I suppose, just for one provision of it. But, you know, it's I think, Justice Chief Justice Roberts would very much prefer to not have to deal with any of that coming out of this election. And I suppose time will tell whether we have to or not. But it'll be interesting to see if there's five votes to grant cert on this, if there's, or more, if there are, perhaps differences of opinion when it gets up on the merits or what will come out of it. It seems unlikely to me that the High Court will be able to avoid all of these cases, and at some point, they're going to have to get involved, and I do not envy them that.

**Anthony Sanders** 54:03

Right. Well, and of course, we have, you know, from the date, we are recording this, we have seven days till Election Day itself. And there could be there could be the Supreme Court getting involved, the next seven days, there likely will be something on one in some of these cases. But then there's after that, if there's challenges or maybe you know, it could be the election, at least for the president is decided pretty, pretty much one way or the other. And so pretty authoritatively one way or the other, so there's no need. Of course, there still there still could be close races all over the place for representatives for state house for you know, city council, whatever

you ever I'm sure there going to be some close races that may be made, will make or break depending on whether you have say three extra days after Election Day for absentee ballots. So that we won't have heard the last of all these issues of COVID and elections on Election Day, even if the presidential election is decided pretty decisively.

**Diana Simpson** 55:09

And the signature verification requirements are going to be a big issue too. Do, you know, do states have the ability to turn away ballots that they've otherwise received in time because somebody thinks that the signature doesn't match that signature? You know, I don't even know if the science behind signature matching is science or if it's like pseudoscience, like bite mark evidence that doesn't, doesn't actually count to science? I don't actually know the answer to that. You know, and so that's going to be a big deal; provisional ballots are going to be a big deal people, people get them all the time, if there's some kind of hiccup. Are those gonna end up changing election particular races, you know, all of these things are going to come back and or could come back and be a big issue. And that's going to be, you know, a tough couple of months coming up for sure.

**Anthony Sanders** 55:54

And when they do come back *Short Circuit* will be here to tell you all about some of it, at least, I think we've told you, everyone more than their fair share of election law cases for the Federal Courts of Appeals, the Supreme Court, the, the state courts, so whatever else we talked about, so thank you for staying with us. I want all of you to go out, of course and to vote if you haven't already. We'll talk to you on a future podcast. And in the meantime, I want all of you to get engaged.