

# Short Circuit 244

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## SPEAKERS

Anthony Sanders, Diana Simpson

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### A Anthony Sanders 00:24

I leave you gentlemen now, and you will now write it, you will interpret it. That's your right. But as I leave you, I want you to know, just think how much you're going to be missing. You don't have Nixon to kick around anymore, because gentlemen, this is my last press conference. Well, that is something that everyone running for office today hopes not to have to say after the upcoming election on November 8, 2022. That was Richard Nixon, in 1962, when he conceded to Pat Brown in the race for governor of California. This is Short Circuit, your podcast on the federal courts of appeals. My name is Anthony Sanders, I'm director of the Center for Judicial Engagement at the Institute for Justice. And today, we're doing something a little different. We are having our second biannual election law special. So two years ago, in the run up to the 2020 general election, we had a special where we talked about all kinds of opinions that had just come out about the rules and regulations and constitutionality for the election in in November 2020. Now that's different than the litigation after the election about you know, who won. That's a whole different story. So we're going to do the same thing today. And we again have with us, one IJ's election law experts, Diana Simpson. Diana, welcome back to Short Circuit election special.

### D Diana Simpson 02:03

Thank you for having me, Anthony,

### A Anthony Sanders 02:05

We had a really good time two years ago. We talked about I can't remember how many cases. Today, things aren't quite as crazy as in 2020. And that's a very good thing. You know, don't have the pandemic going on, and all that part of the legal environment. But there is all kinds of litigation, as there is in any election in the modern era, about the rules of American elections on the eve of those elections. So we're recording this on the morning of Wednesday, November 2, 2022. We're going to be talking about about six cases that have opinions that have recently come out on all kinds of election law issues. We're going to go through them kind of quickly, a

lot more cases than we usually have on Short Circuit, but we think it's going to be a good time. Now, one important disclaimer, as all of you probably know, the Institute for Justice, which Diana and I work for, is a nonprofit law firm. We are very much not connected to any political party and do not have a stake in who wins any election next week. So this is about the election law. It is not at all about who's going to win, who should win, or what you should go out and vote for. We're going to leave that to your own decisions. Fancy that. But we are going to talk about the law. And first of all, Diane is going to bring us to Pennsylvania, where there's quite a lot going on including some breaking news from last night. So Diana to get us up to speed.

D

Diana Simpson 03:45

There is a lot going on in Pennsylvania. So all registered voters in Pennsylvania can vote by mail. The voter will cast a vote by marking their ballot. They then place it in a secrecy envelope, and then they place that in a return envelope. The return envelope includes a voter declaration that the voter has to fill out, date, and sign. The voter then has to mail or deliver it to their county election board, which will then stamp the receipt and log it into the state's system. It is deemed timely if it is received by the county election board by 8pm on election day. But what happens if the ballot or I suppose the the envelope that the ballot is in is undated? Do you count the votes or you do you toss the votes, even if they're received on time? That is what this whole case and a lot of shenanigans are about. So in the 2021 election - - I have to take you back to that to talk about it for a little bit -- Lehigh County set aside 257 ballots out of about 22,000 ballots that lacked a handwritten date next to the voter declaration signature. And so this engendered a lot of litigation and the Third Circuit held that the state law requiring that date was preempted by the materiality provision of the Civil Rights Act of 1964. What is the materiality provision? It prohibits the denial of the right to vote in any election because of error or omission if that error or omission is not material in determining whether the voter is qualified to vote. So the court, the Third Circuit, back in 2021, found that Section 1983 provided a private right of action to enforce the materiality provision, and that the state law requiring the date on the return envelope was not material. So the lack of a date could not be used to reject the ballot. So the petitioners in that case, sought a stay from the US Supreme Court, which was ultimately denied. Ballots were then counted in accordance with Third Circuit's decision, which for the record, resulted in the flipping of one of the election results. Those election results were then certified. And then there was nothing left for the courts to review. So the petitioner said, argued that the Supreme Court should grant vacate and remand as moot, which is Supreme Court did on October 11 of this year. But the issue has not gone away. So while this was going on, some state courts have since relied on the Third Circuit decision to say that rejecting undated mail ballots violates the federal civil rights law. While some states, some state courts were relying on the state law to reject the undated ballots. So this was resulting in shenanigans, more shenanigans. And so a group of folks who were Pennsylvania voters and political party committees filed a king's bench petition with the Pennsylvania Supreme Court, which would take the case directly to the state high court without going through the normal court process.

A

Anthony Sanders 06:55

And Diana sorry to interrupt why do you think they didn't file it in federal court? And why didn't they file it earlier if they knew this might be an issue? You get a sense of that?

D

Diana Simpson 07:10

I get a sense that they didn't file it earlier because the Third Circuit decision was not GVR'd as moot until October 11.

A

Anthony Sanders 07:16

Gosh, that is interesting timing, isn't it?

D

Diana Simpson 07:19

It is interesting timing. Why they didn't do federal court versus state court I don't know. Perhaps they viewed the earlier Third Circuit decision as not a harbinger of their likely success going forward. And so they wanted to try the state courts, but I don't know it. They don't talk about it too much.

A

Anthony Sanders 07:36

Gotcha.

