

MORRISON FOERSTER

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John Salter (00:04):

Good morning.

Judge (00:05):

Good morning. Hold on. Let's let the court settle down a little bit. You're Mr. Salter?

John Salter (00:14):

Yes, Your Honor.

Judge (00:23):

Okay. Mr. Salter.

John Salter (00:25):

May it please the court, John Salter, the Barnes Law Group for the state defendants, which includes the State Election Board and the Secretary of State's office, which is currently occupied by Brad Raffensperger. The point I'd like to—

Judge (00:38):

You know, one of the things that was curious to me is I looked at your notice of appeal, and—

John Salter (00:46):

Yes, Judge.

Judge (00:50):

—the State Election Board is the Board itself.

John Salter (00:51):

In their official capacity. Yes, Judge.

Judge (00:54):

No, no, no. Listen.

John Salter (00:54):

Oh, excuse me. Beg pardon.

Judge (00:54):

Listen to me. The Board itself, as opposed to the individual members of the Board in their official capacity, is named as a defendant in one of the complaints.

John Salter (01:09):

Yes.

Judge (01:09):

The Curling complaint, the second amended complaint. But you didn't file a notice of appeal on behalf of the Board.

John Salter (01:16):

I believe—I thought that we had—

Judge (01:20):

Looking at it. Come now, Brian Kemp and his official capacity as Secretary of State of Georgia—of course, he's been substituted—

John Salter (01:26):

Yes, sir.

Judge (01:26):

—by law. And the members of the State Election Board, David J. Worley, Rebecca Sullivan, Ralph Simpson, and Seth Harp and their official capacities and give notice, but you don't list the Board itself.

John Salter (01:41):

Sorry. They are only sued in their official capacity. And those are—we were—I think we were intending to speak collectively. But they are only sued—the members are only sued in their official capacities. It's my understanding of both the Curlings who had two complaints. The second amended—

Judge (01:55):

It seems like the only to me—I was looking at this case, and I was thinking that you actually do have somebody who sued. You have an entity that sued that actually does have an 11th amendment immunity defense, and that's the Board. You can't sue the Board.

John Salter (02:11):

Yeah.

Judge (02:12):

You can sue individual members in their official capacity for injunctive relief, under *Ex parte Young*. But you can't sue the Board itself, but you didn't file a notice of appeal on behalf of the Board.

John Salter (02:24):

I beg your pardon. My understanding of the complaints, as it's been called down and changed, and we got two, we got the third amended complaint, which the coalition group is traveling under, then the second amended complaint. But my understanding of the claims is that the purpose and the function of both the third amended complaint and the second amended complaint that the Curlings are still under, was that they were only asserting claims against the members in their official capacity, Judge. So I apologize if that was unclear.

Judge (02:47):

Okay. Well—and they can clearly do that, right? I mean, *Ex parte Young* allows them to do that. And I've

read their complaints. Their complaints ask for injunctive relief to enjoin the defendants from using the election system that they contend violates the federal constitution.

John Salter (03:09):

That's the allegation. And the problem with that is cause you need—we would ask this panel to look past that mere allegation that there is a constitutional right to a particular balloting system.

Judge Rosenbaum (03:21):

But they're not asking for a particular balloting system. They're just asking that the DRE machines not be used. I mean, it seems like that's kind of a problem with your position.

John Salter (03:31):

I think that's—with respect to Judge Rosenbaum, I think that's a bit formalistic to try to cabin it. That's certainly how they've couched it in some [inaudible], but—

Judge Rosenbaum (03:39):

Well what is the specific and particular voting system that you contend that their complaints seek?

John Salter (03:44):

It's kind of circular, because what they're saying is that the reason they have a right to force a change from the DRE is to prevent them from being used is because they say that they have implied in the right to vote a right to a voter-verified auditable paper ballot.

Judge Rosenbaum (04:02):

Well, actually, it seems to me what they're really saying—

John Salter (04:03):

That's where we dispute.

Judge Rosenbaum (04:04):

Right. At bottom, what they're really saying is they have a right to have their vote counted. Are they not saying that?

John Salter (04:09):

No, ma'am. No, ma'am. That's not—I mean their argument, and I'll let them argue that, but our argument is that's really not the vote. When you penetrate to the substance of the legal theory, this accountable vote—

Judge (04:20):

Well we can't evaluate—we can't penetrate and evaluate the legal theory in an interlocutory appeal from a denial of immunity.

