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SPEAKERS

Anthony Sanders, David Asp

A Anthony Sanders 00:00

"The electors of Kenningford who really had any definite opinions on politics were fairly equally divided. There were about as many earnest liberals as there were earnest unionists. But besides these, there was a strong contingent who did not care which side won. These looked on elections as heaven sent opportunities for making a great deal of noise. They attended meetings in order to extract amusement from them, and they voted, if they voted at all, quite irresponsibly: a funny story at the expense of one candidate told on the morning of the polling was quite likely to send these brave fellows off in dozens, filling in their papers for the victim's opponent." Well, that is from PG Woodhouse's Psmith in the city, which was originally published in serial form in 1908 to 1909. It's the first in the Psmith series of Woodhouse, which you probably are more likely to know of from the Jeeves and Wooster series. That's about 115 years old now, and yet it pretty much sounds like politics today, and that means that it's time for our biennial election special here on Short Circuit, your podcast on the Federal Courts of Appeals. I'm your host, Anthony Sanders, Director of the Center for Judicial Engagement at the Institute for Justice. We're recording this on Wednesday, October 23, 2024 and yes, as we did in 2020 and 2022, it is time once again for the Short Circuit election special. This is a special edition where we don't just talk about two or three cases from the wide world of the Federal Courts of Appeals, but we talk about a bunch of them going on on election issues just before an election. Every election, there's all kinds of shenanigans, and last minute maneuvers, and unconstitutional enforcement practices that come up right before the election, and so that hits the Federal Courts of Appeals, and this is our chance to review some of that. Now, the last two times we've done this, I had on the show our dear colleague, Diana Simpson. Diana cannot join us this time. She's on maternity leave, so a disappointment to us, but with Diana's absence, I have the next best thing: I have an actual election lawyer with us. This guy does election law, at least at times, and so he knows a thing or two about election cases, and he's going to share his expertise with us today. He's also a return guest on Short Circuit—he was here about a year ago to talk about the scintillating area of ERISA law, but now he's back with something almost as exciting, and that is election law. So I'd like to welcome back to the show. David Asp, Dave, how you doing?

D David Asp 03:28

I'm great. Thanks, Anthony—thanks for having me on and for your too kind introduction. You're correct that I'm not able to stand up to Diana's great performance in the past on this, but I'm happy to be here and happy to help.

A Anthony Sanders 03:44

Oh, well, thanks. Yeah. I'm happy to talk about my experience. As you mentioned, it's not really my full time practice now, and I think for most folks who are not in the DC area who are interested in this work, it's not a full time practice. Well, great. Well, full introduction for Dave: of course—I should disclose, as we did the last time we had him on—he's an old friend of mine. We were roommates in a couple unspeakable apartments—that means we won't talk about them—from law school. But he's gone on to great things, and he's a partner at the firm of Lockridge Grindal in Minneapolis now. And he also—we should disclose this, although it won't be what we're going to be talking about—he is actually a member of the Minnesota Campaign Finance Board, so he knows enough, at least, for him to get in a spot like that. I should also give a disclaimer from my side, and that is—everyone knows this, but we want to point it out—we at the Institute for Justice are a nonprofit 501(c)3 law firm. We do not take positions on political campaigns. We do not help people run for office. We don't have anything to do with running for office and politics. So we are talking about the law. That's what we do on Short Circuit, is talk about the law, and interesting cases, and cases that intersect with judicial engagement, a philosophy that we try to espouse. But nothing we say today should be taken in any way to endorse anyone running for office, although we will mention them because the cases are about people running for office. So we will get to election law stuff in a moment. But first, I want to do a little bit of housekeeping here for Short Circuit listeners. We've realized that over the years of our Short Circuit podcast—it's almost been going 10 years now—we have, at times, not done a great job revisiting issues. We've revisited cases in the past, and we're going to try to do better at that going forward. So what do I mean by that? I mean, if we talk about a case a few months ago, and people might be saying, hey, whatever happened to that case? And it goes to the Supreme Court, right—that's something our listeners are probably interested in. So, like, hey, that case, it actually it was so interesting that it's now at the Supreme Court, so we're going to try to do a little bit better job of updating people on where cases we talked about in the past are. Now, we're not going to do that for every case. We're not going to say, Oh, that was remanded and then they settled. We're not going to do that for every single case, but for some of the big ones we are. So a couple updates here, and this is from a few months back, because right, it takes a while for a case, even after a ruling in the Court of Appeals, goes to the next stage in its life, if it has more life. We talked about a couple cases in Short Circuit 325, which dropped on May 23, 2024 and both of those went to the Supreme Court, but they were both just denied cert just earlier this month in October. One was the case that Ted Frank, who has been on this show in the past and helps run the Hamilton Law Institute, he was involved with the other side. That was a case about fees, and I think we titled it, "It's a Racket," which is what was said in the case: fees about class actions. In that case, the other side appealed to the Supreme Court, did a writ of certiorari, but it was denied about a week before we're recording this. And there was another case that we talked about that day, Veasley, which was about the Second Amendment and controlled substances, and whether, under the Second Amendment, the government can take away your rights of firearms for a controlled substance violation, or even just being on a controlled substance. And that case—interesting opinion by Judge Stras that I had some words for, although I think it was interesting in many ways, and