D

Diana Simpson 07:38

But so the Pennsylvania Supreme Court accepted review on October 21st. And they had a three day briefing turnaround, which is as spooky as I can imagine, around this Halloween time as well. So yesterday, November 1, the Pennsylvania Supreme Court issued a decision by a three to three vote that ordered the county boards of elections to refrain from counting any absentee and mail in ballots for the upcoming election that are contained in an undated or incorrectly dated outer envelope. The court goes through in a very short order, addressing the fact that the Pennsylvania voters who are petitioners lacked standing, but that the political party committee petitioners had standing. The court ordered the county boards of elections to segregate and preserve the undated ballots. And the court said that they were evenly divided on the issue of whether failing to count the ballots violates the materiality provision of the Civil Rights Act of 1964. The court then said that opinions would follow. So we're left to wonder why. We're left to wonder what will happen in the next week. Are the respondents going to seek a stay at the Supreme Court? Who knows? Perhaps they do. I do not. But what's interesting -- well, one of the other interesting facts to me about this is that this is normally a seven justice court. It's currently a six justice court because the previous chief justice passed away on October 1, 2022. So you have a three to three vote that results in a ruling that the state law stands. So normally, I'm familiar with the Supreme Court practice after a death or a recusal of a justice where a vote is tied, that results in the affirmance of a lower court's decision. But there's no lower court decision here to affirm, and so they don't explain it. But, you know, does the tie go to upholding the state law? I don't know.

A

Anthony Sanders 09:43

Doesn't the order, well, the order basically says, Well, I guess it says segregate but it doesn't say what the legal impact of the ballots is going to be in the future.

D

Diana Simpson 09:56

It says don't count them, but hold on to them, so don't throw them away. So I suspect the court realizes that this is not the end of this litigation, which it's not. I think any reasonable person would say that it's not. And it'll be interesting to see what their ultimate opinion comes out and says, and it will also be interesting to see whether there is an immediate application filed at the Supreme Court of the United States, as opposed to the Pennsylvania Supreme Court.

A

Anthony Sanders 10:24

And the other thing is, I didn't think about till just now, Diana, is that Justice Baer, he actually was retiring. I think it's mandatory retirement and his seat is being filled in an election. And I'm guessing that justice would take the seat in January, which would be within the 90 days to seek review at the US Supreme Court. So I wonder if that would change the outcome?

D

Diana Simpson 10:57

I have no idea. And I don't know if there's like a reconsideration procedure at the Pennsylvania Supreme Court when you're in this kind of procedure, which is already unique to me, this King's Bench petition?

A

Anthony Sanders 11:12

I doubt it's as many as -- well, it would be what? 60 days, which is pretty long. So if any Pennsylvania law experts want to write into us on Short Circuit that we would love to hear. But that is quite a pickle, but you're right, it's seems like a pickle that the US Supreme Court would be well positioned to to rule on considering this is a federal question about the civil rights act.

D

Diana Simpson 11:47

I would think so. And I'll say that the Third Circuit decision from the 2021 election, the petitioners, in that case, sought a stay from the US Supreme Court. They got the administrative state, but then they didn't end up getting the full stay. And there were dissents from that among the justices. And then when the Supreme Court GVR'd it this year, there were dissents for that. So there's certainly a lot of attention already around this particular issue. And I suppose I suppose there will be more given that, you know, there are a few high profile elections going on in Pennsylvania this term, and I suspect we will hear a lot more about this in the coming days, weeks, months, however long.

A

Anthony Sanders 12:34

It does sound like... because it's not signatures. So if you don't sign your ballot at all, it sounds

It does sound like -- because it's not signatures. So if you don't sign your ballot at all, it sounds like there's no dispute that those are tossed. It's just if you don't put the date on. So it's in the end, it sounds like it's not that many ballots. But given that there's so many races, it could affect a few races.

**D** Diana Simpson 12:55

Right. So the legal question, I suppose, is is it material to require the date on the outside of the envelope that is received on time by the board of elections? Like if it were received later I think that might be a slightly different issue. But if it's received on time, then why does the voter need to date the ballot?

**A** Anthony Sanders 13:19

Right. Well, we'll see. And this may be an issue that we have an update or two in future Short Circuits. So I'm going to take us now to a case in the Eighth Circuit, which concerns Nebraska. Now, this is a much less, I guess, hot topic. But it is a topic of some interest to some listeners, because although it's not really how the court ruled, it concerns an effort to liberalize marijuana laws, which I know some listeners are interested in, in Nebraska of all places. So Nebraska has a, like many states have, has an initiative and referendum process where you can get an issue on the ballot. It's in the Nebraska Constitution to have a new law adopted statewide in the referendum. Now it can be a proposed statute. And in that case, you need 7% of the registered voters in the state to sign your petition. Or it can be a constitutional amendment of the Nebraska Constitution, but in that case, you need 10% of the voters to sign it. Now, on top of that, though, whether you're going for one or the other type of law, you need to also have 5% of the registered voters in two fifths of the counties of the state to sign your petition.

**D** Diana Simpson 15:06

I was told there wouldn't be math, Anthony.

