Short Circuit 304: The Writing on the Wall

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SPEAKERS

Joe Gay, Anthony Sanders

A Anthony Sanders 00:24

"In the same hour came forth fingers of a man's hand, and wrote over against the candlestick upon the plaister of the wall of the king's palace. And the king saw the part of the hand that wrote. Then the king's countenance was changed, and his thoughts troubled him, so that the joints of his loins were loosed, and his knees smote one against another. The king cried aloud to bring in the astrologers, the Chaldeans, and the soothsayers. And the king spake, and said to the wise men of Babylon, 'Whosoever shall read this writing, and shew me the interpretation thereof, shall be clothed with scarlet, and have a chain of gold about his neck, and shall be the third ruler in the kingdom.'" Well, certain judges on the Fifth Circuit seem to be saying that they are the astrologers and Chaldeans. And we'll hear about why that is 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. Now, we're recording this on Wednesday, December 20, 2023. But it'll be going out shortly before the New Year to round out 2023. Joining me today to bring the ball down on Short Circuit and this wonderful year we've had is my colleague, Joe Gay. Joe, welcome back to Short Circuit.

J Joe Gay 01:56

Thank you, Anthony. Thank you for inviting me back on. I'm happy to be here.

A Anthony Sanders 01:59

Of course. And it's a very happy day for Joe to be here because he actually had a victory in one of our cases this morning. We're not gonna be talking about that case, but it's a First Amendment occupational speech case that you all should check out. And anything, any brief words to say about maybe that case or other occupational speech cases these days, Joe?

J Joe Gay 02:24

Yeah, well, I don't want to just celebrate our own victory. We also had another victory yesterday in Indiana involving giving end of life advice, and now we have a victory today in North Carolina. So it's been a very exciting and joyful couple of days here at IJ.

A Anthony Sanders 02:42

And it was a case about engineering speech. So someone being an engineer and speaking as part of their occupation and whether this definition of what an engineer is should envelop them in regulation. And the funny thing is, my case before I came to IJ that I did as a volunteer attorney was about someone truthfully calling themselves an engineer, but they didn't have a license for technical reasons. And that was against the law and were actually prosecuted for that. So I'm glad that many years later, we're winning these victories in federal court on behalf of the First Amendment and allowing people to truthfully describe the events of the world. So whether or not in the book of Daniel the events of the world were truthfully described, which was the reading I had at the beginning, we will go back to that in the Fifth Circuit a little later in the show. But first, Joe is going to take us to an old part of the Fifth Circuit, which since 1980 has been the 11th Circuit. Anyone who's had anything to do with employment law over the years or discrimination law knows about what this case is going to discuss, which is the McDonnell Douglas test. It is the thing you learn about when you do employment discrimination law. And apparently, most of us, including me until I read this case, have been doing it wrong for a very long time now. So, Joe, tell us about this case and what we're getting wrong with McDonnell Douglas.

J Joe Gay 04:31

Sure. Happy to talk about this. And as the case makes clear, you're not alone in getting it wrong. Apparently, many parties and many judges have been getting it wrong all along as well. So the case is called *Tynes v. Florida Department of Juvenile Justice*, and it's an 11th Circuit decision. The panel is Judge Grant, joined by Judge Newsom and Judge Pryor.

A Anthony Sanders 04:57

Jill Pryor, we should say, right?

J Joe Gay 05:01

Yes, more than one Pryor. And so this case is a Title XII discrimination case. And it's specifically about how do you prove racial discrimination under the act? And the act, of course, as you mentioned, it prohibits discrimination in employment on account of race, color, religion, sex, or national origin. And before jumping into the facts, I think it's helpful just to set the lay of the legal land a bit. So when a plaintiff is trying to prove discrimination under Title XII or some other statutes that are in this constellation of employment discrimination statutes, obviously what they would really like to do is have what's called direct evidence of discrimination, right?Like the email that says, whatever you do, just don't hire a woman for this job. Like that's really like what you would want to have. That makes your job as a lawyer very easy. But most cases aren't going to have that, so they're going to use what's called circumstantial evidence. An