had a lot of history—it went to the Supreme Court, and it was also denied cert earlier this month. Also, sadly, an IJ case: so we talked about Brinkmann Hardware, that's a eminent domain case from the Second Circuit that my colleague Jeff Redfern talked about in Short Circuit 330 on June 28. We were all very sad around the office earlier this week that it was denied cert at the Supreme Court. So it's an issue that I think will eventually get to the court about the how wide the Kelo decision is, and whether this went even beyond what Kelo allows for in how governments can define a public use. But that case, unfortunately, was not taken by the Court. But the flipside is that a another case we discussed in Short Circuit 339, that was on August 30, called Villarreal, and it is about a citizen journalist, Ms. Villarreal, who was arrested for basically doing journalism in Texas. We had JT Morris of FIRE on to discuss that case, and he had a cert petition pending, and that cert petition was granted. The lower court opinion was then vacated and remanded, otherwise known as a GVR. So congratulations to JT for that, and the folks at FIRE. That is now going to be remanded, and it was GVRed because of the IJ case, Gonzalez, from last term with our client, Sylvia Gonzalez, who you may remember is a city councilwoman who was arrested for supposedly taking some documents at a city council meeting. So congratulations again to the folks at FIRE for that, and we will be back with more updates in a future episode. But that's enough for now. And now I want to turn it over to Dave. So Dave, you're not a full time election lawyer, but you've done some election law in your time, and you even got to do it relatively fresh out of law school. And so, I'm wondering, you know, that sounds like a dream job to some attorneys, especially, you know, people in law school super into politics. Like, Oh, that'd be fun to do election law one day. How did you manage the score that gig, and what's it like? Seasonal employment, perhaps.

D David Asp 10:24

It's seasonal, and it gets busier during certain times of the year every other year. But you know, for me, I was someone interested in politics: I was interested in politics, and when we were in law school, we would discuss politics a lot. Of course, you mentioned—

A Anthony Sanders 10:47

We had election parties.

D David Asp 10:48

Our election parties are, I think it's fair to say, legendary. But, I just liked politics. So I got involved in politics. I got active in it. And I was also practicing law, learning to become a litigator, and over time, I just had the opportunity to take on some work for candidates, campaigns, or really other other folks who were interested in the political process. And so I had a natural inclination to get involved. But the really interesting thing about the practice area is if you can start doing it, it gives you a lot of early experience in areas that I think a lot of practices don't have. So first of all, First Amendment cases. And as you know, and the folks at IJ know, First Amendment cases are really interesting. There's a lot of cool law in that area, and most of us in private practice don't do a lot of First Amendment work. So it's cool to be able to think about those issues that are exciting at the outset. But then it's also a way to take the lead on cases. Because a lot of times campaigns, especially local candidates, will come to you and say, Hey, I've got this problem. It's usually something unique, and they don't really have a lot of

money. So if you're able to take the case for cheap and litigate it, you'll get some good experience. And that was definitely true in my case. As you mentioned, I had a case as a relatively new lawyer a few years out of law school: a candidate for Secretary of State of Minnesota had a dispute about using a nickname on the ballot. He wanted to use his name, "Doc," on the ballot and there was a dispute about whether he could use it or not. It was a question of first impression under Minnesota law, and it went right to the Minnesota Supreme Court, because ballot challenges usually do. So, in that case, I was relatively new out of law school, and had a Supreme Court argument at the Minnesota Supreme Court, which was exciting.

A Anthony Sanders 12:39

That is pretty sweet. Go straight to the top.

D David Asp 12:41

Yeah, and the same thing happened in North Dakota. I got admitted in North Dakota, and started working on some ballot questions there, and all of a sudden there was an issue that came up; again, sort of a question that hadn't been discussed by any court for probably a hundred years at that point. So they were interesting statutory interpretation issues, constitutional issues, state constitutional issues, which I know you're excited about, and that went straight to the North Dakota Supreme Court. So a few years ago, I had an argument at the North Dakota Supreme Court.

A Anthony Sanders 13:11

Wasn't that a case from like, 1912 and no one else knew it existed?

D David Asp 13:16

Yeah, it was 1920 or something, and it was about how—in North Dakota, like a lot of states, ballot questions can be put on the ballot by getting signatures. And so there was a case about how you get signatures and what you have to disclose to people when you get signatures on the ballot. And the folks who got these signatures didn't disclose everything they needed to, so the court took it off the ballot. So that's just an interesting issue. It was fun to think about. It's fun to think about these very old cases and how they apply to law today. And so I enjoy doing that kind of work. And the other thing I'll note is that in a lot of cases, and we see these in some of the cases we'll talk about today, but sometimes there are factual questions that have to be determined very quickly. And when that happens, you usually get some type of trial experience, maybe in an administrative setting, or it might be a referral to a special master or district judge or something, but you can get an opportunity to do some sort of evidentiary trial proceeding or hearing pretty early on, and that's really helpful, too, and is a thing a lot of us don't get to do on a daily basis. So for those who are politically interested and engaged, I'd say this is a great practice area to look into. As you mentioned, I don't do much anymore on the Campaign Finance Board. I've moved more into the sort of volunteer regulator side of the board

that oversees campaigns and lobbyists in Minnesota. So I'm not really practicing as much as I did before, certainly not in the state, but it's nice to be involved in it, and these are still issues that I find very interesting and exciting.

