Emergency Election Litigation in Federal Courts

From Bush v. Gore to Covid-19

Federal Judicial Center
2023

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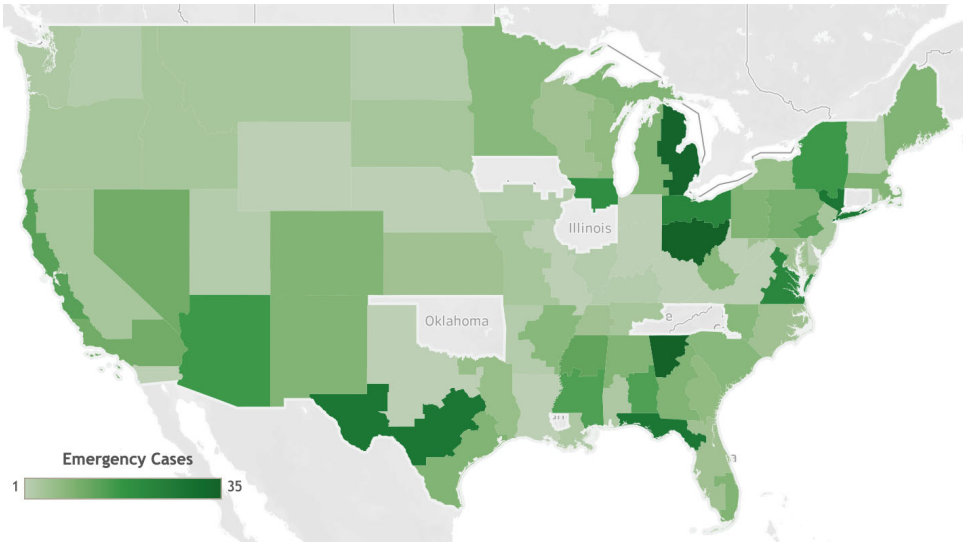

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1:09-cv-82 687
1:13-cv-2610 440
1:14-cv-5398 429
1:16-cv-1891 494
1:18-cv-293 317
1:18-cv-1277 317
1:20-cv-2112 299
1:20-cv-2189 299
1:20-cv-2791 538

Southern District of Illinois
3:09-cv-259 117
3:14-cv-890 429

Northern District of Indiana
2:08-cv-287 867

Southern District of Indiana
1:08-cv-1484 47

Southern District of Iowa
4:07-cv-350 1056
4:12-cv-339 626

District of Kansas
5:02-cv-4087 237
2:10-cv-2488 345
5:12-cv-4046 185
5:12-cv-4148 1119
2:18-cv-2572 997

Eastern District of Kentucky
2:14-cv-60 621

Western District of Kentucky
3:03-cv-665 1115
3:20-cv-407 981

Eastern District of Louisiana
2:04-cv-85 702
2:04-cv-2653 1230
2:07-cv-5221 131

Western District of Louisiana
3:00-cv-2200 279

District of Maine
1:00-cv-206 147
2:00-cv-360 953
2:06-cv-151 1059
1:09-cv-538 637
1:18-cv-179 1009
1:18-cv-465 1009
1:20-cv-216 287
1:20-cv-248 781
1:20-cv-272 287

District of Maryland
8:00-cv-3699 1238
8:10-cv-2646 859
1:18-cv-2825 410
1:20-cv-1253 290
1:20-cv-1995 290
1:20-cv-2197 290
1:20-cv-2391 755

District of Massachusetts
1:00-cv-12067 461
1:01-cv-10944 145
1:01-cv-11889 938
1:04-cv-10826 453
1:05-cv-12218 133
3:06-cv-30123 1060
1:08-cv-11340 479
1:18-cv-12312 823
1:20-cv-11808 781

Eastern District of Michigan
4:00-cv-40336 463
2:00-cv-74912 955
1:04-cv-10257 1134
1:04-cv-10267 1134
2:08-cv-10149 448
2:08-cv-13982 130
2:08-cv-14019 127
2:08-cv-14370 1102
2:10-cv-13503 509
2:12-cv-12782 443
2:12-cv-13627 441
2:12-cv-14114 1023
2:14-cv-11818 327
2:14-cv-11903 327
2:14-cv-12016 264
5:16-cv-10256 559
4:16-cv-13255 321
2:16-cv-13545 615
2:16-cv-13784 615
2:16-cv-13924 652
2:16-cv-14233 1246
2:20-cv-10831 304
2:20-cv-11023 781
4:20-cv-11246 304
2:20-cv-11605 304
2:20-cv-11819 285
4:20-cv-11991 396
4:20-cv-12016 304
2:20-cv-12115 304
2:20-cv-12127 396
3:20-cv-12129 765
3:20-cv-12130 396
3:20-cv-12252 304
2:20-cv-13134 1159

Western District of Michigan
5:06-cv-82 1256
1:07-cv-1237 691
1:12-cv-788 848
1:20-cv-915 765
1:20-cv-948 765
1:20-cv-1083 1163
1:20-cv-1088 1163
1:20-cv-1098 1163
1:20-cv-1169 1154

District of Minnesota
0:04-cv-4653 935
0:10-cv-4401 1098
0:16-cv-4279 1195
0:20-cv-2030 739
0:20-cv-2049 976
0:20-cv-2066 668
0:20-cv-2195 1087
0:20-cv-2250 668