**A** Anthony Sanders 15:10

Yeah that was Gerald Ford well Chevy Chase, actually. So in this case, this group that wanted this medical marijuana petition to be on the ballot, they challenged the restriction for the counties because they said, Look, you can get, you know, getting 7% or 10%. That's hard enough statewide. But to get 5%, in all these counties and Nebraska, like many states has a lot of counties that are, you know, tiny when compared to the overall population of the state. And I'm sure that it's a lot easier to concentrate your efforts in somewhere like Omaha or Lincoln, bigger cities in Nebraska, than to have to go to all kinds of counties. Like there's, you know, whatever county, by the way, Alliance, Nebraska is in, which is the home of Carhenge. Which is a replica of Stonehenge, but it is made of cars. I went there kind of on a pilgrimage once on my way across the country many years ago. And it's, it's pretty cool, I have to say. So if you're if you're going through rural extreme western Nebraska, be sure to stop by Carhenge. But it would be very hard to get, you know, all that many signatures in Alliance, Nebraska, and many

other parts of the state, trying to get this 5% of the two fifths of the counties. So that's challenged. And the challenge is that it violates the the US Constitution. And there is some case law on this, including a case from 1969, called Moore versus Ogilvie, which concerned as kind of a similar requirements for getting on the ballot in Illinois, but for candidates. Now, the interesting -- there's a dissent here by Judge Kelly, it's interesting that the majority doesn't even mention this Moore case from 1969. Which when you read the dissent, you think, Well, that sounds pretty important. But the majority says, look, here's how this breaks out. And this is an equal protection challenge. So they said there is a right to vote for candidates protected by the US Constitution. Now the right to vote is really a funny right when it comes to the US Constitution, because there's lots of provisions that say protect who can vote, right. So women have to be able to vote under the 19th amendment 18 year olds have to be able to vote under the 26th Amendment. But the actual like, quote, right to vote is kind of more implied by the US Constitution, although everyone recognizes it's a fundamental right. So there's a fundamental right says, the Eighth Circuit, to vote for people running for office. But there's no fundamental right to like, have something on the ballot as an initiative, because that's a matter of state law. And the majority says, Well, circuit precedent says that that's true. So it's not a fundamental right. And so therefore, this equal protection challenge is subject to a lower level of scrutiny. And there's important interests here for the state in trying to have a distributed level of support before we put something on the ballot that's going to change state law. And so therefore, this is fine. I have to say that's a little bit of odd reasoning, because there I mean, there is a fundamental right to vote for people running for office, but there aren't that many offices mentioned in the US Constitution. There's just like, state legislature. You know, there's no right to vote for your mayor in in the US Constitution. But you could have your mayor's appointed by the governor, I guess. But once you have your mayor on the ballot, of course, the equal protection clause is going to apply to that and it's a fundamental right that you would be treated fairly in that election. So I don't quite get the reasoning there. But they say they're they're foreclosed by circuit precedent. The dissent then points out that there's this Moore case from 1969 about candidates, and they say the Ninth Circuit has actually used this in a couple of different states in the Ninth Circuit out west for initiatives. One is Idaho, and Idaho has had a whole history of the legislature trying to curtail the initiative process by having these kinds of rural county require signature requirements. We actually had a blog post at the Center for Judicial Engagement last year about a recent state constitutional case on that issue. And then there's also a state case from from Utah that doing something similar. So it looks like there might be a bit of a circuit split here. I haven't really dug into the Ninth Circuit cases. But you could argue that there's that this is creating a circuit split. And there's a dissent by Judge Kelly, so I don't know. Maybe this is gonna kind of go somewhere. The dissent also says that this Eighth Circuit precedent isn't really on point. And so the majority should have drilled down on the issue more, but I don't know if the if current Supreme Court will want to take this case. But it is an interesting split, it seems between between those circuits.

D

Diana Simpson 20:53

It is interesting, and one of the things I find frustrating, I think, is that ballot measures generally are not as respected by courts, as I think they should be. Because initiatives as a general matter, are direct democracy, it's like one of the purer forms of direct democracy that we have in this country. They are a lot more common out west than they are on the east coast. And because of that, you get I think, a lot of judges more hostile to them who live on the east coast. Because they didn't grow up with them. They don't understand them. And I think that that might end up being an issue, right, that the the Ninth Circuit is perhaps more amenable to the idea of direct democracy than some of the further east districts that are or courts of appeals.

A

Anthony Sanders 21:45

Although these are a couple of good midwestern Eighth Circuit judges who dismissed the direct democracy issue.

D

Diana Simpson 21:51

True, and they may it may be fighting words, if I'm identifying Nebraska as not the West. But I grew up in Colorado. So it is it is further east than Colorado. And that's where I draw the line.

A

Anthony Sanders 22:03

Well, and the other thing is, I mean, we hear about initiative referendum at the state level, and about half of all states have a process like that of getting signatures on the ballot, you know, how crazy California's ballot is, and places like Oregon and Washington too. So that's all in the air. But at the local level, towns all over the country will have bond levies, school board referenda on various issues, including, of course, levies, and raising your taxes. So this isn't something that is foreign is voting on issues instead of candidates. And yet, it does have this kind of undeveloped status, which I think candidates may like suing about being on the ballot more than citizen groups just trying to get issues up there. Maybe. That's my theory.

D

Diana Simpson 22:53

Yeah, and when candidates are suing, then you have the whole issue of the right to association and you have the parties interests up there that just just don't exist with like a ballot measure that's about an issue instead.