A Anthony Sanders 14:48

Yeah, it was the board that I did a lawsuit a few years ago where I sued them all. So that was before Dave was on the board, so we didn't have to worry about that. Well, I am going to start things off here with the cases we're going to be discussing. So we have a few cases to bring up. I will say I noticed in preparing for this show, and maybe it's just, I don't know, the time of the month or how I put it together, but there's a little less flood of opinions coming out than I noticed two years ago or four years ago getting written before the election. Now there's going to be more, I'm sure. We're recording this 13 days before the election, there's always last minute stuff. There's also post-election litigation. People remember, there was quite a lot of that in 2020 right after the election. There's that in some way every election, but that is a whole different kettle of fish, challenging the results of the election, or the administration of the election, then challenging stuff before the election. In some ways it's kind of the same thing. In some ways it's kind of conceptually distinct. So we, of course, are doing stuff before the election. I think the reason why maybe there's a little bit less now is this is kind of a more normal election cycle. In 2020 of course, with the pandemic, there were all kinds of arguments —I mean, there are arguments on both sides, whether it was some of it was legitimate or not. Some of it undoubtedly, of course, was, but there was all this effort to deal with this weird situation of the pandemic and so a big demand for mail-in ballots and all that kind of thing, which you wouldn't have in a normal year. And then the last go round in 2022, like you are going to have in any election cycle that ends in two, you have redistricting. So after the census of 2020, there's all this redistricting. And then people are fighting over the redistricting, and the Voting Rights Act comes into the play in some of that, and so that creates a lot of litigation. In 2024 maybe nothing's normal anymore, but this is kind of a little bit more of a normal cycle. But of course, the cases that get to the Courts of Appeals that are worth commenting about are the abnormal ones.

D David Asp 17:18

Yeah, I mean, the cases were a lot more a couple of years ago, obviously, because of the pandemic, but also a lot of legislatures were acting. I mean, you had different—you had a lot of legislative activity that was happening. So courts were looking at new laws. I think what we have now is probably less activity of that overall, is my sense, and maybe a clear playing field as to how these things get decided.

A Anthony Sanders 17:42

Yeah, yeah, that too. But there still are plenty of cases to talk about. So the first one is a case from the Sixth Circuit that came out just a couple weeks ago, October 8. And it is kind of an odd acronym, but OPAWL v. Yost, and this is a challenge to a new Ohio law that restricts foreign nationals contributing to campaigns and also using their own money in connection with campaigns. So there's long been a federal law that restricts foreign nationals from spending on federal elections. So if you are a U.S. citizen or a permanent resident, that is a person with a

green card, you are barred from contributing to candidates for federal office—so, you know, Congress, Senate, President—or, I think, spending your own money on that as well. That was challenged in a case called Bluman that went before a special three judge panel in 2011, and that's when Justice Kavanaugh was then Judge Kavanaugh on the DC Circuit.He wrote the opinion. It was then appealed to the Supreme Court because there was an automatic right of appeal, but as often happens in those situations, the case was just affirmed without comment by the Supreme Court. So it's kind of a Supreme Court precedent, but it's kind of not. But this three judge panel is definitely persuasive precedent in the Sixth Circuit, and the Sixth Circuit is basically going to follow and extend it. But there in that case, there were some very sympathetic plaintiffs: there were two people who worked in the U.S. on work visas, weren't U.S. citizens and weren't green card holders, but they were in the U.S. for a long time, and one was a Canadian citizen, and one was a Canadian-Israeli citizen—so it's not like, you know, they were from a hostile power or anything—and they wanted to give a little bit of money to a few of their favorite candidates. And they're like, I've been living here for a while, and so I have a First Amendment right to do that. Now the the court said, Well, we have to apply heightened scrutiny here, because they do have First Amendment rights, even though they're not U.S. citizens. Lots of immigrants have, or foreign nationals will have, they'll have rights in this country. They they may not have the same rights as citizens, but they at least have first First Amendment freedom of speech rights. But even though that's true, this restriction is constitutional, said then-Judge Kavanaugh, and it's essentially because there is a compelling interest in having a political community that is not influenced unduly by foreign powers. And this makes sense as a way to further that. There weren't a lot of... facts, I guess is the best way to put it, in proving that, but that was the way that the judge put it together. So that became a precedent. And I should say that IJ filed a brief in that case, and we were arguing that if you're going to do strict scrutiny, you got to do it right, and you can't just wave your hands and say that the law is constitutional after applying strict scrutiny, because that's not what strict scrutiny is all about. Or heightened scrutiny, at least. Sometimes in these campaign finance cases they say heightened, sometimes they say strict. It's a little hard to tell exactly what they mean, but they don't mean anything close to, say, rational basis scrutiny. So that was Bluman. This case from the Sixth Circuit is about an Ohio law that takes that law and puts it a little further. So it's about races in Ohio. So state races, but it also includes ballot initiatives, and it also includes green card holders. So unless you are a true US citizen, you cannot contribute to one of these campaigns in Ohio, and you can't even contribute to a committee that's supporting or opposing a ballot initiative. Usually, ballot initiatives get a little bit more protection because there's not the same argument that you can corrupt, say, a candidate, because there's no human on the ballot. It's just an issue. So you can't, for example, have contribution limits for ballot initiatives. The Supreme Court has said that. So here can foreign nationals who are green card holders, can they contribute to these campaigns? And so is this new law unconstitutional? And the district court said it was probably unconstitutional, issued a preliminary injunction that went up to the Sixth Circuit. And the Sixth Circuit said it technically was about a stay of the injunction, but it does very much get into the merits, and it says, You know what, the stay is granted because we think the law is okay, and they said there's a compelling interest—same compelling interest that was talked about in the Blumen case—and it seems like the challengers don't really dispute that about the dangers of foreign influence over elections. They say that this is not narrowly tailored, that's the argument. Judge Thapar though says, Yeah, this is tailored enough. You don't really need that many facts to think about this type of issue. This is an issue we can all wrap our heads around, which is foreign influence of people who are not US citizens, so they can't vote, but they're still engaging in these elections, and this is just an easy way for the government to regulate that. There's a dissent, though, and the dissent says, I get all that, but you've got to have something more, especially because we're applying heightened scrutiny here, and that just doesn't follow. So those are the

both sides of the argument. It's only on a stay, so there will be further briefing of this going forward, and probably oral argument for the preliminary injunction itself. But you can kind of tell that maybe the writing is on the wall here, although there could be further life, and there could be an en banc opinion in this case's future, which is something we'll talk about in a little bit from the Sixth Circuit. So that is the goings on at the Sixth Circuit about campaign finance and Dave, I think you've got some news from out west?

