Nonmailable Matter

ROMAN MARS: It is Thursday, September 17th, at 2:00 p.m. as we're recording this. What are we gonna be talking about today?

ELIZABETH JOH: All right, well, in 1912, the residents of Oklahoma City, Oklahoma, received a widely distributed flyer in the mail from the Armstrong Bird Music Company. In the center of the flyer was a nine-box square, something that would be familiar to a Sudoku player today. And three of the boxes were filled in on a diagonal with the numbers two, five, and eight. Below the square were the instructions. "Take the numbers from one to nine inclusive and place them in the boxes so that, when added together vertically, horizontally, and diagonally, the total will be 15. No number can be used more than one time."

Winning entries could receive prizes. The first special award, according to the flyer, was a "beautiful upright piano, value $350." Second place won you an upright piano worth $350 at the discounted price of $125. Third place earned you a $350 piano for $150. Fourth and fifth places earned you a violin and a guitar. And the next 100 winners would receive 100 additional awards. In fact, everyone who sent in a correct answer would receive an award. But how would the top prizes be awarded? The flyer said that prizes would be awarded to the neatest solution to the problem. The remaining prizes would be awarded in order of merit. Now, more than 6,000 entries were received. Most people wrote their answers on the flyer, but a number of entries decided that the neatest solution would also be the most creative one. Some turned in their answers on burnt wood. And some turned in pillows with answers stitched in embroidery. And the number of unusual answers actually exceeded 105 special awards that were announced in the flyer, but the judges awarded them anyway. Those special awards, they turned out to be a voucher for $117 to buy a new piano.

But this contest ended up being the center of a legal dispute. And that's because when the Armstrong Bird Company tried to notify the contestants of their awards, the postmaster refused to deliver them. And that's because federal law, in 1912, as it does now, prohibits the mailing of any item considered a lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance. Both sides in the lawsuit agreed that a lottery consisted of three elements: a prize, consideration--that's something you do or offer--and chance rather than skill. No one disputed that there was a prize or that the contestants did something for a chance to win. But was chance an important part of that scheme? After all, what determined whether your embroidered pillow or burnt wood solution won the contest?

In 1914, a federal court decided that, while chance might've played some small role in whether you won a free piano, it wasn't enough to turn the contest into a lottery. The court also noted, with some annoyance, that the piano, advertised as being worth $350, only cost the company $130 full sale, so the value of the voucher prize was dubious. Nevertheless, the winners could be notified by mail. Had the court decided otherwise that this was a game of chance rather than skill, the postmaster would have been right to refuse to deliver the contest results. The results would have been classified as "nonmailable matter" under federal law. And it turns out that a dispute about whether a shady contest for free pianos tells us something about why the Trump administration has been trying so hard to restrict mail-in voting for the midterm elections. Could--should--our ballots for the 2026 midterms be considered nonmailable matter under federal law? Time to find out.

ROMAN MARS: Let's do it!

This is What Trump Can Teach Us About Con Law, the ongoing series of indeterminate length and sporadic release, where we look at the right to a free piano and the right vote, and we use them to examine our Constitution like we never have before. Our music is from Doomtree Records, our professor and neighbor is Elizabeth Joh, and I'm your fellow student and host, Roman Mars.

ELIZABETH JOH: All right, so, Roman, first, let's talk about why the midterm election in November is so important, right? At this point, in his second year of his second term, Trump's approval ratings are really low in the 30s. This is very low for historical standards for a president at this point in a second term. This is like Nixon levels of disapproval before he resigned. They're just terrible numbers. We're in a deeply unpopular war. We have high inflation, pessimism about the economy, unpopularity about immigration enforcement--and it doesn't help that Trump keeps talking about building his ballroom or building his arch. So what that means is that Democrats are very likely right now to secure a majority in the house. They have a chance of controlling the Senate. That's a little less certain.

ROMAN MARS: And what does it mean for Trump if they do win the house?

ELIZABETH JOH: Well, potentially a lot. So, remember, right now, Republicans control it all, the House, the Senate, and the White House. If Democrats take the House, there are a lot of things that might happen. First, the House will certainly try to block Trump's legislative agenda. Any GOP bill will not pass a Democratic House, period. Second, investigations... A Democratic House means that Democrats will control House committees. And that means they will have the legal power to issue subpoenas and launch investigations into what the Trump administration has been up to. And this could include anything, everything from how Trump and his family have been profiting from the presidency, foreign policy decisions, what kind of looks like a pay-to-play use of the pardon power, his ballroom project, the Epstein files... There's a huge list of potential topics. Now, Trump would certainly respond with his usual tactics, blocking and delaying and refusing and suing, but a Democratic House is almost certainly going to be launching investigations on day one.