example would be like suspicious timing where a woman gets let go a week after she tells her boss that she's pregnant. It's sort of suspicious timing. It's circumstantial. It suggests that maybe her sex, her getting pregnant were the reason why she was let go. And in practice, that gets really tricky because job decisions, hiring, not hiring somebody, demoting them, promoting them, you know, they're made for a million reasons. Good reasons; bad reasons; stupid reasons; stupid, but legal reasons; and illegal reasons, like race or sex discrimination. So it's just like really hard to tell, just as a factual matter, why an employment decision was made the way it was and whether one of the reasons or the reason was something illegal. So along comes like this 1973 case, Supreme Court case, called *McDonnell Douglas Corporation v. Green*. And it basically invented a framework for what it called "the order and allocation of proof in a private non class action challenging employment discrimination." And it's kind of an amazing decision if you go back and read it with modern eyes. Like when I say invented, I literally mean it because there's no discussion about where the standard comes from. There's no discussion of precedent. There's no citation to precedent or the common law or the laws of procedures or evidence or anything like that. They just sort of go, this is kind of a tricky issue. The circuit courts need some guidance. Here's the law now. And they just say it. And that's how McDonnell Douglas announces this framework for resolving these cases. That now has been the law with us for the past 50 years. But it's just funny to read it, and it is very much a product of its time.

A

Anthony Sanders 07:56

Yeah, you would not have a case like that today most likely.

J

Joe Gay 07:59

No, I don't think so. And so the framework, basically, that it announces is that a plaintiff first has to make a prima facia case, which in turn, has these four subparts. And, in that case, it was are you a racial minority? The language gets tweaked over time, like are you a protected class?But, at the time, it was are you a racial minority? Did you apply for a job that you were qualified for? Did you not get hired for the job? And then after that, did the position remain open, and the employer continued to look for somebody to hire for the job? So that was the prima facia case that they announced in McDonnell Douglas. And if you do that, then the burden shifts to the employer to articulate some legitimate non-discriminatory reason for that rejection. And if the employer does that, then it goes back to the plaintiff, who has an opportunity to prove that those reasons are pretextual. And so that's your basic McDonnell Douglas framework for resolving these cases, which, as you said at the outset, like it's super important. Employment discrimination cases is a huge portion of the work that the federal courts are doing. And they often are applying this framework from 1973 about how you resolve these kinds of cases.

A

Anthony Sanders 09:13

And adopted in areas outside of Title XII. I mean, you see it, you know, I don't want to say infected because I don't want to be pejorative here, but it is, you know, used or adopted in all kinds of areas.

J Joe Gay 09:28

Yeah, I've seen it, for example, in age discrimination cases with other kinds of statutes that have adopted this framework. And I think, as you might not be surprised from the timing of when this case was released, I think it was intended to be plaintiff-friendly. Like you come in, you're a plaintiff, you don't really know why you didn't get the job. So you have this really easy standard of like, well, they didn't hire me for the job, and I was qualified, and that creates your prima facia case. And then it puts the burden back on the employer, right? And so that, I think, as it was originally formulated, it's a very plaintiff-friendly standard that's supposed to make it easier for you to kind of come in and make your case of discrimination.

A Anthony Sanders 10:10

Right. It gets your toe in the door, if nothing else, and then, you know, it seems like you get closer to the factfinder at that point, whether it's the jury or the judge.

J Joe Gay 10:21

Yeah, yeah, I think that's right. But then kind of a funny thing happened over the next 50 years, which is that in different contexts, you then have different standards that you have to have for your prima facia case. And then what has often happened is they said, well, to make this initial case, you actually have to point to somebody who was similarly situated. And then, so to make that case, you have to point to somebody else who is not your race or your sex or whatever who is like you, but was treated differently. And then you can kind of see where the trouble is happening then with this standard because there are a million different kinds of employment decisions you can make. It might not always be easy to point to somebody else who's similarly situated, but was treated differently. And then the 11th Circuit a couple years ago said not only do they have to be similarly situated, but in an en banc decision by Judge Newsom, whose concurrence in this case we'll talk about a little bit later, said you actually have to be similarly situated in all material respects. So this standard that was originally designed to be this kind of plaintiff-friendly presumption that's going to help them along has now actually kind of become this obstacle that makes it really hard for plaintiffs to make their cases because there might not be somebody who's similarly situated in all material respects. So it's just kind of an interesting way that this doctrine has evolved over the past 50 years. And the way it has evolved, I think, is irrelevant to how the facts of the law play out in this case, *Tynes v. Florida Department of Juvenile Justice*. So with that legal background in mind, we can turn to the facts now, which I think are pretty simple, as portrayed by the panel opinion, which is basically that there's a superintendent of a juvenile detention facility, our plaintiff, and she goes out on medical leave. And during that time, there's a number of incidents, and backup has to be called to the facility to help out. And that leads to a higher level official assembling a team, technical assistance team, to look at the staffing and personnel issues, and they conduct this review. And after they do this review, but before they finish their report, this official basically fires the superintendent, our plaintiff, and the superintendent sues for race and sex discrimination. And she says, hey, there's this white male here and this white female here; they're also superintendents. They had similar managerial problems, and they weren't fired. They received reprimands, they were allowed to transfer, they were given chances to comply with recommendations for improvement. So they're like me, but they were treated differently. That's discrimination. So then it goes to a jury trial. And there's some evidence that the technical assistance team was, in one person, one witness' view, a search and kill mission against the plaintiff. There's