Northern District of Mississippi
3:00-cv-61 247
1:10-cv-49 861
2:10-cv-178 1035
3:11-cv-27 216
3:11-cv-28 216
2:11-cv-40 216
2:11-cv-41 216
2:11-cv-42 216
2:11-cv-43 216
1:11-cv-59 216
1:11-cv-60 216
1:13-cv-99 1020
3:14-cv-144 1206

Southern District of Mississippi
3:09-cv-438 1221
3:10-cv-71 564
5:11-cv-28 216
5:11-cv-29 216
5:11-cv-30 216
4:11-cv-33 216
3:11-cv-119 216
3:11-cv-121 216
3:11-cv-122 216
3:11-cv-123 216
3:11-cv-124 216
3:11-cv-321 216
2:13-cv-72 496
3:14-cv-532 1206
3:18-cv-815 811

Eastern District of Missouri
4:16-cv-1548 834

Western District of Missouri
2:04-cv-4177 1141
2:04-cv-4248 136
2:14-cv-4287 619
2:20-cv-4184 741

District of Montana
9:08-cv-141 125
1:12-cv-135 846
6:20-cv-62 403
4:20-cv-95 729

District of Nebraska
4:02-cv-3257 594

District of Nevada
2:04-cv-1035 582
2:06-cv-1268 1103
2:08-cv-46 1054
2:10-cv-1753 856
3:12-cv-310 1028
2:16-cv-2514 652
3:20-cv-243 789
3:20-cv-271 539
3:20-cv-592 607
2:20-cv-837 539
2:20-cv-2046 971

District of New Hampshire
1:16-cv-52 618

District of New Jersey
2:81-cv-3876 652
2:01-cv-1733 245
1:05-cv-5126 270
2:16-cv-8230 1088

District of New Mexico
6:98-cv-1160 465
1:00-cv-1307 913
1:00-cv-1475 465
1:08-cv-1002 865
1:14-cv-617 432
1:14-cv-844 560
1:14-cv-848 560
1:16-cv-393 412
1:20-cv-748 1240

Eastern District of New York
1:00-cv-2748 389
1:00-cv-3754 389
1:02-cv-4762 380
1:02-cv-4784 937
2:02-cv-4836 378
1:02-cv-6465 138
1:03-cv-4170 370
1:04-cv-3247 378
1:04-cv-3662 380
1:04-cv-3836 368
1:06-cv-3683 380
1:06-cv-4770 355
1:06-cv-4789 355
1:07-cv-1521 347
1:08-cv-3512 355
1:08-cv-3839 688
2:08-cv-4171 355
1:10-cv-3565 488
1:10-cv-3847 370
1:10-cv-3918 355
2:11-cv-2712 212
1:11-cv-4099 370
2:12-cv-1318 338
2:12-cv-5397 355
1:15-cv-568 681
2:16-cv-1892 106
2:16-cv-3527 355
1:20-cv-4664 732

Northern District of New York
1:00-cv-317 502
1:00-cv-322 86
1:02-cv-926 81
5:03-cv-1413 1232
1:04-cv-369 898
1:04-cv-1193 1114
1:04-cv-1205 898
1:06-cv-1083 879
1:06-cv-1191 350
1:07-cv-722 86
5:07-cv-848 350
1:07-cv-1123 877
5:08-cv-207 480
1:08-cv-876 86
6:11-cv-408 1031
1:14-cv-1071 495
1:18-cv-846 1007

Southern District of New York
1:00-cv-6469 1079
1:00-cv-6639 1077
7:03-cv-9886 1231
7:04-cv-5895 253
1:04-cv-6936 488
1:04-cv-9124 1229
1:05-cv-7679 499
1:10-cv-6923 1039
1:12-cv-3836 355
1:12-cv-4223 355
1:12-cv-6342 332
7:12-cv-8017 46

1:13-cv-5493 370
1:13-cv-5656 370
1:13-cv-5731 370
1:13-cv-5787 370
1:13-cv-6769 624
1:14-cv-6643 355
1:16-cv-8336 1089
1:20-cv-3325 671
1:20-cv-3533 671
1:20-cv-3547 296
1:20-cv-3571 293
1:20-cv-4003 781
7:20-cv-5121 293
1:20-cv-5504 772
1:20-cv-6516 755
1:20-cv-8668 609

Western District of New York
1:01-cv-610 488
1:07-cv-609 346
1:08-cv-810 477
6:10-cv-6240 681
6:18-cv-6303 681
1:20-cv-689 774

Eastern District of North Carolina
5:05-cv-177 1129
4:10-cv-158 1034
4:20-cv-182 735
5:20-cv-505 735
5:20-cv-507 735

Middle District of North Carolina
1:00-cv-477 1082
1:02-cv-741 454
1:12-cv-111 188
1:15-cv-559 167
1:16-cv-1274 102
1:16-cv-1288 652
1:20-cv-911 735
1:20-cv-912 735

District of North Dakota
2:10-cv-95 1038
1:18-cv-222 916

Northern District of Ohio
3:02-cv-7204 143
5:04-cv-1948 72
1:04-cv-2147 64
5:04-cv-2165 1109
5:04-cv-2178 1104
3:04-cv-7582 1137
3:04-cv-7622 1137
3:04-cv-7646 65
3:04-cv-7689 887
3:04-cv-7724 1257
3:05-cv-7286 1257
1:06-cv-1628 56
1:06-cv-2065 930
1:06-cv-2692 949
1:08-cv-145 1052
1:08-cv-562 947
1:08-cv-2266 871
1:08-cv-2546 118
5:09-cv-742 639
5:09-cv-2210 266
4:16-cv-641 836
1:16-cv-2645 652
1:20-cv-1908 750