ROMAN MARS: Yeah, yeah.

ELIZABETH JOH: So in the less likely event that the Democrats win the House and the Senate, there would be even more obstacles for Trump. Trump would have difficulty getting nominations through the Senate. That includes not just his executive branch appointments, but federal judges. And federal judges includes the Supreme Court. Justice Alito has expressed interest in retiring. So that is a whole other can of worms right there.

ROMAN MARS: Yeah, yeah.

ELIZABETH JOH: And a Democratic Congress also sets up the possibility of yet another Trump impeachment. That seems maybe less likely since there have been already two failed impeachments and it's hard to know whether people have the energy to do that again. So, all of this just halfway through his second term is why the midterms are so important and things do not look good for Trump, right? So, if you're Trump, you're extremely unpopular, you can't make the voters vote for you, and in fact they're not even voting for you. They're voting for members of Congress. So, if you can't do much about it

directly, there's one thing you can do. And that is you can try and make it difficult, maybe impossible, for people who want to vote for a democratically controlled Congress as a check on him. And that is exactly what Trump has done. On March 31st of this year, Trump issued an executive order, which, simply put, tries to blow up voting by mail in the United States.

ROMAN MARS: So how does it do that? What does it propose?

ELIZABETH JOH: Okay. Well, first, let's establish some basics about voting by mail. This has been happening for a long time. States have allowed voting by mails since the Civil War. Keep in mind, the Civil War is one of the very first times we have a big proportion of voting eligible men who are away from their home districts, right? And it wasn't run exactly the way voting by email works today. If you were a soldier then, most of the time you'd have an election at your camp and then the results would be tallied and then that result was sent back to your home district. But that precedent, ever since then, states have recognized that voting by mail is a legitimate and important way for people to exercise their right to vote. So, for instance, federal laws like the 1986 Uniformed and Overseas Citizens Absentee Voting Act... That's a law that allows members of the military and their families to vote from abroad because obviously they can't vote if they're not in their home districts otherwise.

But the biggest recent impact on voting by mail happened in 2020 because of the pandemic, right? During the pandemic, many states did everything they could to give voters more choices so they wouldn't have to risk exposure to COVID-19. So that included early voting and voting by mail. And that had a huge effect. So, in the 2020 election, 43% of voters voted by mail. That's compared to 21% of the voters who voted by email in 2016. And for the 2024 election, almost a third of the electorate voted by mail. So it is a really big and important part of how people vote today. So today eight states allow all elections to be conducted 100% by mail. Let's take California because you and I are most familiar with that. So, in California, county election officials mail ballots to every registered voter. You and I don't have to ask for one, they just mail it to us.

ROMAN MARS: It's the greatest.

ELIZABETH JOH: Yeah, it's awesome. We don't even have to say anything. For registered voters, we simply get our ballots.

ROMAN MARS: Shows up, reminds you that it's happening, gives you everything you need--it's fantastic.

ELIZABETH JOH: Right, that means we vote at home and we put our ballots in the mailbox or put it in an official drop box or even drop it off in person. The easiest thing though is that we just put it on our mailbox and the postal carrier comes and takes it away.

ROMAN MARS: I think it's fun to put it in the drop box personally, down by the library, but still.

ELIZABETH JOH: For me, whatever works. Whatever gets people to vote, right? So California, according to its own state law, will be mailing more than 23 million ballots to its registered voters for the midterms. Now, more than half of the states allow you to request a mail ballot without stating any reason. You can just say, "I want one," and they'll send it to you. Now, the rest of the states have different rules about when and how you can vote in a

so-called "non-traditional" way. And that means either voting by mail or voting in person but early. But the main point is that voting by mail today is a very popular, pretty easy, and very secure way for people in most of the states to vote. I also don't want to give the impression that voting my mail represents just, like, an option for every voter, as if you can vote by mail or you can go in person and that's really just the choice for everybody. A lot of voters--and I'm talking about the elderly, disabled people who live in rural areas--voting by male is their only choice. So if there's no vote by mail, they don't vote at all.