A

Anthony Sanders 23:11

Well, speaking about west, you can take us a little west of Colorado now and a another intriguing, fluid case in Nevada.

D

Diana Simpson 23:26

Indeed, so Nye County, Nevada. It is a large and rural county. It also includes the Nevada Test Site where nuclear devices were tested from 1951 to 1992. And the federal government manages 92% of the county's land. I always like a little fun fact before I get started.

A

Anthony Sanders 23:44

So what's the population in this county with 92% federally owned land?

D

Diana Simpson 23:49

Not much. The county clerk for Nye County, Nevada believes that Trump won the 2020 election and he seeks to transition voting to an all paper, hand counted election with limited early voting and mail in voting options. So for the 2022 election, he issued a plan by which there would only be paper ballots, and that there would be a few touchscreen machines, but those will be provided only for ADA compliance and for those with special needs. The plan also indicated that they would hand count the results with a parallel electronic tabulation beginning on October 25, which if you're paying attention that's before election day. And so the plan there was that you would have a volunteer reader who would verbally announce the selections on each ballot to three talliers. And a verifier will then confirm their reading. This process would be open to the public, and people could observe in person, and the clerk also planned to livestream this so that anyone could become a poll watcher at home. The clerk said that he would also strengthen controls through stringent signature verification, and require ID if the signature or verification fail. As one might imagine, he was sued by the ACLU of Nevada, which filed an emergency petition for mandamus. So the court goes through each of these issues, and I will address each of them. So starting with the livestream of the hand count. The ACLU argued that the state plan violates state law that restricts the release of election results prior to the close of voting, because all counting processes have to be open to the public. So tabulating of mail ballots can begin 15 days before the election, must be done in public, but absolutely cannot be disseminated before the polls closed. So the Nevada Supreme Court said that this livestreaming option violates these restrictions because it would broadcast the results before election day. So the clerk comes back and says, Okay, nevermind, we'll release the recordings of the count only after the polls close. But for one, this contradicted his previous statement. And the Nevada Supreme Court said no, the writ of mandamus is proper. The livestream is so clearly wrong, can't do it. But beyond the livestream, this read aloud requirement -- with the volunteer readers and the talliers and the verifier -- that results in observers learning information, which violates the state law, because those observers are members of the public. So they get the kibosh on that. The second issue is the ADA touchscreen issue. And so the ACLU argues that by limiting the touchscreen voting systems to those with special needs, the poll workers are going to have to determine who has such needs, and that they're going to be asking for proof, which violates voters' privacy. So the clerk comes back and clarifies that he will allow anyone who feels that they need to use a touchscreen to do so without further inquiry, which Nevada Supreme Court says that this is perfectly adequate, that's fine, no mandamus on this one. And then the signature verification is the last kind of big issue in this case. The clerk explains that if the signature or address verification fails when you're checking in to vote, that the election staff would then ask for voter ID. But as with many election related things, there's a lot of state law at issue here. And the state law indeed governs signature verification. And it allows voters to prove identity in one of three ways. One, they can answer questions about personal data on the voter registration application. Two, they can provide other personal data that verifies their identity, or three, they can provide proof of ID. The Nevada Supreme Court says that you have to allow all three of these options, you can't just require voter ID. And so that's where we are. The county clerk is now limited in how he can do this hand count and how he can do the livestream. But it sounds like the hand count is going to go forward and that the mostly paper ballot approach is what Nye County Nevada is going to try this year.

A

Anthony Sanders 28:27



And how is it that in recent elections and elsewhere in Nevada, they've done this early counting before the polls close?

D Diana Simpson 28:38

I think they they just can't release the results until the polls close. I think that's that's what the state law says.

A Anthony Sanders 28:44

And so like one thing, so one thing that's a little confusing is the early count can be in public, but they can't, you know, yell off what the votes are. So like, what's the use of having it public I guess?

D Diana Simpson 29:01

Who knows?

A Anthony Sanders 29:03

Like they're sitting there at a table and the public can watch but they can't talk to each other and be overheard, or?

D Diana Simpson 29:09

Yeah. And so the Nevada Supreme Court ended up coming out with a clarification, because all of this, again, is very fast moving as with all election law cases, anywhere. And they had to come out with a clarification about this live stream approach. And about the hand count generally, because the clerk ended up saying, Well, maybe we can just kind of keep it in different rooms so that the results aren't released from the different rooms so that you never get a fuller picture. And the Supreme Court said, No, that doesn't count either. Like you can't do this process where people are learning of the votes as it continues and before the polls have closed.

A Anthony Sanders 29:50

Right. Yeah, because like counting before election day does happen. It's it's a normal thing in some states. It's just that they of course, heavily sequester what the numbers or maybe they just do vote tabulation on the machine and the humans don't actually know until they kind of open the box on election day.

D Diana Simpson 30:11

Yeah. And I think that that makes sense. Because to the extent that elections are going in a particular direction, some people are just gonna say, well, maybe I don't need to show up and vote a particular way. Maybe my vote doesn't matter. So I'm just not going to do anything. And to the extent that you want to remove that possibility from existing, then you just say, all right, there's no dissemination of results until after the polls close.