Southern District of Ohio
1:04-cv-543 72
1:04-cv-735 134
1:04-cv-738 1109
1:04-cv-750 1104
1:04-cv-755 1130
2:04-cv-891 453
2:04-cv-965 365
2:04-cv-1052 365
2:04-cv-1055 951
2:04-cv-1139 1257
2:06-cv-896 923
2:08-cv-913 871
2:08-cv-983 49
2:08-cv-1077 1126
2:08-cv-1086 862
1:10-cv-596 861
1:10-cv-720 628
1:10-cv-754 628
1:10-cv-820 1121
2:11-cv-748 344
3:12-cv-379 840
1:12-cv-797 841
2:12-cv-1015 1021
2:16-cv-212 1017
1:16-cv-962 104
1:16-cv-996 104
2:16-cv-1030 555
1:16-mc-5 946
2:18-cv-966 552
2:18-cv-1376 841
2:19-cv-3774 101
2:20-cv-1638 24
2:20-cv-2129 542
2:20-cv-2295 542
2:20-cv-2781 542

District of Oregon
3:03-cv-1257 585
3:04-cv-1170 581
3:16-cv-2290 1191
6:20-cv-1053 530

Eastern District of Pennsylvania
2:04-cv-5123 889
2:06-cv-4592 1058
2:08-cv-4083 267
2:08-cv-5048 1047
2:12-cv-488 190
2:12-cv-556 190
2:12-cv-588 190
2:16-cv-5524 1014
2:16-cv-5664 652
2:16-cv-6287 1246
2:17-cv-5137 161
2:20-cv-4096 755
2:20-cv-5533 1170
2:20-cv-5477 720

Middle District of Pennsylvania
3:00-cv-1300 387
1:04-cv-830 895
1:04-cv-2360 895
1:08-cv-1626 446
1:16-cv-1696 412
1:18-cv-443 161
1:20-cv-829 781
4:20-cv-1761 976
4:20-cv-2078 1167
4:20-cv-2088 1167

Western District of Pennsylvania
2:01-cv-1616 460
2:03-cv-302 273
2:03-cv-1677 902
2:04-cv-1651 648
2:06-cv-481 1062
2:12-cv-535 498
3:20-cv-215 723
2:20-cv-1570 1171
2:20-cv-1831 718

District of Puerto Rico
3:01-cv-1789 597
3:03-cv-1880 375
3:04-cv-2251 1262
3:04-cv-2288 1262
3:07-cv-1867 451
3:08-cv-1918 1048
3:12-cv-1749 109
3:20-cv-1432 753

District of Rhode Island
1:06-cv-336 571
1:08-cv-468 1223
1:20-cv-262 289
1:20-cv-318 769

District of South Carolina
3:10-cv-794 685
3:10-cv-1545 1043
3:12-cv-1191 332
3:12-cv-1543 332
2:12-cv-2760 332
3:16-cv-322 412
3:20-cv-3503 21
2:20-cv-3654 725

District of South Dakota
4:04-cv-4177 1107
4:14-cv-4121 428
4:14-cv-4132 475
3:16-cv-3035 412

Middle District of Tennessee
3:12-cv-765 921
3:12-cv-838 1025
3:13-cv-1118 433
3:20-cv-736 746

Western District of Tennessee
2:06-cv-2451 226
2:10-cv-2724 222
2:18-cv-2706 999
2:19-cv-2653 1088

Eastern District of Texas
9:00-cv-241 149
1:05-cv-134 578
2:11-cv-246 1030
1:11-cv-443 506
6:20-cv-660 1150
4:20-cv-775 976

Northern District of Texas
3:08-cv-2117 1254

Southern District of Texas
7:08-cv-116 53
4:08-cv-3332 1128
4:10-cv-3860 1037
3:11-cv-511 192
4:12-cv-2190 176
4:12-cv-2568 476
4:13-cv-1786 172
7:18-cv-46 612
4:20-cv-3709 974

Western District of Texas
3:00-cv-89 661
5:00-cv-498 1080
1:00-cv-592 464
5:00-cv-1259 600
5:01-cv-1049 243
5:01-cv-1191 596
1:02-cv-195 907
5:02-cv-257 240
5:02-cv-369 239
5:02-cv-408 1076
3:02-cv-456 661
5:02-cv-1015 1073
5:03-cv-816 905
5:04-cv-181 905
5:05-cv-500 1065
1:06-cv-742 352
5:06-cv-1046 878
1:08-cv-7 481
5:08-cv-389 1050
2:10-cv-58 677
5:11-cv-788 197
5:11-cv-945 196
6:16-cv-457 1191
1:17-cv-1167 469
1:17-cv-1186 469
1:20-cv-1006 730
1:20-cv-1015 730
1:20-cv-1024 730

District of Utah
1:20-cv-52 297
2:20-cv-245 297

District of Vermont
5:20-cv-131 745

District of Virgin Islands
1:05-cv-5 271
1:10-cv-79 1042
3:12-cv-69 847
3:12-cv-94 1211
1:14-cv-53 260
1:14-cv-55 260
1:14-cv-66 260
1:14-cv-107 260