So, now, let's go back to Trump's executive order, right? Trump's order does not try to dictate who is eligible to vote or even who is able to vote by email. And the order doesn't tell the states how to count votes or anything like that. There are several parts to the order, but the only part I want to focus on is section three, which is about the Postal Service. Trump's order directs the Postal Service to finalize a set of rules around voting by mail. So, first, the order requires election officials around the country, before they do anything else, to send the name and address of every person who is supposed to receive a mail-in ballot to a portal created by the Postal Service. It doesn't appear to be public facing yet, but more on that in a bit. So, there's some portal that's supposed to exist in the future, where all this information goes. And then there's the ballot--I mean the blank ballot--that's mailed to you by election officials. Every mail-in ballot is required to have specific design details. It's supposed to have a USPS election mail logo, it has to be automation compatible, and it's supposed to have a barcode that's unique for every voter. So, election officials under these rules have to get these ballot designs approved ahead of time by the postal service before a single ballot can be mailed out. And it's not totally clear how long the postal service will need in order to approve the ballot design. But nevertheless, under the rules here that are proposed, you have to get your ballot design approved by the postal service. So, while these might seem like sort of technical details--this is about ballot design or whatever--these are actually conditions that directly affect whose votes will count. And here's why. Because if a state mails a ballot to a voter, even if the ballot is correctly addressed to a legitimately registered voter, if Trump's regulations are not followed, then postal workers will not deliver the ballot. It just gets returned to the state, okay?

So, it's not even clear how the state could try to appeal to the Postal Service. If even there's some dispute, like, "Hey, we did do this correctly, this person is individually approved of, and this person should receive a ballot," there's no clear process of appealing. So this is... I just can't even tell you the scope of this problem. This is an enormous task for the states. You need new equipment to apply the barcodes to envelopes, new envelopes to meet the design requirements. You have to submit the new designs to the Postal Service. And then you get feedback whenever the Postal Service gets around to it. Then you need to enroll every registered mail-in voter. Then you also, of course, have to train people to learn how to do this and to implement it. And then, of course, the states have to pay for this somehow. And I haven't even mentioned that, in many places, elections are actually administered at the county or municipal level.

ROMAN MARS: For real, yeah. And there's no consistent ballot design across any district in the United States of America at this point.

ELIZABETH JOH: Yeah. And that's on purpose, right? We have this idea that it's up to the states. So the postal service regulations--the proposed ones from the order--require that the state's chief election official authorize other election officials in the state to use the portal to enter the names and addresses of registered voters who are gonna get these ballots, okay? So it's kind of like the person at the top is supposed to tell every other election official in the state, "Here's how you do it." But that's the problem. How are the

states going to do that? These are county officials. So somehow the Secretary of State is going to have some direct mass meeting where they say, "Here's how you're going to do this thing." And then they're going to manually input some of this information? It sounds like a nightmare, right? But this order is supposed to apply to all future elections, including the 2026 midterms. And there's another twist here too. At the end of August, Senator Blumenthal received a whistleblower report that warned that the Postal Service was totally unprepared for these changes. The process for creating that portal that I just mentioned, the whistleblower said it was "rushed, risky, and haphazard," and created a risk of what the whistle blower called a "catastrophic failure that would derail the midterms." And the U.S. Postal Service started working on the portal this past June. And... Actually, this reminded me of something else. You know, Roman, I don't know if you remember what happened with the Affordable Care Act portal and how that rolled out.

ROMAN MARS: Yeah, I do remember. It was kind of a mess at the beginning, yeah.

ELIZABETH JOH: It was a total mess. So obviously different policies, different programs, and, full disclosure, I'm a big fan of the Affordable Care Act. But in 2013, the federal government was supposed to launch a website for people to shop for individual plans that were part of the central component of the ACA. But it was such a mess and it was so poorly designed that only six people were able to successfully sign up on the first day. And it continued to have a lot of problems after that. Eventually the problems were kind of ironed out. But with the ACA, keep in mind that it was signed into law in March of 2010. The federal government had three years to figure out a portal that didn't even work. So Trump's order was expecting the Postal Service to come up with a portal for all mail-in ballots around the country within a couple of months. So it was impossible to think that this was going to go smoothly, whether it was legal or not.

ROMAN MARS: And so how did election officials respond to this order when they heard about it?

ELIZABETH JOH: Uh, panic.

ROMAN MARS: Yeah, I would think so.

ELIZABETH JOH: Right. I think there are definitely some states that could have complied with these rules, right? But many states just couldn't. They would not be able to comply with the rules in time for the midterms. And then it's unclear what would have happened. If these rules were to go into effect, would the state just pivot. And then if you couldn't mail the ballots, maybe you ask everybody to show up in person. How do you administer that? You know, they don't even have a system for doing that. And then as this was rolling out and we were having all this uncertainty, some states just started mailing out their regular ballots to voters because the state required them to do so by law. There was a timetable, right? They have to keep mailing them out. And some election officials started telling voters, "You maybe want to just vote in person early. You're allowed to do that. You might as well have your vote count." So there was a sense of election officials were thinking of all different alternative scenarios. But I think one widely agreed result was that if these rules had been permitted to go into effect, there would have been mass disenfranchisement. Potentially millions of voters who were lawfully registered in their states to vote--have legally voted by mail in the past--a lot of them just would not be able to vote by mail, period. And if they wanted to vote, they'd have to scramble and find some other way of doing it. And because voters who vote by email tend to be Democrats, this would be a partisan disenfranchisement, which was kind of the point.

