Short Circuit 300 | The Cause of Action Community

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SPEAKERS

Anya Bidwell, Anthony Sanders, Dylan Moore

A Anthony Sanders 00:24

"Looking over the names of the delegates elected at the primaries, the same old names that were identified with the plunderers of the city treasury, are to be found at the top, in the middle, and at the bottom. So that, in rank and file, bone and sinew, the 'vote early, vote often' fraternity are still the warriors of the wigwam; and Horace Greeley's Tammany supporters are, to a man, almost the same whom he has grown bald in vilifying." Well, that, believe it or not, was from the October 5, 1872, edition of The Boston Globe reporting, as you might guess, about the goings-on at Tammany Hall in New York City, which apparently (I did not know this) was in those days called the "wigwam." We're going to be talking about the age old question of voting and American democracy today on Short Circuit, your podcast on the federal courts of appeals. I'm your host, Anthony Sanders, director of the Center for Judicial Engagement at the Institute for Justice. We're recording this on Wednesday, November 29, 2023. We have an old friend and a new colleague today to introduce you to here on Short Circuit. Before then though, they're both going to talk about cases about American democracy, the right to vote, the right maybe not to run for office, barriers to running for office, barriers to getting into court, all that good stuff in a little bit. First, though, a real quick plug. I talked a couple of weeks ago about how our sister podcast, Bound by Oath, has season three coming. We're getting closer and closer. Probably most of you when you're listening to this right at the end of November, beginning of December 2023, it is still a few days away, but season three is coming. The first episode teaser or preview is already out there. You can find it on the interwebs and your various podcast apps. We have that going, so please stay tuned. John Ross's Bound by Oath season three about property rights is coming soon. But before then, it's all about American democracy. So I am pleased to introduce again to the podcast, Anya Bidwell. Welcome back.

A Anya Bidwell 03:04

Hi, Anthony. It's great to be back on.

A Anthony Sanders 03:05

Anya has a lot going on right now because of this little matter at this small court in Washington, D.C. And so she's spending most of her time getting ready for that, but she's breaking with that though to give us some of her time today, which we very much appreciate. But a big-time, important attorney for us at the Institute for Justice is our new litigation fellow, Dylan Moore. So Dylan, this is your first time on Short Circuit. We're very excited to have you. Please tell us a little bit about yourself and what you're doing with IJ.

D Dylan Moore 03:50

Sure. So first, I'll just say it's kind of surreal. I've listened to the podcast so many times. It's wild to be on the inside of it. But I'm a native midwesterner at heart. I was happy when I got to IJ to find that there were so many other people from Indiana, which was something I didn't know.

A Anthony Sanders 04:06

Yeah, we try not to tell too many people about that, but it's okay.

D Dylan Moore 04:10

I'm sorry. I have to get the word out on the Hoosier pride. But I've been a big fan of the Institute for Justice for a long time, and it's just really surreal to get to be a part of it now.

A Anthony Sanders 04:21

Great. And you are a graduate of the University of Chicago Law School, I understand. So my wife approves of that. She also graduated from that place. And you were a clerk for our office in Minnesota, where I used to have an office and I still live in Minnesota, but have you ever actually been to Minnesota?

D Dylan Moore 04:51

I haven't, no. I kept saying that once I started here, I would make a trip up to the office, but now, that's not possible.

A Anthony Sanders 04:59

Well, we'll get you out sooner or later. But Dylan was a clerk of ours at IJ Minnesota. We recently closed our office, but all of us who worked there are still here, we just have a virtual setup now. But he was a clerk of ours in the summer of 2020, which meant he did not actually physically make it, but he still did some great work. And we're very happy to have him as a fellow now. And also, this is a very special episode because it is our 300th episode. Now, we did a big ole kind of where are they now, where did we come from, origins type of stuff in our