Eastern District of Virginia
2:03-cv-897 1069
1:03-cv-1320 80
4:04-cv-20 78
4:04-cv-21 78
3:08-cv-692 1045
3:08-cv-709 863
3:11-cv-856 339
3:12-cv-257 339
1:12-cv-893 626
1:13-cv-1218 108
3:16-cv-13 1019
3:16-cv-467 471
3:16-cv-740 323
3:16-cv-741 323
1:16-cv-1201 412
1:16-cv-1319 37
1:17-cv-1295 1173
1:17-cv-1336 1173
3:18-cv-288 316
1:19-cv-1379 100
1:20-cv-546 777
3:20-cv-801 37

Western District of Virginia
6:20-cv-24 791

Eastern District of Washington
2:02-cv-326 593
1:20-cv-3127 755

Western District of Washington
2:04-cv-2350 1260
3:09-cv-5456 565
2:16-cv-1886 1195
3:16-cv-5801 412

Northern District of West Virginia
1:19-cv-75 551

Southern District of West Virginia
2:00-cv-839 385
5:03-cv-101 592
2:08-cv-990 447
2:14-cv-27456 837
3:16-cv-8981 320

3:16-cv-9918 32
2:20-cv-526 404
2:20-cv-570 404

Eastern District of Wisconsin
1:16-cv-1692 1191
1:20-cv-479 797
2:20-cv-545 797
1:20-cv-1487 976
1:20-cv-1701 1163
2:20-cv-1771 1155
2:20-cv-1785 1155

Western District of Wisconsin
3:12-cv-745 845
3:16-cv-795 1246
3:20-cv-249 797
3:20-cv-278 797
3:20-cv-284 797

District of Wyoming
1:04-cv-256 71

1. Case-Management Overview

We sometimes rely on courts to protect our fundamental right to vote. As the Supreme Court observed in 1964,

> Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.[1]

Time pressure frequently accompanies election litigation, because an election or certification of its results is pending close in time. Resolution of a request for interim relief will often have more practical consequences than final resolution of the action.[2]

In emergency litigation, the plaintiff often seeks a temporary restraining order. A temporary restraining order is traditionally a form of immediate relief granted ex parte. Typically, it preserves the status quo ante pending further judicial review. The Federal Rules of Civil Procedure specify that defendants be served as soon as possible. Often, defendants in election litigation are election officials, and they generally are not difficult to serve promptly, so ex parte relief typically is not warranted. When appropriate after a hearing, judges will provide immediate, short-term relief, which may or may not be labeled a temporary restraining order.

If time is of the essence, judges can order immediate service of the complaint on defendants.[3] A judge will typically hold a conference with

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1. Reynolds v. Sims, 377 U.S. 533, 561–62 (1964).

2. *See* Stephen Vladeck, The Shadow Docket 204 (2023).

3. *See, e.g.*, "Ballot-Petition Signature Requirements in Maine During the Covid-19 Pandemic," *infra* page 287; "Failure to Qualify for a Primary Election Because of Filing Defects," *infra* page 370; "Unsuccessful Litigation by a Write-In Candidate to Have the Incumbent's Candidacy Declared Illegitimate," *infra* page 396; "Seeking Federal Relief for Denial of Certification as a Write-In Candidate After Losing in State Court," *infra* page 440; "Requiring Minor Parties to Qualify for the Ballot in Advance of Major Parties," *infra* page 447; "Public Disclosure of Referendum Petition Signatures," *infra* page 565; "Public Campaign Funds Triggered by an Opponent's Expenditures," *infra* page 633; "Voter Interference," *infra* page 652; "An Opportunity to Cure Absentee-Ballot Signatures That Do Not Match Voter-Registration Records," *infra* page 831; "Late Absentee Ballots in Florida," *infra* page 885.

the parties promptly, using remote technology if necessary. Often the initial conference also will be a hearing on whether to grant a temporary restraining order, if one is sought.

At one telephonic conference, Judge Colleen Kollar-Kotelly, in the district court for the District of Columbia, explained to the attorneys how she would make the most of the conference:

> I would ask that if you listen to me, there may be an instance where I'm going to interrupt you either because I think you've wandered off what we want to talk about or I've heard enough and we need to move on to something else. So I would ask that you please listen.[4]

Another judge once scheduled a preliminary-injunction hearing and then granted the injunction on the day set for hearing without oral argument.[5] In another case, because of the judge's illness, the case could not be considered until after the election was over.[6]

Judges frequently review the complaint to determine whether the case includes all election officials that ought to be included.[7] Courts often allow election officials, candidates, political parties, and others to intervene if their participation will be more helpful than disruptive;[8] sometimes courts deny intervention but permit participation as amici curiae.[9] One judge

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4. Transcript at 4, Dunlap v. Presidential Advisory Comm'n on Election Integrity, No. 1:17-cv-2361 (D.D.C. Nov. 17, 2017, filed Nov. 29, 2017), D.E. 29; *see* "The Presidential Advisory Commission on Election Integrity," *infra* page 1178.

5. Minute Opinion, Cal. Justice Comm. v. Bowen, No. 2:12-cv-3956 (C.D. Cal. May 21, 2012), D.E. 19, 2012 WL 2861349; *see* "Too-Early Ballot-Access Requirement for New Political Parties," *infra* page 445.

A permanent injunction followed a bench trial. Findings of Fact and Conclusions of law, *Cal. Justice Comm.*, No. 2:12-cv-3956 (C.D. Cal. Oct. 18, 2012), D.E. 49, 2012 WL 5057625.

6. *See* "Objections to Primary Procedures," *infra* page 704.