A

Anthony Sanders 30:38

Like we all know, in states with more than one time zone that can be its own issue at times. But this is kind of a whole different level. Well, now from Nevada, so that was in Nevada State Court. And I should say, remind the listeners in case we have new listeners today, as always, we will have links in the show notes to all of the opinions that we discussed, but they were specially will be true today with these many cases. So that was Nevada.

D

Diana Simpson 31:09

Or orders if there's no opinion like the Pennsylvania -- we'll update that when we can, but I don't think we'll update the podcast.

A

Anthony Sanders 31:16

No, we may mention in a later podcast, but yeah, Pennsylvania, there's just kind of a lot to -- if you really want to get on that case, there's a there's a lot you can read. So up in Alaska now. So this is also in state court at the Alaska Supreme Court. And Alaska did and some of you may have heard about this, because it kind of a made some national news in a recent special election for the Alaska congressional seats the one seat that Alaska has, and Sarah Palin was running in it and lost out narrowly because of this new system they have. So you may have heard about this, this new system of instant runoff voting, they have in Alaska. And this, this opinion is about a challenge to that, that system writ large. And it just happens to have recently come out at the Alaska Supreme Court in advance of the general election in 2020. So this came out a couple of weeks ago, on October 21, 2022, but it's been in the offing for a little while. And so what happened in Alaska was Alaska used to have the kind of election that we normally have in the United States, which is a primary and then we have a general election. And the winner with the most votes is elected, or the winner is the person with the with the most votes. So the new system of instant runoff voting kind of does two big things. One is the instant runoff voting, which I'll explain how that works in a moment. The other is it redoes how the primaries work in Alaska, where it's now really a jungle primary that they have in some states. And that's the colloquial term. I know, Louisiana has a system like this and a few other states do something like this. California, I think does something like this, where everyone's on the primary ballot. There's no primary ballot for particular parties, where you winnow the field in an individual party and then you go on to the general election. You just get the top four from the jungle primary that can then go on to the general election. Now, you can list your party next to your name, even though it's kind of a non partisan, primary. Because there's there's no party, it's just everybody. You can list your party, but that's up to the person running. So even if the party, you know, has its own say nominating process, and they're like we want we want candidate alpha to be elected. They're our nominee. And then if you go into the voting booth, you will see candidate alpha listed with that party's name next to it. But candidate beta may

also have the same party next to it. And that's because candidate beta says Well, I'm a member of that party. I'm running even though I didn't, you know, get the nomination or I didn't even try for the nomination through the kind of the private nominating process. And there's a disclaimer on the ballot that says basically, don't pay too much attention to the party label. It says a candidate's designated affiliation does not imply that the candidate is nominated or endorsed by the political party or group that the party or group it approves of or associates with and goes on to say it's just the candidate who wants the name there. So the one challenge is to this kind of party affiliation. And then the other is to the system of instant runoff voting. So how that works is you go in, you go into the primary, or the general election, and you rank who you want. So you have your number one candidate, but then so say, like, you to lack of a better example, say you're a Democrat, you vote for the Democrat, you liked the Democrat member of your party, you vote for that candidate. But then as a backup, you're like, Well, I also kind of liked the Green Party candidate. So you put number two, or however they do it for the Green Party candidate, and then on down the list, and I'm not sure how many you get, but it seems like you know, at least maybe the top three might have an impact on the result. And so how it works then is in the primary, there can be a lot of people on the ballot, and then the general election will be just four. And so if the top person gets 50%, or more number one votes, then they're automatically either elected or they go on in the primary. If it's below that then what happens is the last person on the ballot, say the last person just gets like 2%, they're kicked off. And so then people who who listed them as their number one vote, get taken away, and they rearrange the votes for their number two, what was their number two, and then those are added to the people who are still on the ballot. And then the next one gets kicked off until someone gets above the threshold to either make the next round or to be elected. So confusing, but you know, it's not that confusing. Not totally counterintuitive, like, okay, I get number 123. And then I get rearranged after people get thrown off the ballot. In the vote counting phase.

D

Diana Simpson 37:02

It basically eliminates the need for a later runoff.

A

Anthony Sanders 37:05

Yeah, that's why it's called instant runoff voting. So that this is challenged. And first of all, we'll first talk about the the party label. There is some case law. It's interesting, the Alaska Supreme Court talks about case law that it has that is about the First Amendment and what the US Supreme Court has said about parties and their associational rights, but also the Alaska Constitution, Alaska has interpreted constitution to have a maybe a little bit stronger protection of associational rights when it comes to parties and to primaries. And primary ballots, we could talk about this for a long time, but primary ballots and primary elections have this interesting kind of status under constitutional law, where they're kind of their own thing by the parties, but they're regulated by the state. So there's kind of a state interest there. So there are some things that the that can't be done in the primary process. But that could be done. If you just had, say, a caucus or a convention for a party, but where there's associational interests of the parties at stake. But essentially, what the court says is yes, we've said in the past that certain kinds of primaries are unconstitutional, because they infringe on the parties. But here, it's kind of the flip side of that. We're not having any parties, anyone could get on the ballot, that for the primary, that's fine. And so if you put your name on there, that's just your party you happen to