episode 200, so we'll put a link to that in the show notes. We interviewed John Ross (the origin host, now the Bound by Oath host), we interviewed Clark Neily and Evan Bernick (who were on the show in the early days), and we had a few other folks on, so you can listen to that. We're now a couple years removed from that. We do an episode a week now, which we didn't used to do. That's how the numbers have gotten high quickly, even though we're almost 10 years old. This podcast is almost 10 years old now, but now we're at our 300th episode. Anya, you've been on a few of those. Yes, I have. Now I'm going to have to go buy strawberry shortcake and have 300 candles. I was looking for an excuse to do exactly that. We'll have more when we get to our 10 year anniversary very soon. We're going to have more to say. But to mark the 300th episode, we've had a lot of fun times here on Short Circuit. And you can listen to that, again, to get some of the story on the background, if you're curious, in the 200th episode, which we'll put a link to in the show notes. So there was some big news in the voting rights community a couple of weeks ago, also in the cause of action community, for want of a better phrase. This was all sparked off by our friend, Judge Stras, on the Eighth Circuit, who had some things to say that surprised a lot of people about Section 2 of the Voting Rights Act. So Anya, take it away. Section 2, Judge Stras, Eighth Circuit. What's going on here?

A Anya Bidwell 07:30

Yeah, so the case is Short Circuit.

A Anthony Sanders 07:33

We are not involved in any litigation that I know.

A Anya Bidwell 07:35

The case is the *NAACP v. the Arkansas Board of Apportionment*, and our listeners will be familiar with the topic of cause of action. It's, like I said, a very big, important, loud community. And then the question is, how specific does Congress have to be in this setting? Because we're talking about statutes. How specific does Congress have to be when it creates a cause of action language in its statutes? If a statute says that you have a right to be free from the mailman bothering you on Sundays, does that also mean that you can sue the mailman when he comes on Sundays? Or does Congress specifically need to say you have a right to sue him when he comes to you on Sundays? So for a long time in the common law tradition, courts would interpret the right recognizing language as also authorizing you to sue. Everybody knows, right, this Blackstonian notion of where there is a right, there must be a remedy. But that's really not true anymore, especially when it comes to federal courts. The rollback really started with Justice Scalia in the 1980s. And this case that we're talking about today is a great example of that. So the NAACP and Arkansas Public Policy Panel sued the Arkansas Board of Apportionment for discriminating against Black individuals in violation of Section 2 of the Voting Rights Act, and they sought declaratory judgment declaring the redistricting to be unlawful. So Section 2 does, on the one hand, say that citizens have a right to vote free of discrimination on account of race. That's very clear rights language, but the Voting Rights Act enforcement provision, Section 12, on the other hand, lists only one party that can sue, and that's a state attorney general. Does that mean that other parties like individual citizens can't sue? The majority says yes. Individual citizens can't sue; they must wait for the attorney general to file an action. The