John Salter (04:29):

Actually, you have in the past. In the McCullough v. Finley case, you all—in fact, I think in the opinion you wrote—published in December, Judge is that the legal viability of these at a plausibility kind of an Iqbal standard, these legal conclusions that there is this right in the constitution to a paper ballot. That is something that you can test and apply a plausibility standard just to immunity as you have, and I think that was a judicial immunity case. You can look at that legal conclusion and test it on a plausibility center just as

you would do on a case like under article three, standing, whether there's an injury, in fact. And the point we're trying to make, in terms of the *Ex parte Young* analysis, which I think comes back to Judge Pryor's argument about whether this is a classic case, the district court thought this was a classic case for *Ex parte Young*. Okay. And the problem with that, and then—and I know we probably want to get into the appellate—the pendant appellate jurisdiction argument. The problem with that is it's really not a classic case for *Young's* exception.

Judge (05:27):

McCullough didn't have anything to do—but we are jumbling a lot of federal jurisdiction doctrines this morning.

John Salter (05:34):

Yes.

Judge (05:34):

All right. So that was a case about judicial immunity—

John Salter (05:40):

Yes, Judge.

Judge (05:40):

—and official immunity, and there's a complaint for damages there. I don't—there's not a complaint for damages here—

John Salter (05:47):

No, Judge.

Judge (05:48):

This is a complaint for injunctive relief, right? For prospective relief. And as I have thought that your defense was an 11th amendment immunity defense that it brought it up here.

John Salter (06:00):

It is. There's no—there's no argument we think that there's—

Judge (06:02):

And *Ex parte Young* makes it very clear, does it not? That they can seek a prospective injunctive relief against officials in their official capacity.

John Salter (06:17):

That's what ex—

Judge (06:17):

And we don't evaluate, do we? And that in that kind of posture, whether they have stated a valid claim or not.

John Salter (06:30):

I think you can, in terms of—if that claim is not legally plausible, and I would point you to—there's actually a section I think in *McCullough v. Finley*, it may be in another case that we've cited. It may be in this

[inaudible]—this recent [inaudible], I think decision that has been cited to supplemental authority. There's a portion of that opinion that points out that if a—if the argument for jurisdiction is really just there just to obtain jurisdiction, if it's legally implausible, then we think the court has a duty to inquire into whether or not that jurisdiction really meets it. And I admit, Your Honor, I'm not saying it's a high threshold. I'm not saying that we get into a really hotly—hot controversy about the merits. But that is a low bar, but it's a bar that they can't meet here because there is—there is no right to pick the manner in which an election is conducted. And actually, you know, the substance of what's—

Judge (07:23):

But you don't do that—you don't do that on an interlocutory appeal though.

John Salter (07:26):

The reason we're here—

Judge (07:28):

Your—the basis for your interlocutory appeal is one thing, do they have a right to sue you?

John Salter (07:37):

It's two things. It's the legislative immunity argument, which gets into the nature of this—

Judge (07:42):

It's frivolous, as far as I can tell. I mean, there is not—their complaint does not enjoin anyone for making any regulations or anything like that. Their complaint seeks an injunction against the administration of an election using this system.

John Salter (08:02):

I think—here's the argument that there is no question that they engaged in some pretty artful pleading at the third and fourth and fifth, try to get around the jurisdictional and immunity arguments. The point we're trying to make is that when you take away the DRE machines, you're going to have to count these votes. And when you order the ballots—

Judge (08:19):

That's going to the merits again. You can take up their pleadings and the merits before the district court, right? The only thing we want to know now is can they—do you have—do your clients, are they immune from suit?

John Salter (08:33):

They are immune from suit. And here's the reason why. There is no—there is no colorable federal right. There may be state rights to certain things regarding election procedures, but in terms of the manner in which an election is conducted, there is no federal right that says you have to have a voter verified paper ballot. That's not in the constitutional taxed—

Judge (08:51):

Again, that's going to the merits.

John Salter (08:52):

It's not going to the merits. It's going to whether or not this legal conclusion—

Judge (08:58):

Take it up with the district court. That's exactly—

John Salter (08:59):

Well, we certainly have perfected it.

Judge (08:59):

That's what—that's what we—here's the thing, 11th amendment immunity is about being immune from being subject to litigation at all, to the vagaries of litigation.

John Salter (09:14):

Right.

Judge (09:14):

We're entitled to be immune from having to sit for depositions or having to deal with the lawsuit itself.

John Salter (09:23):

Correct.

Judge (09:23):

There's actually one entity named in the complaint that would have that, but you didn't file a notice of appeal for that entity. But that aside, that's not the same thing though as what they—where they alleged that you have violated, for example, the 14th amendment, and they've sought injunctive relief under *Ex parte Young*. You're subject to a lawsuit about that. *Ex parte Young* makes that very clear and all the case law since *Ex parte Young*. Now, it may be you're exactly right that these are invalid claims that, in fact, you know what you're doing does not violate the 14th amendment. But that's not a question of immunity. That's a question of whether it's a valid claim or not. Those are two different things, aren't they?