evidence about maybe some technical inaccuracies in the reporting. But I think, perhaps most importantly, the assistant secretary of the department who fired the plaintiff, who's probably your star witness if you're the defense, right? This is the person who's going to really explain what was motivating these actions. By all accounts, her testimony goes horribly. She couldn't even recall why she thought plaintiff had engaged in "conduct unbecoming as a public employee." And she couldn't point to any other employee who had been fired without first receiving negative performance reviews or getting prior reprimands, so I think, you know, pretty bad for the defense. So based on all of this, the jury finds in the plaintiff's favor, awards her $424,000 in damages, $500,000 for pain and anguish. And the judge orders that she gets her job back too with a different supervisor. And so the Florida Department of Juvenile Justice appeals. And given the evidence, given the jury verdict, you might ask, well, given that testimony, how are they going to appeal? Like what is their basis? And that brings up these McDonnell Douglas factors. The defendant said, look at these factors. She actually never met her prima facia case. And that's because, as I mentioned earlier, in the 11th Circuit, your prima facia case requires you to show your comparator was similarly situated in all material respects. And they said, well, perhaps this white male and this white female that the plaintiff pointed to, maybe they were somewhat similar, but they weren't similar in "all material respects," so there was a failure to prove their prima facia case. And so judgment should have been granted to them as a matter of law, applying these McDonnell Douglas factors. The panel basically just smacks that argument down. And it says, it reminds us, that it has said so before, that McDonnell Douglas is an evidentiary tool. It's a procedural device that basically is establishing an order of proof and production, but it's not the actual substantive standard of liability that you have to prove. You only have to prove that you were discriminated against. These other factors, they're just kind of procedural tools to get you to that ultimate question. But the ultimate question is the only thing that actually matters here. And the panel points out that, you know, courts have kind of talked about this in a loosey goosey way before, and so "parties" and sometimes courts have missed that point about how you apply these factors. And they have treated the prima facia case as a substantive standard of liability. And it also notes that there's confusion as well because, oftentimes, if you fail to prove your prima facia case, like whether there was an adverse employment decision, that means you've also just failed to prove your case in chief too. So there's all these kind of pitfalls in like the language and the overlapping standards that have led courts and parties into error on this issue. But it basically just tries to make very clear that the ultimate standard is whether there was discrimination, not whether this prima facia case is satisfied or not satisfied. I'm gonna point out, for example, that maybe you don't need comparators because you can prove your case using a "convincing mosaic of circumstantial evidence." So, in short, you know, looking at the facts in this case, once there's been a trial, once all the evidence is in, you're kind of well beyond the point of looking at this prima facia case there, right? At this point, you just have the full evidentiary record, you're just looking at is there enough evidence for the jury to find that there was discrimination, or isn't there? And that's the ultimate question. And then the court concludes that because the defendant only argued about this prima facia case issue, it loses on that. And it actually forfeited any argument about whether that actual ultimate weight of the evidence was actually insufficient. Because they focused on the prima facia case and not this ultimate burden, it actually forfeited the argument that mattered.

A Anthony Sanders 17:23

I think that they could see the writing on the wall with that argument, with a jury verdict, which are very hard to overturn.

J Joe Gay 18:05

Exactly. So there is some harsh medicine there. And then I'm not going to describe it in detail, but less significantly, it also briefly addresses the claim that the plaintiff hadn't properly presented their claims under 42 USC 1981, which also prohibits discrimination. It may have impacted the quantum of damages that could have been awarded here and basically says they forfeited any objection to amending at trial to include that claim in the pleadings since they weren't in the pleadings. And then they forfeited any argument that the plaintiff didn't meet her burden at trial because they focused on the pleadings. So that's sort of thrice harsh medicine for the department here.

A Anthony Sanders 18:51

And this is kind of a very lawyerly point I'll just briefly bring up, but they talk about Rule 15 of the Federal Rules of Civil Procedure, which is about amending the pleadings at trial, which is something that I've never done myself or come remotely across because, usually, if you actually are at trial, you're hopefully not trying to amend the pleadings. But it reminds me you can do that, and it actually worked this time.