dissent says no, individual citizens can sue. Interestingly and importantly, the United States government also agrees with the dissent. They submitted an amicus brief in the Eighth Circuit explaining their reasoning. So let me start by discussing the dissent first because it relies more on precedent than the majority does. The dissent basically says, and that's Chief Judge Smith, he says, I have history-binding precedent and implied congressional approval on my side. I really don't see how we, as an intermediary court, can overlook all that. Start with history. Congress passed the Voting Rights Act to make the guarantees of the 15th Amendment, finally, a reality for all citizens. The achievement of this goal would be severely impaired if each citizen was required to depend solely on litigation instituted at the discretion of the attorney general. So that's history. Look at binding precedent. We have this case called *Morse* from the United States Supreme Court, where five Supreme Court justices specifically said that Section 2 of the Voting Rights Act can be enforced by private individuals. True, the case actually involved Section 10 of the Voting Rights Act, but the justices discussed Section 2 in the same breath. And Judge Smith says, I don't buy that this is the type of dicta that we as lower courts can ignore. Oh, he also says, by the way, over the decades, hundreds of cases assumed that private individuals can sue, and he just lists a whole bunch of lower circuit court precedent that relies on that understanding. So he looks at history, he looks at binding precedent, and finally, he looks at implied congressional approval. He says the Voting Rights Act was passed in 1965 at a time where right of action was routinely implied. That was not controversial. So the background assumption was that Congress didn't need to specify that people can sue when their right to vote was discriminated against. So they didn't put that specific language in there. So for Judge Smith, it isn't even a close call. And the United States agreed with him for largely similar reasons. It also added that the court should at least allow enforcement under Section 1983 if it disagrees with the NAACP here. After all, the Voting Rights Act is unquestionably a right-creating statute, and under *Gonzaga*, there is a presumption that individuals can sue under 1983 if that's the case, unless the text of the statute is unequivocally against it, which it isn't. So that's Judge Smith and the United States. Let's now go to the majority. Judge Stras basically says that precedent really doesn't tell him much since it's dicta. All we must do is look at the text and structure of the Voting Rights Act. And both he says are against the plaintiffs here. It is immaterial that the courts so far have been assuming that the private right of action exists. What matters is that the text of Section 2 does not say who can or cannot sue. There is an enforcement provision that applies to Section 2 under Section 12, and it mentions only one party that can sue. It's a state attorney general. So the negative implication canon basically tells us if one thing is mentioned, then by definition, the other thing is excluded. As a result, only the attorney general can sue. Stras is confident in this conclusion because he understands, as a former federal courts professor, the doctrinal world in which he currently operates, and it's a world where Scalia's method of interpretation and his skepticism of implied rights of action dominates. In this world, legislative history, especially post-enactment legislative history, is not nearly as important as text and structure. In addition, in this world, you can't imply remedies under the Constitution or a statute because that dominating text must specifically say what is to be done. And if it doesn't, you can't make it. There is this common law idea that where there is a right, there is a remedy. But that's not for federal courts under this view. Federal courts are not common law courts and can't engage in legislative action by filling in the blanks of the Constitution or statutes. And that is especially problematic with constitutions because constitutions are extremely difficult to amend. At least with statutes, you can say, okay Congress, go back and clarify that you meant for private parties to be able to sue. With constitutions, it's very difficult to, you know, go back and say let's amend the Fourth Amendment, and let's specifically say that individuals can't sue under the Fourth Amendment. We have a statute for that, 1983. But when it comes to federal officials, 1983 doesn't apply. So what you end up with is that you have a Fourth Amendment provision in the Constitution. There isn't an enforcement statute, so you can't sue federal officials when they beat you up and

unlawfully searched your house. And speaking of 1983, that's also an interesting caveat in Stras's majority opinion because he says, yeah, there is this argument about 1983 and how, at least, plaintiffs here should be allowed to sue for violations of their rights under Section 1983. But he says, listen, it was barely briefed. It's just in a footnote. And, you know, they essentially lost their right to argue this at this point. The United States government, of course, extensively briefs it in their amicus brief. And frankly, if Judge Stras wanted to reach that question, he could have reached that question, but he chose to let that be. And the holding is that the Voting Rights Act, because it does not specifically say that private parties can sue under the Voting Rights Act, it's not for private parties to use to enforce their rights.

D Dylan Moore 17:13

I just can't believe that. There's this whole basket of rights that we have. And then the people that have to actually, you know, work on our behalf to enforce those rights might so be politically against us that they don't want to stand up for the people that they don't like. And this idea that you have to just put your rights in the hands of an enforcement mechanism that you have no real control over, it's just so frustrating.

A Anya Bidwell 17:39

Yeah, but I do want to say, I don't think it's about politics. I do think it's about fundamental philosophical disagreement over what federal courts are supposed to do, right? It is this idea that it's for state courts to do this common law thing about where there is a right, there must be a remedy; that federal courts are of limited jurisdiction, unlike state courts that are of general jurisdiction. So federal courts really can't go about doing stuff that is not specifically in the text, and I agree with your intuitive reaction. How can it possibly be that you have a right guaranteed to you by the Constitution, and yet, you can't enforce that right? But it is a very nuanced, philosophical view very much based in the serious idea that federal courts are powerless to imply rites of action.

D Dylan Moore 18:48

But if you're going to tackle such a big, philosophical question in an opinion like this, why sidestep the 1983 argument?