John Salter (10:22):

Not in terms of the invalid—invalidity. I'll try to answer your question, and then I'll hush. There can be claims that are invalid on the merits, and there can be claims that are invalid because the legal theory is simply made up. And this argument that there is a constitutional right to pick—

Judge (10:36):

That's one and the same thing.

John Salter (10:37):

I would—I think there's a difference there, Your Honor, with respect. And I think the point we're trying to make is there is no federal right to this. And every case that's this case—the 11th circuit and *Webster vs. Anderson* has said that this is not a constitutionally based claim. So we'd point out to those—

Judge (10:53):

They say it is. They say it's about the—it's about the federal constitution and their voting—federal voting rights. And if you think they're wrong about that, that's an argument you make to the district court. And if the district court agrees with you, you win. If not, then we come up, and we can decide that later. But this is interlocutory appeal about immunity.

John Salter (11:18):

I think the point we're trying to make is there is no federal right in the constitutional text, which actually confers the manner of elections to the legislatures there. This is not a case where a vote has been denied, not counted, diluted, or changed. That's not the issue. The issue is whether there's a federal right or a violation for [inaudible] to operate on. That's what—

Judge (11:36):

They shouldn't have used the interlocutory appeal to make that case.

Judge (11:40):

That's right. Let's hear from Mr. —

John Salter (11:45):

Thank you.

Judge (11:47):

—Qian. I'm sorry, I don't know how to pronounce your name.

Michael Qian (11:51):

No problem. Michael Qian, Your Honor, for the Curling plaintiffs.

Michael Qian (11:53):

Good morning and may it please the court. The panel's observations this morning are absolutely correct. The merits are not before the court in this interlocutory appeal. This is a classic *Ex parte Young* case because we are provided—we are presenting a suit for perspective relief against state officials who are assertively committing a violation of federal law.

Judge (12:12):

And you're not enjoining the promulgation of any regulations. You're just enjoining the use of this election system. Is that right? That's what you want.

Michael Qian (12:24):

Exactly right, Your Honor. This does not implicate legislative immunity because we are suing executive officials for the implementation and enforcement of existing law.

Judge (12:34):

Now, let me ask you a name. So which—you're for the Curling Plaintiffs.

Michael Qian (12:38):

Curling Plaintiffs.

Judge (12:38):

So you have the second amended complaint.

Michael Qian (12:40):

Yes, Your Honor.

Judge (12:42):

You can't sue the Election Board itself as an entity, can you?

Michael Qian (12:45):

No, we agree. And in fact, our complaint doesn't include the Board as an entity and our federal constitutional claims.

Judge (12:51):

I looked at it this morning, and it looked like it did. You might want to clean it up. It's not—they didn't file a notice of appeal on behalf of the Board. So it's not a big deal, but that—at least at one time, I know it did, right?

Michael Qian (13:05):

I agree, Your Honor. Pages 23 and 26 of our second amendment complaint exclude the Board as an entity. But we agree that's not before the court in this appeal in any event.

Judge (13:14):

Okay.

Michael Qian (13:15):

I just want to say a couple of quick words about standing because the defendants devote so much attention to it in their briefs.

Judge (13:20):

Well Summit Medical makes it clear we can't address that, right?

Michael Qian (13:22):

That's exactly right, Your Honor.

Judge (13:25):

I have an interesting question about that. Now, there would be—we would have to address whether they have standing to appeal, right?

Michael Qian (13:35):

In the sense that the court has to verify it's appellate jurisdiction.

Judge (13:38):

It's appellate jurisdiction. That's a separate question from whether there would be plaintiff's standing in the district court, right?

Michael Qian (13:46):

Exactly. The district court's denial of the motion to dismiss on standing grounds is not properly in this appeal.

Judge (13:50):

But there's really no question that they're standing on appeal, right? Because they were denied their motion for—to dismiss based on immunity. And so they have standing to appeal that, right?

Michael Qian (14:06):

That's right. We agree that there's appellate jurisdiction over the immunity issues.

Judge (14:09):

Right.

Michael Qian (14:09):

The district court correctly rejected those defenses, and standing isn't before the court in this appeal.

Judge (14:13):

That's right.

Michael Qian (14:15):

If there are no further questions. Thank you.

Judge (14:16):

I don't have any. Do you gentlemen?

Judge Rosenbaum (14:19)

None for me.

Judge (14:20)

Mr. Maguire, do you have anything to add?

Robert McGuire (14:24):

Your Honor, Robert McGuire for the coalition plaintiffs. I really don't have anything to add, unless there's some particular question that pertains to my clients that the court's interested in.

Judge (14:32):

I don't have any. Nope. Thank you.

Robert McGuire (14:36):

Thank you.

Judge (14:39):

Mr. Salter.