ROMAN MARS: So, are any of these postal regulations actually legal?

ELIZABETH JOH: No.

ROMAN MARS: [CHUCKLING] Okay. It's as simple as that. Case closed!

ELIZABETH JOH: For so many different reasons, they're just not. But let's review how.

ROMAN MARS: Okay. Let's count the ways it's illegal. Let's go.

ELIZABETH JOH: So, first, let's start with the Constitution, right? There is clear, explicit text in the Constitution. The Elections Clause says that "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations." So the plain English of the Elections Clause means that the Constitution assumes that the states have primary responsibility for the mechanics of running federal elections. There is an exception. Congress can decide to step in and regulate some aspects of elections. Congress has definitely done that on many occasions. The 1986 Uniformed and Overseas Citizen Absentee Voting Act that I mentioned before allows members of the military and their families who are abroad to vote. That is an instance of Congress stepping in under their Elections Clause power and regulating. But otherwise, if Congress doesn't do anything, the assumption is that everything else is left up to the states. Who is absent from the Elections Clause? The president. The Constitution gives no authority to the president to regulate federal elections. None, this isn't even a close question. There is just no authority for the president to do this.

Second, there's the postal clause. The Constitution gives Congress the power to "establish Post Offices and post Roads." So Congress has used its Postal Clause authority a bunch of times too. Congress has used this to restructure the Postal Service a number of times. And with the Postal Reorganization Act of 1970, Congress delegated or gave some of its own powers to the postal services. And that includes the power to issue postal regulations. None of this authority is given to the Post Office in any way that says anything about treating election mail in any particular way. So, in terms of the Constitution, to sum up, the Constitution assumes that the states are primarily in charge of administering federal elections, including how and whether to allow voting by mail. Congress is allowed to regulate the Postal Service and continues to regulate it, but Congress has never passed any law that tells the Postal Service to treat election mail in any particular way. And it's very clear that the president of the United States has zero authority on telling the states on how to run elections.

ROMAN MARS: But is the Postal Service part of the executive branch in some way that allows him to say that this piece of mail can't be couriered under the guise of the Postal Service?

ELIZABETH JOH: Oh, because they're an agency within the executive branch? Yeah, I haven't seen the argument made, but I will say that some of the Trump administration's legal arguments to justify the order are a little even weirder than that.

ROMAN MARS: [LAUGHS] Okay, so then what is the administration's argument for why they can do this if there's nothing in the Constitution that allows it?

ELIZABETH JOH: Yeah, they don't really address that exactly. That's a problem for them. I mean, the Postal Service claims that they have the authority to implement Trump's order because "Congress has given powers to make rules as may be necessary in the execution of its functions." There's that kind of broad language here.

ROMAN MARS: But is that a defensible argument at all?

ELIZABETH JOH: Well, so what the post office is doing is saying, "Congress gave us some of this power. We're an agency. We can implement that power." This type of argument is raised a lot. The executive branch wants to do something big and points to what looks like general or ambiguous authorization from Congress. Unfortunately, that is not always a winning argument. Remember Trump's worldwide tariffs? The Supreme Court decided earlier this year that the language of the International Emergency Economic Powers Act, or IEPA, used the word "regulate," but the word, "regulate," did not include an ability on the part of the president to impose massive worldwide tariffs. Congress would have said so if they meant "regulate" also included tariff. So the tariffs were illegal. And I don't know if you remember when Biden launched his really expansive Student Loan Forgiveness Program. The Supreme Court decided in 2023 that the words "modify" and "waiver," under federal law, couldn't possibly encompass forgiving federal student loans. Congress would have said so instead of using vague, general language. So it's kind of the same problem. Here the Postal Service is saying that the ability to reject what the states consider otherwise totally legal votes or legal ballots being sent to legitimately registered voters is part of what it means to "execute its functions under federal law." And even worse for the Postal Service is that Congress has never explicitly delegated its Elections Clause power to the Postal Service or any aspect of it.

And then there's another clear answer as to why the Postal Service can't treat our mail-in ballots this way. And that takes us back to our piano lottery.

ROMAN MARS: Okay. How does it connect?