A Anya Bidwell 18:56

I don't think he tackled this big, philosophical question. He's basically saying, listen, the Supreme Court has been really clear about this since the 1980s. And he cites the *Bibbins* precedent, right? Not *Hernandez v. Mesa* and *Egbert v. Boule*, where the Supreme Court basically says federal courts stay out of implying causes of action.

A Anthony Sanders 19:20

But yet the Supreme Court seems like it has assumed, basically, it's pretty closely held that there is a private right of action under the statute. Those are back in, as they say, the heady

days where courts used to do that.

Anya Bidwell 19:44

That's Justice Scalia's phrase, for our listeners. Yeah, he called it the heady days of the federal court.

Anthony Sanders 19:50

But that is a pretty aggressive reading of some kinds of U.S. Supreme Court precedent and not other kinds.

Anya Bidwell 20:00

That is very aggressive. And the district court was very aggressive too, I might add. What the Eighth Circuit panel did is affirmed the district court's ruling, although the district court actually dismissed without prejudice, and the Eighth Circuit said, yeah, we should dismiss.

Anthony Sanders 20:19

I should say, the district court brought this up on its own because it said, well, this might be jurisdictional. So that's kind of like standing, which we'll talk about in a little bit, where a court has to raise it on its own or it's supposed to, but then the Eighth Circuit said, no, it's actually not jurisdictional. You can waive this argument about cause of action, so you don't have to bring it on its own. But you are right anyway. And yeah, it's with prejudice. So Anya, what you brought up there in kind of giving this argument the benefit of the doubt, about which we've talked about on Short Circuit, so we don't have to go in the past, and we will again, I'm sure. We had a real in-depth episode a few months back, that we'll put a link to, where you and I talked about this. But I want to get into this distinction you just made because you said there's this argument that federal courts don't, at least post this famous case called *Erie* from 1938, have the power to "make law in this area." So that is an argument that's out there. But this argument bleeds into the state court. I know this isn't a state case, but I think it's relevant here. It bleeds into the state courts because you see state courts saying stuff like the legislature passed the statute, or even that it's a congressional thing; Congress passed the statute. But we are only a court. We aren't a lawmaker. And so we can't infer an implied cause of action for someone to remedy the rights that were violated that they have under the statute. And so we can't do that. But they're a state common law court, they have the same rights that any court going back hundreds of years would have. So that's kind of it. What are your thoughts on that? To me, I don't exactly agree with the argument, the whole post-*Erie* argument, but it seems like it's kind of bastardized in the states, where it just takes on a life of its own. Courts can't create remedies, which is balderdash.

Anya Bidwell 22:38

It's balderdash. You hit the nail right on the head. You know, one of the worst externalities of

this kind of argument from the *Bevans* cases and the *Alexander v. Sandoval* case is that now, state courts also think that they can't imply rights of action. And you saw it very recently in an Iowa Supreme Court decision, where it reversed a decision from 2017 and said, it is out of our hands. The legislature must specifically say this, which runs in the face of Scalia's main argument that federal courts are courts of limited jurisdiction, so we need to be humble, we can't have our heady days. Our hands are tied, but common law courts are not bound by those same restrictions. And somehow, now, state courts are actually feeling like they are bound by those same restrictions, and I have very little understanding for, and I have a hard time giving the benefit of the doubt to, state courts that do this.

A Anthony Sanders 23:55

One other question I have before we move on because I just haven't thought much in the past about Section 1983, which we have spoken of many times on the podcast. We observed its 150th anniversary in a special a couple years ago, but it says the Constitution and laws of the United States. And I never pay attention to the "and laws" part because I, as a constitutional lawyer, usually dealt with the Constitution. But the case law, so I'm not familiar with that case law. You mentioned *Gonzaga University v. Doe* from 2002. The comments on this, is it pretty clear then under that case law that any law of the United States that gives you, an individual ... So I know there's the spending power argument, but say it's just a normal act of Congress. Congress is within its purview to pass this law. It gives an individual some right against either the government or whoever and if you're suing a person under Section 1983, it says "person" that you can do that? I mean, is this pretty clear?