associate with, we have this big disclaimer. And so it's not confusing the voters. And there's no right to just be on a primary. The parties can do their own conventions and nominate people. That's fine, no problem, get the word out about who you're nominating, but there's not an actual constitutional right to say have that on the ballot. So I think the biggest kind of maybe landmine there is that they say, this is a facial challenge. When this case was filed, there hadn't been any elections under this system. So there's no like data about voter confusion. Future cases, whether they're brought in state or federal court, I could see someone looking into the data, getting an expert, and saying, Look, voters really are confused by this process. Well, maybe they are. Maybe they aren't. I could just see that as an issue in the future. The court explicitly says this is a facial case. And of course, there's no past elections to look at. And then on the instant runoff voting, the court disposes with that and says look, instant runoff voting has been done in other places, and we think it's just fine under both state and federal law to the extent it was even an issue in this case. Most of that concerns this very specific provision in the Alaska Constitution about how you count votes for governor and lieutenant governor. And if you're really into like Alaska history and the Alaska Constitution, there's all these quotes from the Alaska constitutional convention from 1956 about how this provision is supposed to work. I didn't delve too into that. And I'll leave that to our listeners, maybe especially our listeners in Alaska, if you are interested in that history. But the bottom line is they think it's a kind of a close call. But they say that this does not violate that provision of the Alaska Constitution, and therefore, the system is okay. Diana, any special thoughts on Alaska?

D

Diana Simpson 41:01

I mean, there's a lot there. But it'll be interesting to see if there is an as-applied challenge later on. As you mentioned, they hadn't had one. And so you know, instead of having just like this big, huge question of an entire system under the Alaska constitution, maybe there would be a challenge later on on behalf of Joe Smith saying that he was confused or whatever. That'll be interesting to see if that means shakes out any differently.

A

Anthony Sanders 41:31

Some listeners remember the the butterfly ballots of the year 2000 in Palm Beach County, Florida. And, you know, some voters said they were confused by that ballot. That could be that could be something that could give rise to a claim in the future. So now, we're gonna have the devil gone down the Georgia. Is that correct, Diana?

D

Diana Simpson 41:56

We are. Going to go from cold to hot. At least in terms of weather.

A

Anthony Sanders 42:03

Yeah, that'd be quite a flight from Alaska to Atlanta, I have to say.

D

Diana Simpson 42:07

Diana Simpson 42:07

Hope you have a lot of leg room on that one. So this case is the result of a kind of response in -- Georgia's sixth congressional district had an out of cycle election to fill a vacant seat. A Republican won by a very slim margin 51.78% to a 48.22%. And one of the nonprofits at issue here, which is a plaintiff in this particular case, called the Coalition for Good Governance did not trust those results. So they brought a case along with a couple other folks challenging the state's electronic voting system. They said that it was vulnerable to hacking, and it should be replaced with an all paper balloting system. So the state in response ended up replacing all their machines with new machines that instead of just being electronic, printed out paper ballots that were marked with the electors' choices in a format that was readable by the voter. And then the paper ballots were tabulated by scanner. Just a fun aside, that's kind of how my Virginia based elections work, I go in and I push the button, it spits out the basically a document that looks like a scantron back from my old high school test taking days, and then I take it over to another machine, and I put it in the machine and it shows me that it counted my vote, and then I go on my way. I get my I Voted sticker, and then I get to leave. So you know, it seems pretty straightforward in that sense in that there is kind of a more physical manifestation of your vote than there would otherwise be with just a computer screen selecting whatever your preference. But as with many lawsuits, the plaintiffs were not happy with this shift. They wanted more change. And so they filed an amended complaint and sought to enjoin the new equipment, and then continued to request a paper only balloting system. So there's a whole host of claims in the case, there's only two that are really relevant here at the 11th Circuit. And so one is about the hardcopy backup check in lists that are used at polling places. And so all these polling places have the electronic lists of voters, but then they also have a backup paper list. So the counties request these backup lists in a month-long period from the end of voter registration to the week before the election. And the paper lists are sometimes printed before the end of early voting. So they are not up to date with a list of voters who are eligible to vote in this particular election who have not yet voted. The plaintiffs disagreed with this. They wanted the list to be updated at the close of early voting to ensure that there would be shorter wait times and that there would be fewer provisional ballots or double checks to confirm or voter eligibility. The plaintiffs also wanted the voters who were on the hardcopy list to be able to cast emergency ballots instead of provisional ballots. Frankly, before I read the case, I didn't know kind of what the difference was between these.

A

Anthony Sanders 42:07

Yeah, I have no idea what the difference is.

D

Diana Simpson 44:11

Well, I can tell you, based on this case. So the provisional ballots require that a voter swear that they are eligible to vote. And then officials will examine their ballot and their documentation to determine whether the voter is eligible. And only after that, do they count the vote. By contrast, an emergency ballot is counted right away, because the voters are already known to be eligible. And so it's really just a shift from the standard vote to a slightly different vote, but it's still counted. And so the plaintiffs in this 11 Circuit case wanted everyone to do the emergency ballots instead of the provisional ballots so that all of them are counted. So that's the first claim. It's all about this hard copy backup check-in lists, and what happens if you have to vote underneath that instead of the electronic list. The other claim is about increasing the sensitivity of scanners that tabulate the ballots. And so perhaps this is the slightly updated

version of the hanging chad or the butterfly ballots or all of those folks can remember back all the way back to 2000. But the instructions on the voting machines direct the voters to black in the oval next to their choice. And they show a picture of an oval that is completely filled in. Some voters don't follow this. Instead, they either check or cross through the ovals. And their votes are not counted by the machines. And so the plaintiffs wanted the state to increase the sensitivity of these scanners to include all perceptible votes to capture checked or crossed ovals.