J Joe Gay 19:20

Yeah, and as far as I know, it had a substantive impact.

A Anthony Sanders 19:25

Yeah, and to be fair, it wasn't a complete surprise. It was just kind of sharpening what the pleading said, it seems.

J Joe Gay 19:35

So, anyway, that's the majority opinion, which I think is just interesting for all the reasons we described, you know, pointing out the way that judges and parties have been getting this wrong and pointing out the correct way to actually apply these standards. But what also makes this decision really interesting is that there's this concurring opinion by Judge Newsom that, at 20 pages, is actually a little bit longer than the majority opinion.

A Anthony Sanders 19:58

And, actually, I should add that talking about Judge Newsom's concurrences is getting to be a bit of a side hustle for us here on Short Circuit. We've done this like a half dozen times it seems now, but this latest one is a real doozy.

Joe Gay 20:11

Yeah. Yeah, it's interesting. Part of what makes it interesting is to start off, it describes the kind of background of McDonnell Douglas and how it's been applied. And then it says, "I've concluded that I was wrong about that, as in 180 degrees wrong." And then it goes through and explains why. And then it concludes saying, "I repent; I had it backwards." It's not often that you see that kind of maybe confession of error from a circuit court.

Anthony Sanders 20:35

I appreciate the judicial modesty there.

Joe Gay 20:48

Yeah. And so, just briefly, the reason why he basically goes through and is kind of critiquing the McConnell, the McDonnell, I call him McConnell because there's so many like politicians and jurists named McConnell that it's hard to remember which is which. The McDonnell Douglas factors, he's basically critiquing them and how they've been applied because he says, first, if you just look at it, it really just seems kind of made up. And that kind of gets to my point earlier about kind of how this 1973 decision is written. It is just made up. They just say this is the standard, but there's not really any justification about why it's the standard or why it should be the standard. They just say it, and it certainly doesn't come from like the text of the statute or any evidence or procedural rules. He calls it a "product of its time."

Anthony Sanders 21:40

And he likens it to the Miranda warning, which I think was just five, six years prior.

Joe Gay 21:47

That's right. And McDonnell Douglas, I mean, it's actually from 1973. And there's another decision from 1973 that I thought he might mention, but perhaps it's too soon.

Anthony Sanders 22:04

We're talking about Roe v. Wade, for those who don't get the reference.

Joe Gay 22:06

His second criticism, basically, is that this sort of like minor decision about this like procedural ordering of who presents proof in what order has sort of taken on this real outsized importance, especially in summary judgment decisions, where if you, for example, can't point to that comparator, then you're going to get bounced on summary judgment, even if you might conceivably be able to put together a circumstantial case that otherwise shows that you have made out a case of discrimination. And then, third, he just thinks as a matter of first principles, the summary judgment standard, which (for non-lawyers) basically is a motion you file before you get to the jury that says if you look at the factual record, no reasonable jury could find in favor of my opponent on this issue. So the court should just grant judgment in my favor. He says that's the standard that applies. That's the procedural standard that applies in every case. It's kind of weird that we've ended up with this weird, quasi summary judgment standard that

applies only in discrimination cases, which is kind of like the practical way that it's played out with these factors on summary judgment. And he actually quotes Justice Cavanaugh from when he was on the D.C. Circuit, who said that actually, in summary judgment, the framework should be "almost always irrelevant." And then there's other precedent that says there's not a pleading standard, and he points out that it's also not used in jury instructions, not used in your trial standard.

A Anthony Sanders 23:47

So what is it a standard for?

J Joe Gay 23:50

I'm left kind of scratching my head. Like what is left with this? It is, I think, probably an occasional tool a plaintiff could use if they need it, but maybe not something that would otherwise need to be pulled out all that often.

A Anthony Sanders 24:09

And the funny thing about McDonnell Douglas is, and I think this is how it became so popular, it's kind of in the abstract, without getting into all the details, especially that comparator requirement. It makes a lot of sense in some way. So you can have a lot of discrimination claims. There are a lot of discrimination claims. And it's hard to tell the good ones from the bad ones because, as you say, you have to make inferences. Usually, there's very few smoking guns in this kind of case. And so to think that, okay, you have to come forward and that you have a prima facie case (so you're a protected class and something bad happens to you. And then you go to the other side, and they say, well, we had a good reason. I mean, that all makes sense. It's just kind of a working tool, right? It shouldn't turn into this be all, end all, which is both the majority and Judge Newsom's point, it seems. And so it seems there's a lot of value to it. It's just, one, it's not in the statute or the rules. And two, you can't get hung up on the ... It's like a lot of things in law. You can't get hung up on where it evolves and kind of turns into something else that it wasn't originally intended for. And it seems that it's gotten lost in the weeds in a sense.