A Anya Bidwell 25:07

It is pretty clear, unless Congress gives an indication to the contrary. So there is a burden shifting that's going on here. That's much easier than what you have with the VRA situation, where Stras is specifically looking for an affirming language that there is a cause of action. In *Gonzaga*'s line of cases, it's the other way where Congress must specifically indicate that they don't want a right of action here if there is a right given.

A Anthony Sanders 25:38

So the fact that they said that the attorney general has a right, but Congress is silent on individuals, that most likely wouldn't be enough to shift the burden. So the individual probably still has a right because Congress didn't say the AG has an exclusive right to.

A Anya Bidwell 25:58

Exactly. That's exactly right.

A Anthony Sanders 26:00

Okay. So is this all Much Ado About Nothing?

D **Dylan Moore** 26:05

I was going to ask, it kind of gives you a sense of what are we doing here?

A **Anya Bidwell** 26:09

I mean, there is much more value in being able to sue under a statute that prohibits a particular conduct like the Voting Rights Act. So, and again, it has this bleed-over effect into other statutes. So I do think it's important to be able to sue under the very statute that specifically tells you that you have a right to do something, rather than rely on Section 1983.

A **Anthony Sanders** 26:39

Gotcha. Well, I'm guessing these same plaintiffs, if they haven't already, are getting a complete ready that invokes Section 1983. And they can do this all over again. So not to comment on whether their claims under the Voting Rights Act Section 2 and all that very complicated business are going to be worthy or not, but it looks like they'll have a way to do it. So someone else though, who I think his road is at an end, is this fellow who was going to run in New Hampshire. I guess he is running in New Hampshire, but it kind of took him a while to get there. And his main point in running was because he seems to not like former President Trump. So Dylan, what's his story? And what should he have done that he didn't do?

D **Dylan Moore** 27:34

Yeah, so I'll tell you right now, Anthony, it's not just New Hampshire. This guy, John Anthony Castro, has filed 27 lawsuits across the country. I think all of them are solely to keep Trump off the ballot, and it's funny that this one that we're going to talk about today arises out of New Hampshire because he lives in Texas. So he's just a crusader against Donald Trump on the ballot. The case that I'm going to be talking about is called *Castro v. Scanlan*, and it's out of the First Circuit. So the bottom line is John Anthony Castro, pro se representing himself, is a Republican presidential candidate who tried to sue the New Hampshire secretary of state and former President Trump to prevent New Hampshire from allowing Trump to declare himself a candidate in the state. So Castro argued that Section 3 of the 14th Amendment prohibits Trump from putting his name on the ballot because he engaged in or provided comfort to the January 6 insurrection. So this is one of a long line of cases and scholarly articles and news reports that are coming out about Donald Trump and Section 3.

A **Anya Bidwell** 28:39

Name checking Will Baude, speaking of Chicago.

D **Dylan Moore** 28:42

Yeah, his stuff is great.

A Anthony Sanders 28:43

Former IJ clerk.

A Anya Bidwell 28:44

Former IJ cerk, and he makes a very powerful argument.

A Anthony Sanders 28:47

This is all about IJ clerks today.

A Anya Bidwell 28:49

Yes, and he makes a very powerful argument for why Section 3 of the 14th Amendment applies and why Trump should not be allowed to run.