D David Asp 24:38

Yes, I do. I have a case to discuss from the Ninth Circuit, Anthony,from Arizona, called Arizona Alliance for Retired Americans v. Mayes—the Attorney General of Arizona. And this is a case about voting. It's about voter registration in states that have voter registration. And this is one that the state of Arizona passed a statute saying that the election officials or the local officials could cancel someone's registration when they learn that that voter has moved to a new jurisdiction or moved outside of the jurisdiction where they're registered then. And it also makes it a felony to knowingly provide a mechanism for voting to another person who has registered in another state, including by forwarding an early ballot to that person. So those are the two issues that were up at the Ninth Circuit, and essentially the first question, the cancelation provision, was resolved by the Ninth Circuit on standing grounds that said the plaintiffs didn't have standing to challenge that provision. But the real fight in the case is not about standing. There's a lot of standing analysis, and I know that you love to think about that, and your listeners, I think probably think about standing a lot.

A Anthony Sanders 25:59

We do, we do.

D David Asp 26:00

But let's not talk about that. Let's talk about the real issue, which is the National Voter Registration Act. And the fight in this case was about the concurrence. There's a concurrence and a dissent that are arguing about whether this provision of Arizona law is preempted by the National Voter Registration Act. And so that's a federal statute, and it governs the conditions when a state can remove a voter from the registration list. And the federal statute says that a voter can be removed from the list if the voter confirms in writing that they've changed their residence to some place outside the jurisdiction, or if they just don't vote for some period of time, and then they get notice from the jurisdiction and don't respond. So if you decide to abandon your jurisdictions of residence and don't vote for a couple cycles, they'll send you notice.

A Anthony Sanders 26:52

And that notice probably goes to your old address, right? Which you're long gone from.

D David Asp 26:56

It could be that, I mean, that would be a different question, I suppose, as to whether that notice is deficient. The statute talks about that. But the question here is, the first part of that is whether the voter confirms in writing that they have changed their residence to a place outside the jurisdiction, because the Arizona law says the county recorder can cancel registration if they get written confirmation from another county, basically someone saying that this person has now registered in our county, or if they get some information that the person is in a different county, and then confirm with that county that they are in fact there. So the dissent and the lower court are saying, Well, look, this is in conflict with the federal statute. And the federal statute was, in fact, created for the purpose of preventing the states from using questionable resources to decide if someone is actually still registered or not. But the concurrence, I think, in a pretty detailed opinion, says that the laws aren't in conflict, because—and in doing so, by the way, it's creating, or at least criticizing Seventh Circuit case law that says the contrary, so there may be a circuit split developed here—but the concurrence is basically saying No, if you register to vote in a different county, you are signing something, usually under oath, saying that you are no longer a resident of the previous jurisdiction. If that is something in writing, if that gets sent to your prior jurisdiction, then that's considered confirmation from the person that they are no longer registered in that county and they're registered in a different county. So, I mean, that's really the argument here. It's a question of statutory interpretation of the state law versus the federal law. And as I said, although it was not necessary to the majority's ruling, that conclusion conflicts with the Seventh Circuit case law, saying that you, the voter, actually has to confirm it. You can'thave it forwarded from one county to another, and use that as confirmation. So it's an interesting dispute, and probably something that is headed for a circuit split on a question of how you interpret the National Voter Registration Act.

A **Anthony Sanders** 29:15

Do you know if this new law in Arizona is a little unusual in that maybe it hasn't come up that much before, because most counties don't do that, or has this been bubbling for some time?

D **David Asp** 29:32

I don't have the sense that this exact issue has been bubbling for some time. I mean, as you know, a lot of states don't have voter registration in the same way that Arizona does, where you have to register in advance and go vote. Some states you can do same day registration. But the cases they're discussing are these Indiana cases where there were situations where the election officials were reviewing third-party resources, like vendor information and saying Oh, it looks like they don't live here anymore, cancel their registration. So that seemed to have been the concern in some of these other cases, and not the concern here. This is a more, I think, a more specific way of doing it, based on county communication, or jurisdictions communicating with each other about whether someone's registered. And it does seem to me, I mean, I can see the argument on both sides of this, but it does seem like if someone is signing something, saying, Yes, I'm registered to vote, and that means you have to say you live there, so that is written confirmation that you live someplace outside the jurisdiction. Whether that remains true or could change is probably a different question, and whether it's accurate is probably a different question too. The second piece of this case is about something that's referred to as the felony provision, which sounds interesting, but it's really just because it's a felony. So it prohibits knowingly provide—it's a felony to knowingly provide a mechanism for voting to

another person registered in another state. Also an interesting question of statutory interpretation, because it raises the question of, What is a mechanism for voting? What does it mean to have a mechanism for voting?

A Anthony Sanders 31:10

Is it a voting machine? Is it a ballot? Is it a stylus?