John Salter (14:40):

Well that was quick. Yes, Judge.

John Salter (14:42):

My argument is look to the where in the Constitution and independent of showing where a vote was diluted or weighted differently or where an election was called for and simply wasn't called by a state official. All of those we would concede would be a valid exercise of an *Ex parte Young* type case. Our point is that the same thing—the same absence of an injury, in fact, which what is that? It's an invasion—

Judge (15:09):

Well that's a standing question. We don't address standing on an interlocutory appeal.

John Salter (15:12):

I'm trying to respond to the summit argument that was mentioned a moment ago. The inextricably linked appendant/appellate jurisdiction argument that we're trying to make is that what is an injury in fact? Well, at one of those problems, it asks that is the invasion of a legally protected right. And for Young to operate, we know that there has to be an ongoing and continuing violation of federal law, not state law under Pennhurst, but federal law. That's why Young exists. It's a preemptive shield against—it basically allows the preemptive raising—

Judge (15:45):

That's what they allege that is going on here. That's what has to be sorted out in the district court.

John Salter (15:51):

With all due respect, we disagree, Judge. What we're trying to point out is—

John Salter (15:55):

I understand you disagree, but I don't understand why.

John Salter (15:56):

Because there's an absence of content—of constitutional texts that says that a paper—a voter-verified paper ballot is required. This court is—

Judge (16:05):

Make that argument in the district court. We can review it on appeal, but that's not a question of immunity.

John Salter (16:10):

With all due respect, we think that the 11th amendment immunity applies because they're in their official capacity. And the question becomes whether Young accepts that and that's the argument we're trying to make—

Judge (16:18):

When they're seeking injunctive relief for what they alleged to be a constitutional violation, it's like super Hornbook law. Yes.

John Salter (16:27):

The viability of that allegation under the law—what we're trying to point out is this is an injunctive relief and trying to provide government by injunction on a matter of policy. And that policy, by the Constitution's elections clause, was expressly committed to the state legislatures and the elections clause, the time place and manner by which elections are conducted. What we're pointing out is there's no federal violation that allows Young to operate in this situation.

Judge (16:55):

That's a merits question about their claim.

Speaker 2 (16:57):

With all due respect, Judge, I'd point you out to the case that we tried to cite that shows that no, you can—

Judge (17:03):

I've read all the cases. I've taught most of them.

John Salter (17:05):

I would point you to Papasan v. Allain, which talks about how you can look to some—you do—you're not allowing people simply to make an allegation on a legal conclusion that we don't look behind.

Judge (17:16):

Heck, one of those I lost with Summit Medical was I—it was Summit Medical versus prior.

John Salter (17:20):

Which is your case. I'm aware.

Judge (17:23):

I think I know what it says.

John Salter (17:24):

We do. And I want to—

Judge (17:26):

By the way, I lost. I think it's actually right.

John Salter (17:28):

Well, let me point—I don't disagree with Summit, and we're not arg—our point is this is a different case. Look at what the prong—there are three or four different, depending on how you count them, prongs of standing on article three. There are arguably three different ways, requirements for Young to operate. We're challenging all three and all four. That wasn't operative in Summit. In Summit, you only—there was only a contest about one of the prongs for an injury under article three, and that was redressability. There was never an argument in Summit about an injury in fact. You had a class D felony, if they performed an abortion.

Judge (18:01):

Doesn't matter.

John Salter (18:01):

So that was clearly an injury in fact. Here, the overlap is at least between, is there an invasion of a legally protected right and is there a federal ongoing violation that's plausibly pled. That's where we're arguing the overlap is. And if you look at the plaintiffs, one of the—

Judge (18:18):

Those are arguments for the district court, Mr. Salter.

John Salter (18:21):

All right. Well, Judge, we've tried to make our argument as best as we know how

Judge (18:25):

I understand.

John Salter (18:25):

I would ask the court to look again at Papasan and some of the other cases. Besides, we actually showed a tenth circuit that did talk about it **[inaudible]** in a particular case. So we're just asking you to take the case on its own merits. There was a case where the injury in fact, upstanding overlapped with the—a—an immunity issue under *Ex parte Young*, 11th amendment. So if there are no further questions, I'll hush.

Judge (18:49):

Have any?

Judge Rosenbaum (18:49):

None from me.

John Salter (18:51):

Thank you very much for your time.

Judge (18:51):

Thank you.

[Inaudible whispers]

Judge (19:27)

Hold on. So yes, *Sconiers v. FNU Lockhart*. I was just trying to wait for the courtroom to clear, Mr. Greene.

[Inaudible]

Judge (19:53)

That's the first time I had heard it. Have we been having it throughout? Did we have it yesterday? All right. If we hear it again, I'll ask them about it.

Judge (20:03)

So, Mr. **[inaudible]**.