D Dylan Moore 28:56

Yes, everyone should go read that. I was just reading it. So the First Circuit, like every other court that's dealt with Mr. Castro's complaint so far, has unanimously said that he is not successful. And in a unanimous panel opinion written by Chief Judge David J. Barron, they ruled that Castro did not have standing to sue because he hadn't suffered an injury in fact. So Castro, what he's kind of doing here is trying to get around the state case law and laws that prevent just ordinary taxpayers from challenging the qualifications of potential candidates. So like I mentioned before, he's done this in 27 states. So Castro is registered with the FEC as a Republican primary presidential candidate for 2024. And he claims that, all over the country, he's competing against Trump for the Republican nomination. So in this suit, Castro sued in September 2023 in the district of New Hampshire. He hadn't actually added himself to the New Hampshire ballot yet because the state wasn't accepting candidacy declarations at the time, but he claimed in his complaint that he was intending to either get himself on the ballot or be formally recognized as a write-in candidate. And he claimed that Trump was disqualified from running against him in New Hampshire under Section 3 of the 14th Amendment, which, as we've alluded to, disqualifies people who have taken an oath to uphold the Constitution from holding state or federal office if they have engaged in insurrection or rebellion against the U.S. or have given aid or comfort to the enemies there of. So at root, Castro is alleging that one, people can sue to enforce Section 3, and two, Trump's involvement in the January 6 insurrection bars him from becoming president. So about a week after Castro filed his complaint, New Hampshire announced that it was going to start accepting the declarations of candidacy for 2024 from October 11 of this year to October 27. So once New Hampshire made that announcement, Castro moved for a temporary restraining order to stop New Hampshire from accepting Trump's declaration. And he noted in that TRO application that he planned to file his candidacy paperwork as soon as he could, so on the 11th. The New Hampshire secretary

of state and Trump both opposed Castro's motion for a restraining order for two reasons. So the first one, and the one that the First Circuit latched on to on appeal, was that Castro lacks standing. So, as most listeners are probably familiar with, standing has three components. The first is an injury in fact (you have to have a concrete and particularized injury that's actual or imminent); two, you have to show that the defendant caused this injury; and three is redressability. So you have to show that the relief that you're asking for will fix that injury that you've suffered or are about to suffer. And the defendant's other argument against Castro's suit was that his lawsuit presented a political question that Congress or another branch of the government, not the courts, should figure out. I won't go too much into this one because it's not what the the First Circuit ended up latching on to. But that's another question floating around here for the intersection of Trump and the 14th Amendment. So Castro claimed that he had something called political competitor standing because if Trump was allowed on the ballot in violation of the 14th Amendment, Castro would lose votes and funding opportunities. And in response, Trump basically was like, this guy's too small time. He's not a serious candidate.

A Anya Bidwell 32:19

Trump said that?

A Anthony Sanders 32:20

A very small candidate I think Trump would say.

A Anya Bidwell 32:27

Probably making fun of his last name, something to do with Cuba.

D Dylan Moore 32:34

Basically, Trump was like, me being on the ballot isn't going to make this guy any less likely to be president because he's not going to be president. So the district court has this hearing to determine if Castro has standing. And Castro submits all this documentation that he has now signed up to be a candidate, he submitted all his paperwork, and says that, even though he doesn't have any campaign efforts at this time in New Hampshire, he's definitely going to ramp them up soon. Over this evidentiary hearing, there was also some unfortunate tweets that came out from Castro saying that he was just planning to do this all across the country, which was not a good look for him for reasons that we'll come back to later. And the defendants put an expert on during this hearing that basically just ragged on Castro for running a lifeless, amateur, and unserious campaign that had no activity, except for a very lame website. So a week after the hearing, the district court agreed with the defendants and said Castro did not satisfy any of the standing requirements, and even if he did, this is a political question that the courts are not well-equipped to handle. So Castro appeals, and before the First Circuit heard the appeal, Trump filed his declaration of candidacy. So there's an argument there that this all could have been moot, but the First Circuit doesn't get into that. Instead, it reaches the same conclusion as the district court but on narrower grounds. It says Castro has not suffered an injury in fact, so he doesn't have standing. So on appeal, Castro tried to bolster his standing