D David Asp 31:15

Yeah, the court says it includes the processes, techniques or instruments needed to cast a vote. Here, they're saying what you're doing with "mechanism for voting," they want to say it's void for vagueness, because they're saying we think that this could be interpreted to mean voter outreach, or registering people to vote. And so if I know you're registered a different state, and I send you information about how you can vote, or about registering to vote, then I might be providing you a mechanism for voting in the ordinary sense, and then be violating the statute. And the court says, No, that is unreasonable. And they do it under sort of a plain text analysis, but then at the end they cite the canon of constitutional avoidance—that is the avoidance of constitutional problems with the statute—and, of course, the rule of lenity to say that this is a statute that should be interpreted only to mean providing someone with the instrument needed for casting a vote. So, I think they're concerned about, like, you know, somebody standing over someone in an election booth filling out the circles for them.

A Anthony Sanders 32:24

So a rare appearance of the rule of lenity. Well that's good to hear.

D David Asp 32:29

Yeah, it was just there at the end.

A Anthony Sanders 32:31

Justice Gorsuch would appreciate that. Good. I think spinning off of that case, I'm going to skip down to a case I need to do pretty quickly, and then we have another one that will take a little bit more time. So kind of in this same vein of last minute voter registration rules and potential penalties, is a Fifth Circuit case that just came out, Judge Ho was the author. It just came out, I believe, last week, from when we're recording this, and this is about a recent Texas law that makes it a crime to do what the law calls "vote harvesting," if you're doing it for compensation. Now, what they mean by that really is when people are voting absentee, and, you know, you have your ballot at home, you can mail it to your electoral people or you can go to wherever your county office is and drop the ballot off, but sometimes what happens, especially with the elderly or the handicapped, is you'll have someone come around and pick up the ballots. So a lot of parties are into this, right? Because the people they think are their voters, they want to help them vote however they can. And if it's that last mile to make sure the ballot actually gets

counted, they go and pick them up for people. And so the Texas legislature was worried about this, and so they said, You can't do that for compensation. You can have volunteers do that, but you can't do it for compensation. So this was challenged, and the lawsuit was filed in August 2021 and for whatever reason—that I didn't dig into, and so I'm going to leave that blank, there could be reasons for why it took so long—the district court did not rule on it until September of this year. So that's three years later that it did not rule, and they issued an injunction. So it's not like nothing happened in the case, but the Court issued an injunction only in September of this year. So this is quickly appealed to the Fifth Circuit, and it gets ruled on and just couple weeks later. And so this came out on the 15th of October. And what Judge Ho says for the court is, we're not getting to the merits of this whole voter harvesting thing and what is constitutionally or legally wrong with it, but we are going to say, because the injunction came out so close to the election, in fact, ballots are already going out, and people may be already voting. We're going to say that this falls under what they call the Purcell principle, and so we are going to not allow this injunction to disrupt the election at this time. So what is the Purcell principle? Purcell was a case. It's a per curiam (unsigned) case from 2006 that I don't think was that big a deal at that time, but it said in there that federal courts must be very wary about ruling on elections when you're close in time to when the election is going to take place. Now, what is close in time mean? The Supreme Court had a case a couple years ago where, like, I think it was they stayed an injunction, or whatever they did in March, and then the election wasn't till November, and they said that Purcell applied there. Well here, I think Judge Ho was saying, Well, you know, this is September before November, and so Purcell definitely applies. Purcell can be overcome, but there's a lot of factors, and they say they don't really apply here. They're some of the same factors, you might imagine in a preliminary injunction, like how good a case do the plaintiffs have, how much of a disruption is it going to have to electoral administration and the court claims here that it's going to have a big disruption. And so they're not allowing the injunction to go forward. And so Purcell applies. So that is that case. But now moving on,

D David Asp 37:06

Can I ask you about this case? I have some questions for you. One, can you talk about this Purcell like is this principle is not absolute, it can be overcome, and the court talks about how it can be overcome, but then it doesn't really talk about all those factors. [Laughter]. So in your experience with this principle, is it like, is it really just, if you have a really strong case on the merits? I mean, one of the factors is the merits are entirely clear cut in favor of the plaintiff. So if you have just a lights out case on the merits. Is that really what matters in your opinion for this, or what is it?

A Anthony Sanders 37:08

You can. So I will disclose, I am not an expert election lawyer like you are. I won't have the answers to all your questions. But my sense is that—I mean, this is part of what I was getting at in saying this is a case from 2006—I think the Purcell barriers, especially in recent years, have gotten higher and higher. So these days, I'm sure you can find courts that have overcome Purcell even this close to an election, when it's just something super obvious. But I think it's a combination here of you know, reading between the lines...at least the two judge majority here. There's a concurrence where Judge Ramirez, she doesn't really, she just concurs in the

judgment. She says, We're just so close to the election. I mean, they waited way too long. Whatever happened, they waited too long. The injunction came too short. Yeah, if the injunction was 2023, I think there probably wouldn't have been an issue.

D David Asp 38:41

In the context of these cases, you know, I think it often comes up in a doctrine like laches or something, where it's like, you need to file to challenge a ballot issue right away. I mean, laches can apply in a matter of weeks or months even before. So that seems clear, but it was the exception that I thought was interesting, because the idea that this is just such a terrible law might be enough to overcome that.