ELIZABETH JOH: Okay, so, Trump's executive order, as it's implemented in the post office regulations, treats our otherwise legal mail-in ballots as nonmailable matter. And you know what? Only Congress can tell the Postal Service what is considered nonmailable matter because when Congress wants to designate things that the Postal Service can't deliver, they tend to say so, right? So, remember the piano contest dispute. The postmaster said that he would not deliver the notifications to the winners because they considered it a nonmailable lottery. Why was the postmaster saying that? Because federal law 18 U.S.C. § 1302 makes it a crime to send in the mail any lottery ticket or paper, certificate or instrument purporting to be or to represent a ticket, chance, share or interest in or dependent upon the event of a lottery or similar scheme. And because it's a crime to send lottery tickets, a separate federal law considers lotteries to be nonmailable matter. The Postal Service cannot deliver them because Congress said so.

ROMAN MARS: While we're on the subject, what else is nonmailable?

ELIZABETH JOH: Well, Congress has given the Postal Service a long list of things: mailings that look like official government invoices but aren't, most illegal drugs, poisons, poisonous animals, explosives...

ROMAN MARS: Poisonous animals? What do you mean? Oh, you mean, like, a snake that bites you--that type of poisonous animal?

ELIZABETH JOH: Right, or, like, a poisonous frog.

ROMAN MARS: [LAUGHING] That you lick, yeah.

ELIZABETH JOH: You don't want to lick that accidentally. And what the law calls "infernal machines."

ROMAN MARS: Oh, and that's a bomb.

ELIZABETH JOH: Right, the historical word for a bomb.

ROMAN MARS: Amazing. "Infernal machines." That's so good. Yeah, I love that.

ELIZABETH JOH: And, believe it or not, the administration has spent a lot of time, in defending these regulations, talking about how there are postal restrictions on mailing cremated remains, even though Congress hasn't specifically used the word "cremated remains." So that's the reason why the Postal Service can also refuse to deliver mail-in ballots.

The problem for the Trump administration is that Congress has already said that the Postal Service can regulate the mailing of powders that are messy or potentially harmful. And that's kind of what cremated remains are, right? I mean, they're messy; it makes them suspicious. Now, what is not plausibly on the list of things that Congress considers nonmailable? Otherwise legal mail-in ballots sent to or from legally registered voters. It just doesn't fall into the same category as poisonous animals, infernal machines, or illegal drugs. So if Congress had decided to step in and use some combination of its postal power and its elections clause power, this is a totally different issue. But this has not happened. It's really important to understand that. Congress has not, at all, said that this is something that they wish the Postal Service to do.

ROMAN MARS: Yeah, yeah, yeah.

ELIZABETH JOH: And so the president all by himself is not allowed to do this, period. The Postal Service can't hide behind some general generic grant of authority that Congress has given it, like you can make rules to make your office run smoothly. That can't plausibly cover voting by mail, okay? So for all of these reasons, a group of states sued over the legality of the Postal Service rules right after Trump issued his executive order in March. It's a case called California versus U.S. Postal Service.

ROMAN MARS: So what's the status on that case?

ELIZABETH JOH: Well, if you want the short answer, as of today, Trump's postal regulations will not affect mail-in ballots on November 3rd. We just found out this week. Voting in the midterms will be conducted largely according to how states have conducted elections in the past. But the twists and turns of the legal challenges over Trump's attempt to dramatically change how the entire country would vote by mail are so convoluted and so crazy that it would be funny if it weren't actually real life. So I thought we'd talk about what happened.

ROMAN MARS: Okay, so just so everyone can breathe easy, this is not a problem for November 3rd, but we're just going to take you back through the things that got us to this point where we can feel okay. Okay, good.

ELIZABETH JOH: Exactly, because we weren't clear until this week. So, on April 3rd, a group of more than 20 states sued the Trump administration in federal court in Boston over the executive order. This is the order that we've talked about, the one that Trump issued in March that tells the Postal Service to issue rules about restrictions on voting by mail, the ones that we have already discussed, that you have to have an approved envelope design, you to have individual barcodes, you have to enter every registered voter in a postal service portal, and so on.

ROMAN MARS: I mean, and what were the states' arguments here?

ELIZABETH JOH: Well, the states relied on many of the legal justifications that we've discussed here--that Trump's order is unconstitutional because it interferes with our constitutional structure under the Elections Clause and that the Postal Service was unlawfully treating mail-in ballots as nonmailable matter without congressional authorization, and that the order violated other federal laws related to voting and privacy. And the Trump administration had a pretty weak case to argue that they could use the Postal Service as a way of policing--really restricting--voting by mail, by claiming that this was a way to protect against voter fraud. They provided no evidence that voting fraud is a serious problem and zero evidence about how making barcodes on envelopes would actually address any hypothetical problem of voter fraud. But the key to understanding what happened in the mail-in ballots case is actually a totally different matter. And that has to do with the stage of the lawsuit and what the states were asking for.