argument by saying that he has now hired campaign staffers in New Hampshire, and he was going to start mailing out postcards to voters. But the First Circuit said this was all too late. First, the court says the facts of this case are limited to the facts that were in existence when Castro filed his complaint, so nothing that he did afterwards (declaring his candidacy, ramping up his campaign efforts), none of that can be considered as to whether he's suffered an injury here. And then the court kind of squarely turns to this argument about political competitor standing. It says the First Circuit hasn't recognized the standing doctrine explicitly, but it analogizes it to something called economic competitor standing. And in those cases, you can show that you have an injury in fact if you might suffer a probable economic injury resulting from a government action that alters competitive conditions to favor your opponents. So this draws from the idea that the market is a zero sum game, and if the government's helping out your competitor, you have standing to do something about it. And to get this economic competitor standing, you have to be a direct and current competitor of whoever got the government's favor. So the court was worried that adopting too broad a definition of this political competitor standing would basically allow anyone to announce their candidacy in a race just to sue and disqualify somebody else. And they say this would circumvent that rule that I mentioned earlier that taxpayers can't challenge a candidate's qualification just as taxpayers. So to satisfy this injury requirement, the court said Castro had to show he was a direct and current competitor with Trump in the 2024 New Hampshire Republican presidential primary when he filed his complaint. And just looking at Castro's complaint before he had announced his formal candidacy and filed the paperwork and before he had ramped up any of his campaign activity in New Hampshire, the court said, that doesn't cut it. It's interesting though because Castro, when he filed his complaint, couldn't have been on the ballot because the window to get on the ballot had not opened yet. So this does raise a weird question of when are you allowed to even bring these challenges, if you can at all.

A Anya Bidwell 36:12

If Castro were to do it now, would he be able to do that? Would he have standing?

D Dylan Moore 36:16

I don't know. I think, for reasons that will come in a little bit later, the court still probably just thinks he's too small time. And that actually leads really well into sort of this next part of the opinion, which I don't know that it's necessary. But the court is basically saying, even if Castro had amended his complaint to include all of this information, it wouldn't have been enough. And I think here, the court kind of tells you what it really thinks. It goes on this very technical we have to look at the world just as the complaint explained it and we can't think of anything else when we're deciding this, which in a lot of cases, makes sense. But here, the court wants to ward off an amended complaint by saying, even if you've filed one now, it wouldn't matter. And basically, the court just says, I mean, it sounds a lot like what the expert said, which is this guy's just too small time to be the one that knocks Trump off the ballot here. You have to have a significant interest; you can't just make a nominal appearance on the ballot. And so even if the court considered all of Castro's current campaign efforts, they say that it's just not enough for him to be meaningfully competing directly with Donald Trump in the New Hampshire Republican primary. So even if people don't vote for Trump, it's probably not going to benefit Castro. So it's not good enough.

A Anya Bidwell 37:38

And it's a unanimous opinion.

D Dylan Moore 37:40

Yes.

A Anthony Sanders 37:41

It seems like the fact that he just didn't do any actual campaigning is the hook that the court grabbed on to, which I am very skeptical about, and we can get to that in a moment. But yeah, it did seem like the guy really isn't doing himself any favors in how he's pleading. And I think to do something like this, you've got to have your ducks in a row. And he says, well, I'm going to be a candidate or I might be a write-in. Well, that's a red flag right there. And then he doesn't like say, I'm going to go to New Hampshire, or I'm going to do this, I'm going to have this many signs, or I'm going to pay for, you know, Facebook ads that are directed, geo-located to New Hampshire, like anything like that. It's just I'm going to be on the ballot, which we could talk about whether that's enough, and I'm very sympathetic that it's enough for standing. But he could have done more, which tells me, I mean, I guess he's in 27 states, or whatever it is, is someone else is trying to do this. And this is all happening very fast right now, of course. And there's this litigation on Section 3, and Trump is all over the place, but someone that is a little bit savvier would be able to get over these standing hurdles.

D Dylan Moore 39:18

Yeah, I think he was trying to do too much at once. 27 of these is too many to target. Just for some feedback for Castro, if you're listening, it might have been better to target a few states and really put in the effort.

A Anya Bidwell 39:31

Or, you know, economies of scale. He could have done it really well in one and then replicated it in all 27.