A Anthony Sanders 39:12

It might be, although, I mean, there's four different factors that the court gives. The last one is, the changes in question are at least feasible before the election without significant cost. And that is, actually, that's all a quote from Judge Kavanaugh's concurrence in that case I was talking about. And I think what he's getting at there is, is it just going to upset the entire apple cart of the state administering the election to have this injunction, or is it something that they can do? You know, like one example, again, I haven't looked into this with Purcell cases, but there was some litigation the last couple cycles about certain ballots maybe being not countable because the postmark is after the election, or maybe so many days before the election, or whatever the rule is. When the clerks are gathering those ballots, the argument is it's fairly simple to just segregate them, because you see, okay, that one has a later date, we'll put it in this pile, and we'll open those if it makes a difference for the race, for whatever race it is. Now you could argue whether that's true or not, but like that conceptually seems fairly simple, compared with reprinting all the ballots, which is something that we're going to talk about in a minute. That's a much different situation.

D David Asp 40:40

And here the restricted activity is paid vote harvesting services. So I guess you know that you can't—

A Anthony Sanders 40:50

Right, if you're making money off the service, then you know you can't do that. Volunteers, you can do that.

D David Asp 40:57

Maybe not as disruptive as ballot changes or things.

A Anthony Sanders 41:03

Anthony Sanders 41:05

Yeah, although, I mean, it's certainly disruptive for campaigns and what they were planning on.

D David Asp 41:10

Yeah if you're the campaign, you know, we were only going to have volunteers vote harvesting...

A Anthony Sanders 41:14

Right, so on to reprinting ballots. So now we're going to talk about the whole RFK Jr. saga, at least as it relates to the state of Michigan. Now we won't do too deep a dive into this. And again, I should emphasize that nothing I say has to do with the merits of Robert F Kennedy Jr as a candidate for president. But as most of you are listening know he was a candidate for president for a while. He was at first, running as a Democrat, and then I think this fact kind of maybe slipped under the radar some of the news—he was running, and he got the endorsement of, The Natural Law Party, which is a minor party, but they've been around a while. You know, Dave may have cast a vote in their direction at some time in the deep past.

D David Asp 42:08

If I did, it was decades ago...

A Anthony Sanders 42:11

Right. A youthful indiscretion, I'm sure you would say.

D David Asp 42:14

I would, yeah.

A Anthony Sanders 42:14

Not to cast any aspersions on The Natural Law Party.

D David Asp 42:17

Yeah, nothing against them, as far as I know.

A Anthony Sanders 42:19

And you're seeking votes. They're saying you're not only running, but you want to be running, I

think. Right. But they are minor party, and so different rules apply. And some people think this is very unfair, but different rules often apply to minor parties versus major parties, Republicans and Democrats, although in some states other parties can, at times, qualify as major parties. So he gets the endorsement, and in Michigan, that means he can get on the ballot as the minor party. So then, you know, life comes at you fast, and President Biden drops out of the race. Vice President Harris gets into the race. And for whatever reason—like, we're not going to question motives here—whatever reason, he drops out of the race. RFK Jr drops out of the race, at least as it relates to the Michigan ballot. And they notify the Secretary of State on August 23 and he says, I want off the ballot. Now, something that's not—so we're going to talk about some cases that were in state court and then in federal court. One thing you don't really get from the federal court cases, but get talked about in the state cases, is the state Natural Law Party at the same time is saying to the Secretary of State, No, we don't want him off the ballot. Please don't take him off the ballot. Now, of course, he's the candidate, so you'd think he gets precedence, but so he's saying, Take me off the ballot. The state party is saying, don't take me off the ballot. The Secretary of State takes a reading of state election law that says, Because you are a minor party candidate, you actually can't get off the ballot at this point, it's just too late. And I think the reading was from when he very first got on there, whenever the paperwork was sent in earlier that year. I think the endorsement was like in April. You just can't get off, sorry. So he is not happy about this. He files suit. The suit goes through the Michigan Court of Claims—which is where the government suits go in Michigan State court—and he makes a number of arguments, but they're all state law based, some constitutional, some statutory. And he asked for a writ of mandamus, which is hard to get, as we talked about on on Short Circuit, a special kind of remedies, basically an order to an official to do something that's just ministerial in nature. So to get taken off ballot, doesn't get the writ of mandamus, goes to the Michigan Court of Appeals. Now, meanwhile, there's this pending deadline, which is September 6. The Secretary of State is supposed to tell all the counties in Michigan who's on the ballot. Now, later, there's arguments about, Does that just mean the offices or does it mean the names? At this point, it seems like everyone's assuming it's the names. September 6, that day, the Michigan Court of Appeals reverses and gives RFK Jr a writ of mandamus and says, Look, that reading of the law was wrong. Actually, he could get off the ballot. Doesn't matter what the state party says: he's the candidate, he can get off the ballot. And so the Secretary of State, she communicates on the deadline to all the counties and does not include his name. Three days later, though, the Michigan Supreme Court rules—over pretty strong dissent—but the Michigan Supreme Court rules that actually it's okay what happened, and they're not issuing a writ of mandamus. So the writ of mandamus is rescinded, and then after that, the Secretary of State kind of amends what she did three days before, so after the deadline now, and says, Actually his name is on the ballot, so she kind of corrects what she had said before. And so now he's on the ballot everywhere. Then RFK Jr runs to this federal court and files a lawsuit where he raises some federal claims, including a few claims. There's an Article Two claim, but the most important one, I think, is the First Amendment claim, and he says what I'm really suing about now—I'm not doing a complete redo—I'm suing about this extra thing that happened on September 9, which was after the deadline, when the Secretary of State kind of slipped my name back into this whole business, and so now I'm on the ballot, and I have a constitutional right not to be on the ballot, because it's speech about me, about the fact that I'm running for president when I'm not running for president. Okay, so he loses.Then he goes to the Sixth Circuit. He loses again, although it's a split panel, and then he goes for en banc review, and then en banc review is denied. But there are some pretty strong dissents by some of the judges on the Sixth Circuit who think that he had a good case here. So what do they say? Essentially, the federal courts are saying, this is res judicata. You're trying a second bite of the apple. Although the claims are a little different—you had the state law claims, now you have federal law claims—you could have raised these federal law claims in state court. You didn't. You slept