A Anthony Sanders 46:55

Or they write in lizard people, like happened in the Minnesota gubernatorial or it was senatorial election in 2008.

D Diana Simpson 47:05

You know, I don't think that would qualify underneath the oval being completely filled in.

A Anthony Sanders 47:10

Probably not.

D Diana Simpson 47:11

I mentioned a bit ago, the scantron from my youth. I think this is the same kind of thing. I was always terrified that if I had a slight cut, if I if I exceeded the oval a little bit, or if I didn't fill it in quite enough that my answer wouldn't be recorded.

A Anthony Sanders 47:27

At least the voters don't have to use a number two pencil I believe.

D Diana Simpson 47:31

That's true. Or maybe well, yeah, I suppose they could probably use pen too.

A Anthony Sanders 47:35

We use pen in Minnesota. The same system.

D Diana Simpson 47:37

So anyway, so these are the two kind of big claims going on here, at least at the 11th Circuit

discussing this. And so, the District Court on the hardcopy checking lists rule for the plaintiffs and said you have to update the list at the close of early voting. And any voter on that hardcopy list has to be allowed to vote on the emergency ballot instead of on a provisional ballot. As for the sensitivity of the scanners, the district court ruled for the plaintiffs determining that the average voter would be likely unaware that a checked or crossed oval could not be counted. But the district court did not set the contours of relief for this claim. They instead asked the plaintiffs to propose different injunctive relief than they had originally requested in their complaint. They did. Court never ruled on it. And then while all of this was pending, the defendants appealed. So now we're at the 11th Circuit. Had to set the background. But now we're at the 11th Circuit. And of course, you can't get to the merits of a constitutional claim without first going through a whole host of jurisdictional questions.

A

Anthony Sanders 48:37

Awesome.

D

Diana Simpson 48:39

Awesome. And so the 11 Circuit rules for the plaintiffs on these jurisdictional questions, but some of them are interesting, so I'll go through them. And so the first question is whether the plaintiffs have standing, and the court just says, yes, if a voting advocacy organization has to divert personnel and time to educating volunteers and voters on how to resolve a problem with a policy on election day, that counts as standing. That exists here. We don't have to address any other standing questions, check that box. Or complete that oval. And then the court shifts to the hardcopy check-in lists. But again, we start with a jurisdictional question. And here the state argues that it is immune from suit for injunctive relief, under an exception to Ex Parte Young for suits that implicate special sovereignty interests. So Ex Parte Young is already an exception to sovereign immunity. They're saying there there's an exception to the Ex Parte Young doctrine for these special sovereignty interests. And the 11th Circuit is not having any of it. Suits challenging election procedures are routine. This isn't a special sovereignty interest. You get to set rules, but then the courts get to review said rules.

A

Anthony Sanders 49:59

Yeah, I didn't get the special solvency interest thing.

D

Diana Simpson 50:03

The court didn't spend a lot of time with it. So I don't fully understand what their argument was. You know, it's always heartening to see jurisdictional arguments defeated. Because they always end up being these arguments that -- I mean, I say this from the perspective of an attorney who represents plaintiffs challenging laws that ends up having to deal with all of these kinds of jurisdictional arguments. But the 11th Circuit wasn't having any of it. The state also argued this was a political question. And the 11th Circuit very quickly said absolutely not.

A

Anthony Sanders 50:37

Well, it's a political question in a way of, but not in the way that it's an exception to jurisdiction.

D

Diana Simpson 50:44

Exactly. So the 11th Circuit pushes past all of that and gets to the merits. And so, going to the merits of the the hardcopy backup list, the court says that, look, the plaintiffs have shown a whole bunch of examples for the need of a hard copy list. But most of these examples have nothing to do with the relief sought of printing the list a day or two, sooner or later. The hardcopy list is already required by state law. So the question becomes whether the list is helpful enough when it is printed, according to state policy. So the plaintiffs have argued that if the list is printed earlier, the paper backup list becomes unusable. Because there's too many names that you have to double check against. This leads to longer lines, and then more voters have to cast provisional ballots. But were the lines attributable to the fact that the state's paper backup list doesn't include updated information covering the last several days of early voting? There's absolutely no evidence on that front. The 11th Circuit says that it's not obvious that a better list would resolve these types of problems. And we're really just talking about a few days worth of information for the hardcopy lists. You can't determine that, based on this evidence presented in this case, that this system burdened the right to vote. And so if you can't show that, you don't get strict scrutiny, and then it really becomes a kind of an easy win for the government. And so the court has to evaluate whether the policies are reasonable and non discriminatory, and that there are relevant and legitimate state interests that justify the limitations imposed by the state. And this particular policy easily passes that test. This backup list doesn't draw classifications between voters. There's no allegation that the timing is motivated by discriminatory intent. And besides the state's argument that the printing date is necessary, because of administrative hurdles involved in distributing these lists is actually pretty reasonable. There's 159 counties. The alternative that the plaintiffs have proposed would require distributing lists to all 159 counties in a single day, which sounds like a whole hassle. But that's kind of the result of it.