7. *See, e.g.*, "Overly Burdensome Voter-Registration Rules," *infra* page 56 (interview with Judge Kathleen M. O'Malley).

8. Case studies that have "intervention" among their case-study topics are ones in which the question of intervention arose.

9. *See, e.g.*, "Changing Party Affiliation for a Primary Election," *infra* page 86; "Purging Noncitizen Voter Registrations," *infra* page 112; "Unsuccessful Injunction Against State-Court Proscription on Political Gerrymandering," *infra* page 161; "Consent Litigation Over Section 5 Preclearance," *infra* page 173; "Ballot-Petition Circulators Do Not Have to Be Registered Voters," *infra* page 327; "Casting Provisional Ballots in the Right Place," *infra* page 1141; "Unsuccessful Efforts to Enjoin Certification of the 2020 Presidential Election Results in Wisconsin," *infra* page 1155; "Write-In Spellings," *infra* page 1214.

listed failure to name all required defendants as a reason for denying emergency relief.[10]

Although judges are sensitive to the pressures on election and other government officials, judges have on occasion rejected suggestions by their attorneys that the clients' busyness should delay litigation.[11] But even before the Covid-19 pandemic, judges could allow election officials to provide testimony remotely.[12]

An emergency case may be related to previous litigation, or one or more parties may claim that it is. The assigned judge may be called upon to determine whether the case should be reassigned to the judge who presided over an earlier filed case.[13] Courts may be reluctant to define relatedness so broadly that a single judge presides over too large a fraction of the district's election litigation.[14]

Sometimes the parties reach an agreement without a court ruling; perhaps the filing of the lawsuit fostered negotiations.[15] Sometimes the response by election officials to a lawsuit either moots the case[16] or perhaps mitigates the plaintiffs' entitlement to relief.[17]

For example, state election officials granted a political party the result it sought in court in 2017.[18] Two days after the deadline for withdrawing from a primary election, an incumbent member of Congress decided not to run for reelection.[19] A judge in another case declined to order the retiring incumbent to stay on the ballot.[20]

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10. Order, Stockman v. Williams, No. 1:06-cv-742 (W.D. Tex. Sept. 21, 2006), D.E. 12, *as reported in* "Validity of Ballot-Application Signatures," *infra* page 352.

11. *See, e.g.*, "Conscience Voting at a National Convention," *infra* page 471.

12. *See, e.g.*, "Voting Without Notice of Errors," *infra* page 1052; "2018 Recount Deadlines in Florida," *infra* page 1242.

13. Such cases are among those described in case studies that have "case assignment" among their case-study topics.

14. *See, e.g.*, "Validity Requirements for Provisional Ballots," *infra* page 1126.

15. *See, e.g.*, "Threats to Cancel Voter Registrations," *infra* page 117; "Using Foreclosure Notices to Challenge Voters," *infra* page 130; "Superseded Registration Form," *infra* page 47.

16. *See, e.g.*, "Preclearance for a Soil-and-Water Conservation District," *infra* page 699; "Early-Voting Locations in Volusia County," *infra* page 892.

17. *See, e.g.*, "Early-Voting Locations in Duval County," *infra* page 891.

18. *See* "Suits Over Removing Withdrawn Candidate from a Primary-Election Ballot," *infra* page 469.

19. *See* Complaint, Republican Party of Tex. v. Pablos, No. 1:17-cv-1167 (W.D. Tex. Dec. 15, 2017), D.E. 1.

20. Transcript, Tex. Democratic Party v. Republican Party of Tex., No. 1:17-cv-1186 (W.D. Tex. Dec. 20, 2017, filed Jan. 31, 2018), D.E. 8.

The federal-court filing may be a removal rather than an original filing.[21]

Following removal of one case to federal court, the plaintiffs withdrew their federal claims.[22] The district judge remanded the case to state court because the federal claims were abandoned early and state claims involved novel or unsettled issues of state law.[23]

In a Florida case, a state judge indicated how she would rule, and the defendant successfully removed the case before the state judge actually issued the ruling.[24] Although an Indiana case was not removable, because the state court acted after removal and before remand the federal judge vacated the state-court ruling.[25] A similar dynamic occurred in Puerto Rico.[26]

Petitions for emergency injunctive relief call upon the court's equity power, so equity principles apply, including the principle of laches.[27] Judges often weigh the equities against plaintiffs who bring cases substantially later than they could have, especially when the relief sought would have a substantial impact on election procedures.

As one judge noted, however, "Because Defendant offers no evidence of prejudice, Plaintiffs' claims are not barred by the doctrine of laches."[28] Another judge observed that a laches defense requires a showing of prejudice to the defendant, not prejudice to someone else.[29] Litigation in a jurisdiction that permitted seventeen-year-olds to vote in primary elections if they would be eighteen by the time of the general election addressed whether votes in a presidential primary election were for delegates to a

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21. Such cases have "removal" among their case-study topics.

22. *See* "Remanding to State Court an Emergency Election Case After the Federal Claim Is Withdrawn," *infra* page 476.

23. Oliver v. Lewis, 891 F. Supp. 2d 839, 841 (S.D. Tex. 2012).

24. *See* "2018 Recount Deadlines in Florida," *infra* page 1242.

25. Order, Curley v. Lake Cty. Bd. of Elections & Registration, No. 2:08-cv-297 (N.D. Ind. Oct. 7, 2008), D.E. 20, *as reported in* "Early-Voting Locations in Lake County," *infra* page 867.