A Anthony Sanders 39:36

Right, yeah. I do have worries though about this idea that if you're on the ballot, that's not enough. It can't be the rule, and indeed it isn't the rule, that you have to be a likely, I don't know, victor in whatever the race is. Here, it's the primary for president, so even if you just get a few percent, you could get a few delegates. But it can't be only if you have a shot at winning that you have standing because I could run for office just to try and get one percent of the vote because I'm trying to raise my name recognition or whatever. And if there's someone else on the ballot that's going to take away from those votes, that's standing. I mean, in voting they bend all kinds of rules for standing. Mootness isn't a concern because you could run again in

the future, and usually, courts don't care too much about how much you promise you're going to run again in the future. There's First Amendment cases all over the place, some of which we've been involved with at IJ, where standing is like all over the place. We're wallowing in standing when it comes to First Amendment and campaign lawsuits. And yet, here, they analogize it to this economic competitor stuff, which is a whole different, I think, question in that area. So I see this as another one of these off-ramps to not getting the Section 3. And unfortunately, it's made standing a little bit harder in the First Circuit because they chose an off-ramp.

A Anya Bidwell 41:23

That's why it's so important to pay attention to federal jurisdiction and all these different rules like standing and cause of action because courts have just so many ways to get rid of cases they don't want to deal with, even if the questions raised in those questions are very important ones. In those cases, I always quote Dean Chemerinsky on this, right? If a court were to deny you a specific right, people would be marching in the streets protesting that, but if the court were to say, oh, too bad, you are so close, but you didn't quite get there, then it's like, oh, okay, something procedural and really boring. I'm going to stay home and not worry about it. So it's a very, very persnickety way to avoid doing the hard stuff.

D Dylan Moore 42:18

Yeah. And it's just strange. On reading this case (Anthony, you mentioned this a little bit earlier, I think), it seems like the only people who have a shot at having standing here are people with a reasonable chance of success, but those people also seem to me like they would be the least likely to bring one of these claims, just for purely political reasons. I don't think that it would win you many favors to disqualify probably the leading Republican candidate; I don't think that would rally the base. So the only people who, arguably, can even bring these claims are the people who are least incentivized to do so.

A Anthony Sanders 42:57

Yeah, in this circumstance, there's a lot of races where they would. A lot of us know the story of Barack Obama. The way he got into the state legislature is he challenged the signatures for the incumbent in his district successfully, which it wasn't a lawsuit, but I mean, it might as well have been. But yeah, a lot of the time, that is going to be true. And also, I don't think it's that barring for future, similar situations, which I don't think there will be any, but it's future lawsuits where it's this type of standing where you're on the ballot because, again, if this guy had said, I'm going to send out x number of postcards, or I already have, or I've not just set up a website but have done a few other things; I'm a real candidate. It doesn't mean you're a professional, winning candidate, but it seemed like he was like, I am a paper candidate. And that's it, and that's just that. It should be enough. But I can see why it's not enough. And so, someone doing a little bit more in the future, I think, is probably going to be okay, thankfully. Not to say anything about the merits of these claims, of course, or any others. If you want to get into those merits, there are plenty of other podcasts that have talked about that, plenty of 126 page articles if you want to go read that with our old clerk and my old professor, Mike Paulsen. But yeah, if you want to sue in the First Circuit, things just got a little bit harder. But things are a lot

easier to understand when it comes to that case and Section 2 of the Voting Rights Act because of our lovely guests today, so thank you both so much. Anya, you can go back to all this briefing or whatever it is you're dealing with.

A

Anya Bidwell 45:09

I really appreciate you giving me this opportunity to actually get my head out of there. It's nice.

A

Anthony Sanders 45:14

Anya will be arguing before the Supreme Court later in 2024. We look forward to that.

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Anya Bidwell 45:20

Speaking of podcasts, oral arguments now are essentially podcast recordings. Oh, yes. At some point in February or March, *Gonzalez v. Trevino*. Maybe we can save that for Unpublished Opinions.

A

Anthony Sanders 45:30

Yes, they're much longer than they used to be too with all the questioning they have. Oh, that would be fun sometime. Yeah, I just listened to one this morning. It was a lot of time to set aside. But in the meantime, I hope everyone enjoys Bound by Oath. Get ready for that. And also, I hope that all of you get engaged.