on your rights. And now this is just the same thing. And the fact that you're saying this thing happened on September 9, about adding the name back in, that's different. That's not different from what you originally sued about, which was your name still being on the ballot. So that's the technicalities of everything that happened. His name is now going to be on the ballot in Michigan. We could talk about some of that, if you want, Dave. But I think the more interesting thing is you kind of take a step back and be like, Do you have a First Amendment right not to be on the ballot when you don't want to run for office? So the extreme case of this would be, say that in whatever electoral jurisdiction you are, the secretary of state or the county clerk, or whoever it is, is like, this one guy, I'd love it if he ran for office. I'm just going to put his name on the ballot. So say his name is Andy Pratt. So he says, I think Andy Pratt would be a great county commissioner. And so the clerk puts Andy Pratt, and he's on the ballot. Andy Pratt finds out about this and says, What are you talking about? I never signed up to run for office, get my name off of there, and they're like, too late; deadline has passed. Would he have a claim? I think someone in that situation absolutely would have a claim. Because, I mean, it might be libel, right? Because you're not running for office, and yet the state is saying you are running for office— Right. I mean, if you're actually elected, you could just never take the oath, or whatever. So there's not a problem there, but like, the fact that you are running—there's some kind of injury to you. So I guess the question is, is that a First Amendment problem because they're speaking about you: they're saying you're speaking that way, and you're not. I think you probably do have a First Amendment claim.

D David Asp 49:31

There's an argument there, for sure. It's a forced statement to say you're doing it right, you're doing something, you're seeking election, you're seeking votes. I mean, they're saying something about you. There's an analysis in one of these—I think the concurrence, or the dissents—about trademark law, and thinking about this comparison to trademark law. The state's not speaking for you, but it's giving you some authority to speak to others. So, right, there's an analogy there. Yeah, it's really interesting. And I have to say about this case, I mean, when I read them, these Sixth Circuit judges are coming pretty hard after the Secretary of State of Michigan, and then after RFK. I mean, the one concurrence is, I think they refer to his argument as "completely fraudulent," because they're pointing out, like, Hey, you're trying, you're trying to get off the ballot in Michigan, but you're trying to stay on the ballot in New York.

A Anthony Sanders 50:31

Yeah, meanwhile, there's this thing in New York. He was kept off because his address was wrong. It was kind of a weird, technical argument, but I don't get why he's suing to be on the ballot there, but, you know, whatever.

D David Asp 50:43

They had to write it quickly. I guess maybe they didn't have time to stop and and revisit some of the more strident language, because they're hitting pretty hard in this case, and I think it's really the timing of it, because for the Secretary of State to say, like, Okay, I'm going to tell all

the officials not to have him on and then a couple of days later, just change that, suggests that there's something else going on.

A Anthony Sanders 51:05

I mean, it her point is that she only did it because of the lawsuit, because that day the Michigan Court of Appeals said that there's a writ of mandamus. So of course she's not going to put him on the ballot, and then if that's reversed, I mean, she would have put him on the ballot in the first place, so she's just correcting that. So it's all because of litigation. Things get weird when you have lawsuits. But then RFK Jr's point is, well but you know I don't want to run, and you already...so why did you add me? Like, at that point, just keep me off.

D David Asp 51:36

Yeah. I mean, I guess is there some principled reason for that change of decision here, and I was trying to, like, really, sort of discern how this played out in real time. Maybe it was just hard in real time to make that call. But to your point, you know, I mean, if your county commissioner, Andy Pratt was running and he wanted to get off, he would have to find out and act very quickly, or, I think he'd be sunk, which is this case talks about that as well.

A Anthony Sanders 52:04

Yeah, yeah.

D David Asp 52:05

I mean, with laches, and—

A Anthony Sanders 52:07

You might even have a—I guess you could do a damages claim afterward, but then you got qualified immunity and sovereign immunity and all that business.

D David Asp 52:15

Interesting, yeah. I think, I mean, it is possible, certainly, that running for county commissioner could do damage to his reputation. He'd have to quantify, and then—

A Anthony Sanders 52:26

Yeah, maybe it depends on the office. [Laughter]. So now,we're gonna end by bringing it home to the home state of Dave and I, and that is Minnesota, and someone trying to get on the ballot to run for the state Supreme Court.

D David Asp 52:50

Yes. So this is a Minnesota Supreme Court case which is not featured on Short Circuit very often, right?

A Anthony Sanders 52:58

We do our State Supreme Courts from time to time.