26. *See* "Close Vote in Puerto Rico," *infra* page 1262.

27. Case studies in which this principle arose have "laches" among their case-study topics.

"[A] party requesting a preliminary injunction must generally show reasonable diligence. That is as true in election law cases as elsewhere." Benisek v. Lamone, 585 U.S. ___, ___, 138 S. Ct. 1942, 1944 (2018).

28. Green Party of Mich. v. Land, 541 F. Supp. 2d 912, 916 n.3 (E.D. Mich. 2008), *as reported in* "Providing Election Data Only to Major Parties," *infra* page 448.

29. *See* "Voting in a Primary Election at Seventeen If Eighteen by the General Election," *infra* page 1017.

convention, requiring voters to be eighteen, or for a general-election nominee, which would allow some seventeen-year-olds to vote. The judge concluded that late-litigation prejudice to potential voters whose votes had already been rejected was not prejudice to defendant election officials.[30]

But sometimes claims brought too early can be regarded as speculative.[31] For example, one judge noted that a challenge to ballot-petition signature requirements brought four days before the beginning of the signing period might not yet be ripe.[32] Another judge in another case ruled that an action brought at the end of the signing period was too late.[33] Early or late, prospective relief may be less disruptive than retrospective relief.[34]

Often the federal case is filed after relief in state court is denied, and courts may reject such suits pursuant to the *Rooker-Feldman* doctrine, which states that among federal courts only the Supreme Court has appellate jurisdiction over state-court proceedings.[35] Judges sometimes apply the principle of res judicata to arrive at a similar result.[36] In one case, res judicata barred claims that were *not* brought in an unsuccessful state ac-

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30. Opinion, Smith v. Husted, No. 2:16-cv-212 (S.D. Ohio Mar. 11, 2016), D.E. 14 (abstaining from consideration of relief in light of concurrent state-court litigation).

31. *See, e.g.*, "The Right of Felons to Register to Vote After Release," *infra* page 72; "Initiative to Reallocate Electoral Votes," *infra* page 579; "No-Bid Contract for Election Software," *infra* page 1021; *see also* Justin Levitt, *Long Lines at the Courthouse: Pre-Election Litigation of Election Day Burdens*, 9 Election L.J. 19, 31 (2010).

32. Transcript at 3, Dekom v. New York, No. 2:12-cv-1318 (E.D.N.Y. Mar. 16, 2012, filed July 16, 2013), D.E. 68, *as reported in* "Broad Challenge to Ballot-Petition Signature Requirements," *infra* page 338.

33. Perry v. Judd, 840 F. Supp. 2d 945 (E.D. Va. 2012), *as reported in* "Unconstitutional Residency Requirement for Circulating Ballot Petitions," *infra* page 339.

34. *See, e.g.*, Richard L. Hasen, *When "Legislature" May Mean More than "Legislature": Initiated Electoral College Reform and the Ghost of* Bush v. Gore, 35 Hastings Const. L.Q. 599, 626 (2008) ("Generally speaking, a rule encouraging pre-election review and discouraging post-election review serves the public interest best.").

35. These cases are among those case studies that have "matters for state courts" among their topics. *See* D.C. Ct. of Appeals v. Feldman, 460 U.S. 462 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923).

36. *See, e.g.*, "Signing a Ballot Petition Too Long Before It Is Filed," *infra* page 321; "Disqualification of a Candidate for Failure to Properly File Papers of Candidacy," *infra* page 349; "Unsuccessful Federal Actions to Achieve Different Results from Unsuccessful State-Court Efforts to Get on a Ballot," *infra* page 355; "State-Court Loss as Res Judicata," *infra* page 494; "Criminal Background Checks for Ballot-Petition Canvassers," *infra* page 529.

tion.[37] In another case, the court of appeals determined that relief was not barred, because the local court had actually addressed a separate issue.[38]

The doctrine of *Younger v. Harris*[39] abstention cautions a federal court against interfering with state proceedings.[40] Similarly, *Railroad Commission v. Pullman Company*[41] cautions against federal constitutional scrutiny of uncertain state law that could be resolved in state court.[42] Sovereign immunity, such as what is reflected in the Eleventh Amendment, constrains federal jurisdiction over damages actions against state governments.[43] And federal judges recognize judicial immunity in suits naming state judges as defendants.[44] Occasionally, judges will simply opine that "this entire matter should be in state court."[45]

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37. Lawrence v. Bd. of Election Comm'rs, 524 F. Supp. 2d 1011, 1018–23 (N.D. Ill. 2007), *as reported in* "Disqualification of a Candidate for Failure to Properly File Papers of Candidacy," *infra* page 349.

38. Puerto Ricans for P.R. Party v. Dalmau, 544 F.3d 58, 64–65, 68–71 (1st Cir. 2008), *as reported in* "Challenging a Puerto Rico Party's Registration," *infra* page 451.

39. 401 U.S. 37 (1971).

40. *See, e.g.*, "Removal of an Elected Official as a Violation of Voting Rights," *infra* page 254; "Minor-Party State Faction Opposing the National Nominee," *infra* page 491; "Constitutionality of Proscriptions on False Statements About Candidates," *infra* page 628; "Wearing Political Messages at the Polls in Minnesota," *infra* page 1098.

41. 312 U.S. 496 (1941).

42. *See, e.g.*, "Ineligibility to Serve in the Legislature Because of Moral Turpitude," *infra* page 260; "A Minor Candidate's Suits to Be on Presidential-Election Ballots," *infra* page 412; "Certification Deadline for Ballot-Initiative Signatures," *infra* page 564; "Wearing Political Messages at the Polls in Minnesota," *infra* page 1098.