J Joe Gay 25:40

Yeah, I agree. And one interesting thing I noticed when I went back and looked at McDonnell is that when they talk about the kind of last phase of the burden shifting framework, you know, how can you show that this was pretextual, one of the examples they give, that the Supreme Court gives, is pointing to other similarly situated people who were treated differently. So the Supreme Court is originally envisioning like this pointing to similarly situated people was one

way that you would prove pretext kind of at the backside of this burden shifting framework. And then, in more recent years, it's been used on the front end, the prima facia side of the framework, to actually weed out cases before they can even get to that point.

A Anthony Sanders 26:26

Yeah, because you can see how that evolution happens where courts, to get rid of their dockets ... I mean, this is not a constitutional matter. But it's kind of a judicial engagement thing here and judicial abdication where you have a multi-factor test, and the plaintiff has to meet all of them to then shift the burden, you know. If that's the standard, then the court is going to be like, well, I just have to like one of these four or one of these five, find against them, and then I'm out of here. And so, if it's similarly situated, there's a lot of equal protection law that unfortunately says you need to be similarly situated to someone else to even raise an equal protection claim, let alone whether this difference in treatment is justified. And then similarly situated is often defined so darn narrowly, that you just can't even bring the claim. We've had many cases at IJ where we've had that in a constitutional context. Well, this is kind of another example of that. And whatever you think of employment discrimination law, whether the current employment discrimination law is not good enough or is too narrow, you can see how a court trying to unload its docket is going to latch on to that and use it as a way to toss suits that maybe under the fair reading of the statute shouldn't be tossed.

J Joe Gay 27:48

Yeah, and one of the things that Judge Newsom says is, you know, he advocates instead of taking this what's called a convincing mosaic theory, that is what he called kind of a hack, or what he used to think of as kind of a hack ... Like if you just have a hopelessly losing claim, your Hail Mary is this convincing mosaic theory of these little tidbits of circumstantial evidence that maybe together are enough. He just points out, well, that's just called circumstantial evidence. It's not a convincing, you know, I'll take out the fancy language, that's not a convincing mosaic. That's just enough circumstantial evidence to convince a jury. And so he's advocating that this should actually just be the main way we think about proving these cases. And one of the objections he looks at that people might have is, well, maybe this will overburden the courts. And his response is kind of basically "big deal." That's not our job to have this as a policy matter that we think courts have too much work to do. We should just try to get the get the law right here.

A Anthony Sanders 28:55

Right. One other tiny part of this case I thought was interesting, going back to where I raised the Rule 15 earlier, is not only have I not really dealt with Rule 15, but apparently, counsel for the defendant hadn't heard of it and was asked about it at oral argument and didn't know what it was, which I have no idea was excusable or not. Of course, you could ask all kinds of crazy stuff at oral argument that counsel don't know, but that's not a good sign if your argument is going like that for you.

J Joe Gay 29:31

Yeah, I suspect the way this played out is probably a little bit more defensible for defense counsel not to have known this because this is not something that lawyers have to deal with very often. But yeah, certainly not a good day to have that both come up in oral argument in that kind of way, and then make it into a published decision.