So, remember, Trump's order in March told the Postal Service to prepare regulations for mail-in ballots. And the presumption was that these would apply to the 2026 midterms. The Postal Service didn't do this immediately because any agency rulemaking takes some time and that part is very normal. When the states filed their lawsuit in April, they argued that Trump's executive order was illegal and unconstitutional, that Trump simply could not do this. They argued that Trump lacked the authority to regulate how the Postal Service treats voting by mail. And so the states asked the federal court to order a stop or to issue an injunction on the order while the lawsuit proceeded. I say the "order" because, at the time of their lawsuit, there was nothing except Trump's order.

So on July 7th, the federal district court granted the states' request. Judge Indira Talwani found that the states were likely to win their arguments and that the states would be harmed if the Postal Service were allowed to go forward with issuing these rules and requiring the states to comply. And so this injunction or order blocked the executive order from taking effect for the 2026 midterms. So then the Trump administration appealed that order to the Supreme Court. It's important to keep in mind here, Roman, that at this stage of the case, the case is not finished at the trial level at all. It's just a very early part of the cases, right? They're just saying, "For right now, please put a stop to this while the case is going forward." So here's what the Trump administration did. They asked the Supreme Court, in an emergency request, to stay or halt the block on Trump's executive order. So they're asking for a halt to let the Trump administration keep going with its restrictions on voting by mail. And on August 24th, the Supreme Court sided with the Trump administration. They decided that they would stay or halt the injunction issued by the district court, meaning that the Trump administration could continue with its plans for restricting voting by mail.

[AD BREAK]

ROMAN MARS: So, when the Supreme Court halted the injunction, were they weighing in on whether or not the executive order was legal? What were they deciding there?

ELIZABETH JOH: On August 24th, they did not decide that at all. Instead, they used a gatekeeping mechanism called "ripeness." We've talked about another gatekeeping mechanism before, the doctrine of standing, right? And standing is a constitutionally based rule that only parties with actual harms or real injuries can bring cases in federal court. It doesn't matter how badly the person or institution you're suing is behaving, if you lack standing, your case will be dismissed on standing. So a related idea is the constitutional doctrine of ripeness. Ripeness means you're just too early. The bad thing you're complaining about just hasn't happened yet. And in August, the Supreme Court decided that the state's complaints were just too early. Their reasoning was that Trump's order hadn't yet been implemented into any rules by the Postal Service. So the lawsuit was too early. "Come back later." So, Roman, if you think about this logic, it's absolutely crazy.

ROMAN MARS: Yeah, it is because one of the other things that often happens is, because of stake driving and moving things forward, they often say, "Oh, it's too late." You know what I mean? "Things have moved forward. He's already president. The election has already happened. No point in this." So you get caught on both sides of this thing.

ELIZABETH JOH: Exactly, and with election law, it's even worse because, in election law, there's something called the Purcell Principle. And what the Purcell Principle means is that federal courts are not supposed to change election rules too close to an election because it would be too confusing to voters. So, two months before the midterms was too early. And presumably there was some point at which you would be too late. So there was a Goldilocks time for the states to sue the Postal Service, but the Supreme Court refused to specify when that was.

ROMAN MARS: Oh, that is maddening. Okay.

ELIZABETH JOH: And so it's for that reason that Justice Jackson, who dissented here, said that the situation for parties bringing election cases like this were really what she calls a "Kafka-esque nightmare." When do you bring a lawsuit at the right time?

ROMAN MARS: Okay, so after they halted the injunction, what happened after that?

ELIZABETH JOH: Well, the lack of ripeness meant that that particular case was dead. It was over. It could not continue. And the Trump administration was free to keep going with its plans on mail-in ballots. I told you it was complicated, right? So, that Supreme Court order was issued on August 24th. But actually three days before that decision, the Postal Service had in fact issued what's called a "final rule," which is a little strange because the Supreme Court doesn't mention it or acknowledge it. But they did actually issue a final rule, and the final rule is more or less identical to what we've just talked about in Trump's order. Ripeness problem solved.

ROMAN MARS: I see.