43. *See, e.g.*, "Exclusion from the Ballot Because of Invalid Ballot-Petition Signatures," *infra* page 345; "Allowing Any Voter to Challenge Primary-Election Ballot Petitions," *infra* page 378; "A Minor Candidate's Suits to Be on Presidential-Election Ballots," *infra* page 412; "Certification as a Write-In Candidate," *infra* page 465; "Ohio's Voter-Identification Law," *infra* page 923; "Attorneys Sanctioned for Filing a Suit to Overturn 2020 Presidential Election Results Without a Legal or Factual Foundation," *infra* page 1159; "Complete Ohio 2004 Presidential Recount," *infra* page 1257.

44. *See, e.g.*, "Removal of an Elected Official as a Violation of Voting Rights," *infra* page 254; "Exclusion from the Ballot Because of Invalid Ballot-Petition Signatures," *infra* page 345; "Bad-Faith Litigation by a Felon to Get on the Ballot," *infra* page 496; "Anonymous Campaign Literature and Keeping a Candidate Off the Ballot," *infra* page 615.

45. *E.g.*, Davis v. Johnson, 664 F. App'x 446, 450 (6th Cir. 2016), *as reported in* "Anonymous Campaign Literature and Keeping a Candidate Off the Ballot," *infra* page 615.

Also, judges are often reluctant to issue an injunction that instructs a party merely to follow the law.[46]

Federal judges may balance deference to state proceedings on the same issue in another case with timely resolution of the federal case. One judge set his case for hearing at a time that both accommodated time pressure and afforded the state court an opportunity to act.[47] Both courts were provided filings in each. In another case, the federal judge set two alternative dates for a preliminary-injunction hearing: the earlier date if state proceedings were resolved by then, and a date one week later if state proceedings were not resolved.[48]

When cases present time pressure, a judge will sometimes issue an oral ruling or a brief written order and issue an opinion explaining the ruling later.[49] Sometimes a transcript is the only public record of the court's reasoning.[50] If a transcript is not ordered, the public record may contain the result without reasoning.[51]

In one notable case, the Supreme Court intervened in litigation before the district judge issued her opinion and scolded her for not issuing her opinion more promptly. Three complaints filed from May 9 to June 1, 2006, challenged revisions to Arizona's voter registration and identification law.[52] The district judge denied the plaintiffs immediate relief on September 11, but she did not issue findings of fact and conclusions of law until October 12.[53] A motions panel of the court of appeals decided on October 5 that the 2004 revisions should be enjoined.[54] The Supreme Court

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46. *E.g.*, Order, Fox v. Detzner, No. 4:18-cv-529 (N.D. Fla. Nov. 16, 2018), D.E. 6, *as reported in* "Unsuccessful Attempt at Federal Mandamus Relief Against State Election Officials," *infra* page 984.

47. *See* "Expulsion from a Primary Election for Disloyalty to the Party," *infra* page 485.

48. Order, Varner v. Husted, No. 2:11-cv-748 (S.D. Ohio Aug. 22, 2011), D.E. 6, *as reported in* "Correcting a Defective Candidacy Petition," *infra* page 344.

49. *See, e.g.*, "Overly Burdensome Voter-Registration Rules," *infra* page 56; "Purging Noncitizen Voter Registrations," *infra* page 112.

50. *See* "Reasons for Decisions Only in Transcripts," *infra* page 12.

51. *See, e.g.*, "Challenge to Exclusion from the Ballot Orally Denied," *infra* page 296.

52. *See* "Enhanced Requirements for Registering and Voting in Arizona," *infra* page 58.

53. Findings of Fact and Conclusions of Law, González v. Arizona, No. 2:06-cv-1268 (D. Ariz. Oct. 12, 2006), D.E. 219, 2006 WL 3627297.

54. Docket Sheet, Nos. 06-16702 and 06-16706 (9th Cir. Oct. 5, 2006); Order, *id.* (Oct. 9, 2006), *filed as* Order, *González*, No. 2:06-cv-1268 (D. Ariz. Oct. 16, 2006), D.E. 221 (denying reconsideration).

vacated the appellate injunction and issued its scolding on October 20.[55] Following additional litigation, the court of appeals and the Supreme Court determined in 2012 and 2013, respectively, that the plaintiffs were entitled to partial relief: a voter-identification requirement was not inconsistent with federal law, but extra proof of citizenship for voter registration was.[56]

Recognizing that election litigation can be high in profile and important as part of a broader governmental context, Judge Mark E. Walker in the Northern District of Florida adopted a policy of frequently requiring election officials involved in litigation to publicly file after-action reports specifying how court orders were carried out.[57]

Judge Walker also used Federal Rule of Evidence 614 to resolve emergency election disputes by taking testimony himself from election officials.[58]

Courts adapt their procedures to accommodate time pressures. The clerk's office typically ensures that presiding judges receive prompt notice of emergency cases.[59] Because the passage of time following a district judge's ruling in a time-sensitive case could moot litigation issues before an appeal is resolved, district judges often take steps to facilitate a speedy appeal. What otherwise might be a preliminary injunction could be issued as a permanent injunction.[60]

To ensure prompt evidence, following a witness's unsuccessful effort to quash a testimony subpoena, a presiding judge issued an arrest warrant for

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55. Purcell v. Gonzalez, 549 U.S. 1 (2006).