A Anthony Sanders 29:48

Right. Well, something else if you are a defense counsel you don't want to come up, well, actually counsel for either side, is when you are arguing your case, and then you receive your opinion from the appellate court is you win, and then the court says, but we think this law is wrong, and we immediately call for en banc review. And then, actually, that review is granted. And so that's what happened recently in the Fifth Circuit. And it's the case that I'm going to be talking about this week. So we'll talk about the panel opinion. So that's a three judge panel. You know, the reviews, appeal from the district court, and normal appeal. And then it gets to the en banc court, and that is the full court of appeals that can correct what that panel has done and also gets into this thing we talk about sometimes on Short Circuit called the Rule of Orderliness, which is where a circuit court, so First Circuit, Second Circuit, Fifth Circuit, whatever, they are bound by their previous three judge panels. Even though three judges is not nearly a majority of the whole circuit, they are bound by those decisions, the precedent in those decisions, unless it's super clear that the Supreme Court has told them they're wrong, whether it's an appeal from that court or somewhere else. But it has to be really clear that the Supreme Court has said that that ruling was wrong by implication, or the court itself can do it through the en banc process where you get all 12 or 15 (or however the Ninth Circuit does it; it's a weird process there because they have 29 active judges) to reverse itself. So I'm not gonna go too much into the facts of this case. It is a Voting Rights Act case. But, just very briefly, it is a challenge under Section Two of the Voting Rights Act. And we talked about a case under the VRA Section Two a few weeks ago in the Eighth Circuit about whether private parties who aren't the attorney general of the United States have a private cause of action under Section Two. That hasn't come up here because the United States is one of the parties. Now, there are some private parties involved too, but it's just not part of this case. It shows you how the VRA isn't just about, you know, congressional seats or even the state legislature. It covers a lot of stuff, and that includes the Galveston County Commissioners Court. So the Galveston County (in Texas) Commissioners Court has four county commissioners, and then it has a county judge elected by the whole county. So there's basically four precincts, they call them precincts, but you might call them wards. And so they have to change the maps every Census, and for the last few decades, there has been a majority-minority district. So that is a big thing under the VRA that if you have a majority-minority district, you're not supposed to re-district to get rid of that district or districts. This was a big deal before the Supreme Court last summer where they thought that the Supreme Court might find part of the VRA that mandates it unconstitutional. But it was upheld with two of the usually conservative judges, the chief justice and Justice Kavanaugh, voting with the more liberal justices. And so it's still the law. And this is a challenge to a re-drawing of the map that got rid of that majority-minority district. So that was a challenge. The district court found that the new map invalid under the VRA. And so there's an appeal for that. Now, here's the issue. The district is majority-minority only if you add up the Black people who live there and the hispanic people that live there, so the white people who live there are not a majority or whatever other races are involved with that. They don't talk about that. But if you add the percentage of Black and hispanic people together, you have 58%. So a majority minority. Now, there is precedent in the Fifth Circuit saying that that is okay under the VRA. However, there's a circuit split on this. And the court, the judges in the first

panel, thought that that's wrong. That, actually, if you read the VRA, they use the singular. So it's really just supposed to be about like you have that political identification of a minority population that has a majority of the district. If you just cobble together minorities, that's not really what the VRA is supposed to be addressing, right? You can argue that, but that's what this panel thinks. Now, the problem is there's this precedent. So the three judge panel, which is Judge Jones, Barksdale, and Elrod, they issue a per curiam opinion. So that's an opinion where none of the judges sign their name, and so you don't know who it's by. It's just kind of by all them, basically. There's no noted dissent. And they say, yep, the district court applied the right law, and so we're affirming the district court. But, as I said, they say that we think that law is wrong. And I don't know if I've ever seen an opinion that says its own precedent is so wrong. I mean, you potentially could, but it's pretty darn clear that they don't agree with that. And so they actually end the opinion saying the judgment of the district court is affirmed. We request a poll on whether this case should be referred en banc at the earliest possible date. And the county had actually argued for en banc from the get-go, like as part of the appeal, which is pretty unusual. They say that that request was denied, but denied is moot because the judges are doing it anyway. So that was on November 10, 2023, that that was requested. Now, a circuit court can call for en banc without the losing party asking for it. That happens sometimes, but they usually don't put it in the opinion like they put it in the opinion here. And then there was en banc review granted shortly thereafter. I think it was two or three ... I don't have that in front of me, but a week or two after. There also then was a request for a stay of the district court's ruling. So the district court issued an injunction saying, okay, the old map or the map that was re-drawn, that violates the Voting Rights Act and so we're going to instead do it this way. So that judgment was affirmed by the three judge panel. But then, once the en banc court gets involved on the 7th of December, they say, no, that order is stayed. So they haven't said the district court is reversed, but they're saying that injunction is stayed. It's no longer in effect. And so what does that mean? That means for the upcoming election next fall, unless the en banc process works itself out quick enough, there are going to be voting districts under the map that was re-drawn after last Census, the one that the district judge found was illegal. And that's why the writing's on the wall for all kinds of reasons. The three judge panel thought that the law should be changed, so if it got en banc, it seems like the law would be changed if they agreed with the three judge panel. Well, there were nine judges who not only wanted en banc review, but wanted to stay this order. So everyone can see where this is going. So there were nine judges who voted, and that's majority of the circuit, who voted for the stay. There are four judges that dissented from that, that noted their dissent from the stay. And there's other concurrences even, and we don't need to get in the weeds of all of them, but, essentially, what's being argued about ... There's a lead concurrence by Judge Oldham that has 1, 2, 3, 4, 5, 6, 7, 8, 9. Well, nine in the concurrency even. I haven't looked if it's exactly the same. Yeah, so nine in the concurrence.

J Joe Gay 39:07

I think Judge Ho wasn't in that concurrence.