ELIZABETH JOH: Then the states immediately filed a new lawsuit with the exact same legal arguments. They went back to the same court, and they asked the judge, "Now,

please grant a preliminary injunction." In other words, put a halt or a stop on the Postal Service from restricting voting by mail. And so, on September 4th, the same judge with the same basic attitude issued that injunction blocking the Postal Service from going forward with its rules for the 2026 midterms. Now, again, this is a very early stage of the case. That's important to remember, right? That hasn't fully been completed. But here, the parties, and that's the states, are just asking the judge to freeze everything in place while the case is going on. And on September 4th, the judge issued that injunction. And for a preliminary injunction, one of the legal standards that has to be met is whether or not the states are likely to win if the case keeps going. And here the judge decided that, yes, it seems likely that the final rule of the Postal Service was unconstitutional and there was no congressional authorization either.

The Trump administration then appealed this order to the Supreme Court. So, again, remember, early stage of the lawsuit, the state suing had only asked the federal district court to block the rule from taking effect for the 2026 midterms. So this is not a more typical case that you and I have talked about in the past where the Supreme Court agrees to review a case after somebody has completely litigated the case before. They've lost at the trial court stage, they lost their appeal, and now they want the Supreme Court to hear the full case. This is totally different. It's a very early stage and it's on what's called the court's emergency docket. And so what the Trump administration was doing here is asking the Supreme Court, in its emergency docket, to put a stay on the injunction to decide that the mail-in ballot rules could apply to the 2026 midterms, not to decide whether this entire scheme is legal or not. So that's why the procedural stage of the case matters here.

So we'll get into a little nitty-gritty here. When a court is asked to grant an injunction or to stay in injunction, which is putting a halt on the halt, like what the Trump administration was doing here, a court was supposed to take certain factors into account. One relates to the likelihood that the party bringing the case, and that's the states here, will be successful. We've already talked about why the states are almost certainly right here. Another set of factors concerns what the courts call the "balance of equities." So that's really a fancy way of saying, "If the court does what it's being asked to do, who's going to be harmed more? And is that harm irreversible? And also, is there any effect on the public interest, the balancing of the equities?" So, with Trump's attempt to meddle in the midterms, I think it was pretty clear--overwhelmingly clear--who has the better case. The states, right? I don't even think it's a close call.

ROMAN MARS: Yeah.

ELIZABETH JOH: Because who's going to be harmed more? If you let these rules go into effect, the states had a ton of declarations that were filed with the federal district court. We are facing extreme costs, potential total chaos, disenfranchisement of our citizens... And in some cases, the rules would make state election officials, by having to follow federal law, also violate their own state laws by not delivering their votes on time. So, here's how the states put it to the Supreme Court the second time around. Complying with Trump's rules would be impossible ahead of the midterms, meaning that millions of voters would be unable to vote by mail and some would not be able to vote at all. And there is still no working, public-facing portal for the Postal Service.

ROMAN MARS: And what could the Trump administration possibly say in response to this?

ELIZABETH JOH: They really had very little other than this would be a setback to the Trump administration's goal of reducing or stopping voter fraud, which again, they really have no evidence of it being a huge problem at all. Voter fraud, again and again, has been shown to be a pretty rare crime. And the administration doesn't really explain how these rules were going to support that claim anyway. And on September 14th, the Supreme Court responded in just three sentences. "The application for stay is denied. The government is unlikely to succeed on the merits of its challenge to the district court's preliminary injunction. And the equitable factors applicable for obtaining emergency relief from this Court do not favor a stay." Short, complicated, but it is devastating.

ROMAN MARS: Okay.

ELIZABETH JOH: What the Supreme Court is doing here, in one short paragraph, is telling the Trump administration that, number one, the balance of equities, in other words, who's harmed more, doesn't tip in their favor.

ROMAN MARS: Yeah, yeah, yeah.

ELIZABETH JOH: But the Supreme Court went even further than it had to. The majority also said to the Trump administration--

ROMAN MARS: "You're going to lose."

ELIZABETH JOH: Yeah. "You're not going to win this case." Right. Of course, the Supreme Court was not being asked to decide the underlying case, but I think it's a pretty big hint of how they would vote if they were asked to do so. The other shocking part about this is that it's not unanimous, right? I want to point out one thing about Justice Alito's dissent. Justice Alito was joined by Justice Thomas.

ROMAN MARS: And so what was his dissent about?

ELIZABETH JOH: He blames the victims. He blames the states. Basically, he says, "Look, if you hadn't filed this lawsuit, there wouldn't be what Alito calls a 'cloud over the government's ability to issue a final rule.' There's a delay, and you guys caused it." But the problem with Alito is, like, you can't have it both ways. You can't tell the states that they're both too early the first time.

ROMAN MARS: And too late the second time.