D David Asp 53:01

Okay, well, this is one, and as I mentioned before, often in an election case, you get to go straight to the state Supreme Court on ballot questions, and this is one of those. And so this is a case for a candidate who filed to run for the Minnesota Supreme Court, like Supreme Court justices, and the Secretary of State in Minnesota refused to place her name on the ballot, and the reason that was given for refusal was because her law license has been suspended, and Article Six of the Minnesota Constitution says that a Minnesota Supreme Court Justice must be "learned in the law." So the reasoning was, because your license has been suspended, you're not learned in the law, and therefore can't run for Supreme Court and appear on the ballot. So interestingly, you know, because she's running for the Minnesota Supreme Court, and the case is going to the Minnesota Supreme Court. All of the sitting justices on the court recused and have replacement judges and justices take their place, and they heard the argument and issued an order upholding the Secretary of State's decision not to allow this candidate's name on the ballot. And so I guess the interesting question here is one of Minnesota constitutional law, and it's, what does it mean to be learned in the law? Does it mean that you have to be graduated from law school, that you have to have passed the bar? Does it mean that even if you did those things, it has to be current? So you can't be disbarred or retired, you have to be currently licensed? Or what about suspended—where the suspension could, at least, I guess, in theory, be lifted at some point before service begins. So the Court addressed those questions, and they're largely controlled, the court says, by earlier Minnesota precedent. But this is another interesting thing about these sort of cases is you often have to go back and look at some very old cases where they've considered it before, if there's any precedent covering it before, and then think about how that applies here. In this case, they went back to cases from the early 1970s which is relatively recent for this kind of litigation. But then if you look at those cases, those go all the way back to the founding of the state in 1857 and the constitutional conventions. The court concluded that, based on that analysis—basically a precedential analysis, but also a historical analysis—that being learned in the law requires you to not just have an active license, but also not be suspended. And I think the precedent was, according to the court, pretty controlling on this. And if you go back and look at the precedent, they cite old transcripts from the constitutional convention talking about how at the time being learned in the law—maybe you didn't go to law school, maybe you didn't pass the bar even, but you had to be eligible to pass the bar. And so they left some wiggle room for someone who maybe was licensed elsewhere. I'm not sure how that would come up, but they ended up being pretty clear that you can't be disbarred or suspended. Yeah,

A Anthony Sanders 56:27

Yeah, I dug into some of what they cited. I probably didn't dig in as much as you did, but it looked like there was this case from the 70s, and that cited some other cases, and there was a case from Washington state from the early 1900s which, whatever they were interpreting there had similar language. And it does seem like the courts at that time were unanimous saying that learned in the law is basically licensed. But I wonder, you know—going back a little further to 1857 when the Minnesota Constitution was was framed and statehood a year later—learned, you know, learned in the law could maybe mean a few things, because there wasn't general licensing at that time. There was the requirement that if you literally step in front of the bar, as we say, in the courtroom and argue to the judge that you need some kind of, you know, you could call it a license, probably not a license like we'd have today, but that was the only kind really of lawyer licensing back then, but you could give legal advice and not have a license. It's just because you maybe taught yourself some law, or you had interned, or whatever; you would then be kind of considered a lawyer and/or considered some kind of legal expert, and so you could offer your services to people. And so maybe it did have that technical meaning back then. I don't know. There's probably been an article about it, but I think you know, and so maybe the court was right on all this, but it seems like this is the kind of situation—because, like, no one says learned in the law today, unless they're being funny—so back when it wasn't a punchline, what did it mean?

D David Asp 58:25

Which is hilarious, by the way. That's a hilarious joke, "learned in the law." [Laughter]. But I think it's just leaving the door open for cases where someone is maybe not admitted to the bar of the state, but is still learned in the law. Like went to law school maybe got licensed in a different state, but it didn't come over. I mean, that would maybe be a more interesting case or a harder case.

A Anthony Sanders 58:54

Yeah, well, because, I mean, this candidate definitely was, at one time, learned in the law.

D David Asp 59:02

She's on ballot. She had run many times before.

A Anthony Sanders 59:04

Right, but now is suspended, and so you don't—I mean, from a really textual argument— you don't lose your learning because you're suspended. You might not be very good, who knows, but you don't lose your learning. So I think this is a reallygood example of doing a textualist or originalist look at a state constitution, because what did it mean in 1857? Because what it means to us, really, I don't think adds very much if we just look at learned in the law, because no one uses that today. So what did it mean back then? And you know, what would it mean for someone who is suspended? Maybe there's not a good answer to that, but it's an interesting example of how this can come up in the state constitutional context.

D David Asp 1:00:01

Yeah, it's an interesting question. And I think you're right, the originalist understanding is kind of reflected in the cases cited by this opinion itself, because the precedent controls, they rely on the precedent a lot.

A Anthony Sanders 1:00:15

Yeah, yeah. And these are early 1900 cases. They aren't that far removed.

D David Asp 1:00:19

But I think, I mean, I would say, like, in my experience anyway—because these questions don't come up a lot when you get to litigate this type of an issue—it is an opportunity to really go back and dig in and find...I mean, you mentioned that North Dakota case, where our case was decided by a North Dakota Supreme Court case from 1920 that was very much aimed at something different; that case wasabout ballot measures, but they were trying to create an entire section of North Dakota law about taxes and just import it in through a ballot measure. And so the court said, Well, no, you can't have this 50 page ballot measure, and you're not giving people the whole text of it. So that means it's not consistent with the requirement that you give people the whole text.

A Anthony Sanders 1:01:12

Yeah, well, in yet another example of how entrepreneurial young lawyers get to make a name for themselves in this area, just like you did, Dave.

D David Asp 1:01:26

Well, it's a good way to enjoy practicing law, and there's a fun cases, so. well, that's great.

A Anthony Sanders 1:01:31

Well, that's great. Well, thank you for having a fun time with me and our listeners today. I appreciate you coming on. I appreciate everyone listening and enjoying this run up to the election, and of course, whether you vote or not, I hope it is an election that goes well for everyone. And that's all I'll say on that. Please be sure to follow Short Circuit on YouTube, Apple podcast, Spotify, and all other podcast platforms, and remember to get engaged.