A Anthony Sanders 39:09

Right. Judge Ho was not in that concurrence, but he was separate. So that's ... I said nine earlier, there was nine in this concurrence, which is a majority. So this is basically like a majority opinion of the Fifth Circuit en banc. Then you have Judge Ho concurring for reasons I'll

get to in a moment. But, anyway, you see a majority are for the stay. And they say that the reason for the stay, even though they haven't gotten to the merits yet, is because of this thing called the Purcell principle. The Purcell principle seems like a flexible principle to me, but essentially, it's named from this case from 2006 by the Supreme Court that says federal courts shouldn't get involved in elections, especially as you get close to the election. So you can rule on whether or not a state law is unconstitutional that comes with the election or violates the Voting Rights Act, but you shouldn't be in a rush to do it before the next election because there's settled expectations. We want orderliness with our election. This was a big deal, as they pointed out and the various opinions have pointed out, in the 2020 election where we have all this COVID litigation and all kinds of other aspects to that litigation. And so they say, well, we want to hold back here because of Purcell. The dissent doesn't like that. But one split between the judges also is that they scheduled this for en banc argument in May. So that's in six months, basically. And Judge Ho in his concurrence and also the dissenters are like, okay, this seems like a big deal. Can't we do it a lot faster? Like we can move fast when we want to. And Chief Judge Richman concurs and says, well, we're all full up in the next sitting in January. Anyway, you can see there's some internal stuff going on there about the court practices. But, essentially, they say, no, we're going to do this in May. And of course, if they do it in May, you know, God knows when the ruling will be. Maybe it'll be before the November election. But even if it is, that's probably not going to change it for that election. So really, this isn't going to apply until the election after that. And, you know, the next Census is in 2030. It's not that far away at this point, six years once they have argument. And so it shows you a couple things. Well, one is that election litigation can be super fast, or it can take a long time for the result to occur and get the result you want. And then the other is that when a court of appeals wants to change its law, it can change its law. And it can, as a practical matter, do so quite quickly. Now, I should bring up one other thing, which is that just a few days ago, there was a ruling in an IJ case that we will talk about on Short Circuit sooner or later. It was an opinion by Judge Willett, and it was about a challenge we had to a use of a Texas prosecutor who was moonlighting as a clerk for the judge that he was before, and our client got wrapped up in that and had a conviction because of these shenanigans going on with the court. And Judge Willett did not outright say that there should be en banc review in this case, but pretty close. So we will see where that comes in. That has to do with interpreting what's called the Heck bar, which we won't get in the weeds of now, but it's an interesting other aspect of what the Fifth Circuit is up to. I've talked enough, Joe, but any shenanigans that you think merit mention in the Fifth Circuit?

J Joe Gay 43:41

Yeah, I mean, I think there are a couple of interesting things about this case. I think the first one is that the case itself, I didn't check and see exactly when it was filed, but looking at the district court docket number and just looking at that it's kind of a smaller number, it looks like it was filed in early 2022. And so I don't think it was exactly like necessarily that the plaintiffs themselves waited until the last minute.

A Anthony Sanders 44:09

No, not at all.

J Joe Gay 44:10

So, I mean, they've been litigating this now probably for very close to two years.

A Anthony Sanders 44:14

Yeah. And you can't file it until the new map comes out, so I'd have no reason to think they weren't, you know, lickety- split on that.

J Joe Gay 44:24

Right. Exactly. And then the city, it's Galveston County, I guess. It had made this initial motion to hear this en banc to begin with. Judge Ho has this idea that maybe the en banc panel or whatever you would call it, a poll could have authorized the panel to just decide it as an original matter, disregarding the earlier precedent. Another alternative, as you mentioned, they discuss whether they could have tried to hear it in the January en banc sitting. It just really seems like there were a lot of steps along the way where perhaps the Fifth Circuit could have moved this along a little bit faster. So like if they can't hear it until the May en banc sitting, maybe the solution was to not have this initial panel decision complaining about wanting to call for en banc review. Maybe they could have just started with en banc review, as Galveston asked.

A Anthony Sanders 45:28

Yeah. And one interesting part of that is maybe it is Judge Ho. There's an interesting footnote that says that there is a procedure for, I'm trying to find it here, a circuit reversing, you know, nullifying an earlier precedent and not going en banc, as long as a majority of the judges sign off on it. So, basically, it's like you pass it around the office of judges. You don't actually have an en banc hearing. And they say, yeah, you can do that. And then you're authorized, a three judge panel is authorized, to overrule a previous panel decision. And, you know, why didn't we do that here is the question.