ELIZABETH JOH: And then too late the second time, right? And of course, the majority doesn't really get a pass here either. I mean, they did put an end to the chaos for the midterms right in the beginning of September, but they could have done this six weeks ago because the Trump administration went to the Supreme Court for the first time on July 27th. Then the Court took almost a month to respond and then decided that the state's challenge was not ripe for review. So, you know, the entire Court seems to be, I guess, playing around with everybody's expectations and sort of at the last minute swooped in and said, "You know, it's probably not a good idea for the midterms."

ROMAN MARS: And so what does this mean for Trump's original March order on this?

ELIZABETH JOH: So these restrictions on voting by mail will definitely not apply to the 2026 midterms. That's absolutely clear. That is the entire point of the three-sentence

paragraph from the Supreme Court. The Postal Service cannot refuse to deliver ballots for the midterms and it cannot require the states to upload personal voter information to some kind of centralized portal. But the lawsuit by the states is still ongoing. And the federal courts block on the rules only pertains to the midterms, right? So the states wanted to say, "These rules are unlawful, period." But Judge Talwani's block on the application of these postal service regulations only extends to the midterms while the case proceeds. So we don't have a resolution to the entire case. And we still have future elections; we have 2028. But in the Supreme Court's refusal to unfreeze the lower court's order, I think we see a hint that any attempt to do the same thing for 2028 will be an uphill battle for Trump because they've already suggested that his case is not a good one. I guess I'd also say that Trump has won in one sense because, throughout this whole process, he's able to cast doubt on the legitimacy of voting by mail. And a lot of states now are in an unfortunate position of trying to restore confidence in the process in their states by saying, "It's okay, you can mail in your ballots and they're definitely going to count." And that's also kind of the point of this. Even if they knew they were going to lose, you throw in enough questions and people feel uncertain about voting. Yeah. Yeah. Wow. And as for the Supreme Court, when they handed a defeat to Trump, he posted on Tuesday, "These are not the people I interviewed to serve on the United States Supreme Court. They are merely a shell of their original selves," once again showing us that he thinks he's at the top of the chain instead of one of the parallel branches.

ROMAN MARS: I have a question, like, you know, we talked about the implications of when Democrats would take over the House. I mean, is it worth Congress affirming in law that the Postal Service must treat ballots a certain way--not just put what goes on the nonmailable matter list--but actually there's just a statement of principle of what the Postal Service has to do in terms of ballots? I don't know.

ELIZABETH JOH: Oh, sure. It doesn't have to be a statement of principle. You could have a federal statute that simply says, "The Postal Service shall deliver ballots, except under these conditions" or whatever and just have an affirmative plan. I mean, we've mostly just left things the way they are because no president before has ever tried to do this. But sure, I mean, in a functional Congress, you could have a kind of ensuring a robust democracy set of laws that could be passed. You need a present to sign off on them too, right? So that's kind of the problem.

ROMAN MARS: But I still think it'd be worth doing all this stuff. I mean, my hope is that there's a bunch of policy writers right now that just have things raring to go when things get going back into democratic hands, you know? I know this probably might not be first priority or anything like that, but still, it just seems like one of them that, like... You know, he's figuring out how to break our Constitution in ways that we never imagined. And if this is one of him, then there's a kind of a way to shore this up.

ELIZABETH JOH: Yeah. I think that's right. I think the problem now is, like, if the Democrats win the House and the Senate, there is such a long list of things that sort of have to be addressed. You wonder whether this will be among the top of the things. Hopefully it will in terms of strengthen democracy through ensuring the right to vote. But we'll see. I think the other problem or the other issue that's been raised by the voting by mail case is you really see that, a lot of times, the things that make a case go one way or the other are really not about the legality or the illegality of what Trump has been doing. It's a lot about these special procedural rules that are not really clear to the public. And they involve a lot of discretion. A group of Justices saying, "Well... It seems like maybe not fair this time. We'll give this one to the states." And I don't think that's obvious to most people. I

don't think ripeness comes to the top of people's minds when they think about what happened in the mail-in votes.

ROMAN MARS: Not at all. Not at all! You'd think that everything is determined on the merits. You know, that's common sense. Anyway, well, this is fascinating stuff. Thank you so much.

ELIZABETH JOH: Thanks, Roman.

ROMAN MARS: This show is produced by Elizabeth Joh, Isabel Angell, and me, Roman Mars. It's mixed by Martín Gonzalez. Our executive producer is Kathy Tu. You can find us online at trumpconlaw.com. All the music in What Trump Can Teach Us About Con Law is provided by Doomtree Records, the Midwest hip-hop collective. You can find out more about Doomtrie Records, get merch, and learn about who's on tour at doomtree.net. We are part of the SiriusXM podcast family.