A

Anthony Sanders 53:10

So it seems like a case where there was a bigger problem. And now they're kind of arguing over some of the nitty gritty detail the court doesn't really want to sort out.

D

Diana Simpson 53:22

Yeah, so it sounds like the initial version of the case had perhaps stronger claims and that the state took care of those. And so you know, they kept fighting about about this, and then you're really, you're talking about a couple of days. And how long do people have to wait in lines? I mean, there's always long lines on voting day. I don't know where the line is between a burden on the right to vote and where it isn't. But the court here just said, look, there's just not enough evidence linking the problem you're challenging to a burden on voting. And so that resolved that one. But then the scanner sensitivity claim, the court was held even faster, because the district court never entered an order with injunctive relief. Like there was nothing for the 11th Circuit to review. And they said, I mean, sometimes we can review injunctions. We can do that



with an intermediate appeal, or an immediate appeal, as opposed to a final judgment. But the order has to be clear enough to include a directive to act or refrain from particular action, and nothing like that exists here. So there's nothing for the state to appeal. So you're out. We're just not going to resolve that issue. And you can come back when you've got an injunction, but they're just this doesn't exist here.

A

Anthony Sanders 54:37

Yes, sometimes trial courts, they just don't quite get around to entering that final order. And that can be frustrating I know when you're when you're an attorney and the case. But usually it's required to get on appeal. Well, we have been talking about a lot of big statewide issues or even nationwide issues and so those are some good cases. Good important cases. Now, to close out we're gonna talk about a little tiny case, but important for one guy and his fellow citizens in his town. And that's the Sixth Circuit case, which is Burrell versus Tipton County Election Commission. And it concerns this man Thomas Burrell. So Thomas Burrell, we learn from the opinion, he has long lived in Tipton County, Tennessee. Most of his life he's lived there in different cities in the county. And there's a town in the county called Mason, and Burrell has family members in Mason. He's had business interests there different times throughout his life. So it sounds like he knows Mason, and he moved to Mason in May. It's a little unclear exactly. But he basically he moved there in May of 2022. And then he decided he liked the town so much he wanted to run for mayor of Mason. Now the problem is Mason's town charter says that to be eligible to run for city office for mayor or aldermen, you have to live there for six months before the election. Now the election is on November 8, 2022, which means if you're doing the math, you have to be a resident by May 8, 2022. So what was the timing for Burrell? Well, he signed a lease for what became his residence on May 4, 2022. Alright, so four days ahead of time. He got his utilities connected May 6, but it seems like and it seems like he doesn't argue otherwise that he wasn't actually quote, living there, which usually in lawyer speak means actually sleeping there. Like, Where do you sleep? Usually is the question on where your residency is. He wasn't sleeping in that apartment or that that residence until June. So that means he's he's really only been a resident for five months, not six months, so he can't run. Now he goes to the the city council, they have a process for dealing with this. I'm sorry, with the election commission. And they say no, sorry, six months to six months. You can't run for mayor. So he goes to federal court. And he sues. And he says that this violates his right to travel, his right to vote, and then also that the Commission violated the Open Meeting, Tennessee's Open Meeting Act. Now the only real claim that gets a lot of play is the right to travel. And unfortunately, for him, this issue has come up before as you might imagine, and so the Sixth Circuit says, Look, we upheld a similar restriction for a year in the in the past, that you have to live somewhere for a year before you run for office in that town. And the Supreme Court has upheld a lot longer restrictions in in the past. Some cases from the 70s talk about a seven year restriction for say a state senate seat. So with that caselaw, he didn't have too much of an argument about the the right to travel. Now, if this had been another kind of restriction, say, you know, to get to get a license for working in a profession or something like a building permit, I think then he would have a lot stronger argument. There was even there was one Supreme Court case about a six month restriction to get welfare benefits that was found unconstitutional under the under the 14th Amendment. Here though because it has to deal with being an elected official and the interest in having you kind of know your city before you become an official, it's given a lot more deference, and therefore it survived the challenge. Whatever the policy implications might be for such a restriction. He also has a right to vote argument saying I can't vote for myself. And so then that's taken away from me. The court

doesn't doesn't think too much of that having already disposed with the right to travel argument. And it doesn't really address the state claims either. So poor Mr. Burrell. He's going to have to wait for the next election if he stays in in Mason, Tennessee to run for office.

**D** Diana Simpson 1:00:00

Presumably he'll give it a bigger buffer next time if he wants to run.

**A** Anthony Sanders 1:00:04

Yeah, if he had just started

**D** Diana Simpson 1:00:05

down the wire

**A** Anthony Sanders 1:00:06

just started sleeping there right after the lease, you know he could he could have made it. But fine print is the fine print I guess.

**D** Diana Simpson 1:00:15

Alas.

**A** Anthony Sanders 1:00:16

Well, Diana, I hope you're not running for mayor anytime soon. If you are and it's somewhere else you might want to move soon. I hope the same. I give the same advice for all of our listeners. But thank you for for joining us today on these various cases. And who knows there may be more election last bit specials in Short Circuit's future.

**D** Diana Simpson 1:00:39

Thank you, Anthony.

**A** Anthony Sanders 1:00:41

And thank you all for listening. Remember an upcoming election November 8, that's just six days after we record this, vote early, vote often and get engaged.