J Joe Gay 46:12

And I've seen that in other court systems, like in the state court system. I didn't know that that was an option in the Fifth Circuit or some of the circuit court of appeals in the federal system. But it seems like they're kind of facing a trade off here, which is do you want to have like a very drawn out, weighty, considered decision about what is, I assume, a pretty important, substantive issue? It's how you are interpreting the Voting Rights Act. Or do you want to try to have a faster decision that's going to resolve these issues kind of in time to not mess up the election that's happening here? And it's surprising how much the debate here does involve kind of how fast to go with this case because as some of the concurrences and the dissents note, maybe you could do this in January. You could try to get a decision out pretty quickly. But I think the lead concurrence points out that the candidates have already declared earlier this month, declared themselves as candidates for primaries in these districts.

A Anthony Sanders 46:50

Those districts are gone now for the year, it seems.

J Joe Gay 47:36

Yeah, well, so I think they must have. It was after this decision, a couple days after this decision, I think, was the deadline to declare yourself as a primary candidate. And so if you have a January en banc sitting, you're sort of almost to the primary. And you've already had people who have started campaigning in specific districts; they've declared themselves for specific districts. And so are we already too close to these elections, which is ultimately the November 2024 election? Are we already too close for those and so this Purcell principle should apply, and we should just leave the map as it is? Or does the dissent have it right and November 2024 is actually the date we really care about it, and maybe the court should just try to decide this now and decide on the right map once and for all beforehand? So I think that's kind of an interesting question and an interesting debate that the concurrence and dissent had.

A Anthony Sanders 48:33

Yeah, it reminds me a lot ... I'm sure a lot of listeners of the debates about the shadow docket at the Supreme Court where we need to make a ruling quick, that's important outside of the elections context, of course. And sometimes, it seems like, you know, certain justices are into deciding things quick over having all the deliberation that you get out of full briefing and oral argument. And sometimes, other justices are more into having that lengthy time. And often, of course, it seems to change on the issue which justice is complaining about what. And we are very much about to see how things go faster or how things don't go fast with a couple issues related to our former president, both his prosecution and his now, apparently, not going to be on the ballot in Colorado. And a lot of that is going to be wrapped up in these issues. And that, of course, is going to be a federal court saying something about an election.

J Joe Gay 49:38

Yeah, I'm just sad those aren't in the circuit courts, so we don't have an occasion to talk about Colorado.

A Anthony Sanders 49:43

Yes. Yeah, we will not be weighing in too much on those issues. We said a few things about them already in tangential ways.

J Joe Gay 49:53

One interesting question that I think also comes up is if you're not applying ... There is also this debate about is the likelihood of success on the merits kind of a factor that you consider in this decision? And then some say yes, some say no, some say it's just whether it's too close to the election. And then the other interesting aspect of that was if you do consider likelihood of success on the merits, like what is your framework? Is it existing law? Or is it what you

predicted that law is going to be as a result of your en banc review. Because if it's existing law, obviously, the law is quite clear that Galveston loses, and you have to change the maps. But if you're kind of reading, as you say, the writing on the wall and counting up these concurring votes, you kind of know where the en banc decision is heading.

A Anthony Sanders 50:51

Including, at this point, what the per curiam, the three judge panel this year, said. I mean, they lay out their theory of the law. And then they're like, well, but we can't say that because we're bound. I mean, I think in some ways, it's kind of a remarkable thing, little opinion, because they say ... So I read the end earlier, but this is from the middle of the opinion. So they're talking about the district court and how the district court applied existing precedent, and then they say, but the court's decisions, meaning the Fifth Circuit, so its prior decisions, the court's decisions in this respect, are wrong as a matter of law. And you wonder, what do they mean by law? I mean, "the law." Is the Fifth Circuit precedent right? Or is the law the text of the VRA? Or is it a mixture of a bunch of things? Well, apparently when they mean matter of law, I think they mean the text of the statute itself.

J Joe Gay 51:59

I think it's maybe a *Minority Report* situation where they maybe foresee something that's going to happen in the law very soon here.

A Anthony Sanders 52:06

Yeah. Well, and they're probably not wrong about that. So, well, thank you for joining me today, Joe. And thank you to the listeners for listening to both of us and our cases. Happy New Year to all of you. I hope you have enjoyed, I think we've had 52 episodes of, Short Circuit this year. And we'll look forward to more Short Circuit next year. Some Short Circuit lives are coming up, some other fun stuff. Of course, keep listening for Bound by Oath. But, in the meantime, I want to not only ask you to have a happy new year, but also ask you to get engaged.