56. Ariz. v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1 (2013), *aff'g* González v. Arizona, 677 F.3d 383 (9th Cir. 2012).

57. *See, e.g.*, "Multiple Suits After an Election to Relax the Standards for Counting and Recounting Votes," *infra* page 812 (reports on resolved signature mismatches and overseas ballots received after election day); "Spanish-Language Ballots for Puerto Rican Voters Outside Puerto Rico," *infra* page 1001 (compliance with requirement for Spanish-language ballot materials).

58. *See, e.g.*, "Improperly Requiring Dormitory Names on Students' Voter-Registration Forms," *infra* page 46; "Multiple Suits After an Election to Relax the Standards for Counting and Recounting Votes," *infra* page 812; "An Opportunity to Cure Absentee-Ballot Signatures That Do Not Match Voter-Registration Records," *infra* page 831.

59. *See, e.g.*, "Strict Application of Campaign Filing Requirements," *infra* page 332.

60. *See, e.g.*, Permanent Injunction, League of Women Voters of Fla. v. Browning, No. 4:11-cv-628 (N.D. Fla. Dec. 15, 2012), D.E. 83, *as reported in* "Regulation of Third-Party Voter Registrations," *infra* page 50.

the witness for failure to appear.[61] The witness was released from custody after he testified.[62]

Emergency litigation is more challenging when the law is in flux. From 2002 to 2006, federal courts in California presided over the issue of whether ballot petitions for recall elections, initiatives, and referenda had to be presented in multiple languages. A district judge concluded in 2003 that they did not.[63] In 2005, a panel of the court of appeals concluded that they did.[64] An en banc panel decided that they did not in 2006; such a requirement would impede the ballot-petition process.[65] In 2005 and 2006, district judges applied the changing circuit law to the cases before them.[66]

The global infectious pandemic of coronavirus disease 2019 (Covid-19), caused by the severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2), began disrupting election procedures in 2020, a presidential election year with affected primary elections beginning early in the year. Litigation arose over how election officials did and did not accommodate public-health concerns in facilitating legitimate voting.[67]

The pandemic also disrupted court operations. Proceedings that otherwise would have been held in court or in chambers were held by telephone or videoconference. Contact information for proceedings typically was posted in the public record so that members of the public could audit them. Videoconference resources expanded and improved rapidly early in the pandemic.

Pro se litigants are challenging for the court. The combination of time pressure and pro se litigation can be even more challenging.[68] Strategies for making the most of a pro se case include a regular practice of recording

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61. Warrant, McBride v. City of Jasper, No. 1:11-cv-443 (E.D. Tex. Oct. 7, 2011), D.E. 30; *see* Order, *id.* (Oct. 7, 2011), D.E. 29.

62. *See* "Challenge to a Local Recall Election," *infra* page 506.

63. Opinion, Padilla v. Lever, No. 8:02-cv-1145 (C.D. Cal. Jan. 13, 2003), D.E. 23.

64. Padilla v. Lever, 429 F.3d 910 (9th Cir. 2005).

65. Padilla v. Lever, 463 F.3d 1046 (9th Cir. 2006) (en banc).

En banc panels in the Ninth Circuit usually include eleven judges, but at the time of this case the court was experimenting with en banc panels of fifteen judges. *See* Pamela Ann Rymer, *The "Limited" En Banc: Half Full, or Half Empty?*, 48 Ariz. L. Rev. 317, 319 n.18 (2006).

66. *See* "Ballot Petitions Do Not Have to Be Multilingual," *infra* page 517.

67. Cases arising because of Covid-19 have "Covid-19" among their case-study topics.

68. Case studies involving pro se litigants have "pro se party" among their case-study topics.

the proceedings by court reporter.[69] Although pro se litigants often pose challenges for the court, they also often present the court with cases eminently resolvable.[70] Organizations may not appear or be represented pro se.[71]

Because in 2013 the Supreme Court nullified preclearance requirements for election-law changes in jurisdictions with a history of racial discrimination,[72] judges will not have to preside over preclearance disputes unless preclearance requirements are restored.[73]

Relations among the parties can sometimes be complex or unusual. When a state legislature redrew a municipality's district lines, local election officials were nominal defendants, but they did not defend the legislature's actions, and the legislature declined to participate.[74] In another case, the plaintiff's attorney was an opposing candidate.[75]

Litigation is often only part of the story of a dispute. Some plaintiffs who have lost in court have nevertheless prevailed in the real world. In the Virgin Islands, an election-board candidate was disqualified by a party quota, and the federal court declined to order acceptance of her postelection change in party.[76] Her victory was certified anyway.

The Cases Studied

The cases studied here required prompt judicial attention, within days, hours, or even minutes of being filed. The 513 case studies of 717 individually filed federal emergency actions and 151 related actions come from an examination of 3,611 federal election-litigation cases filed from 2000 to 2020.[77] Of the cases examined, forty-seven did not have sufficient electron-

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69. *See, e.g.*, "A Campaign Manager's Suit to Get His Candidate on the Ballot," *infra* page 498.

70. *See, e.g.*, "Idiosyncratic Preferences for Name on Ballot," *infra* page 1059.

71. *See, e.g.*, "Ballot-Petition Signature Requirements in Oregon During a Pandemic," *infra* page 530.

72. Shelby County v. Holder, 570 U.S. 529 (2013).

73. Preclearance cases have "section 5 preclearance" among their case-study topics.

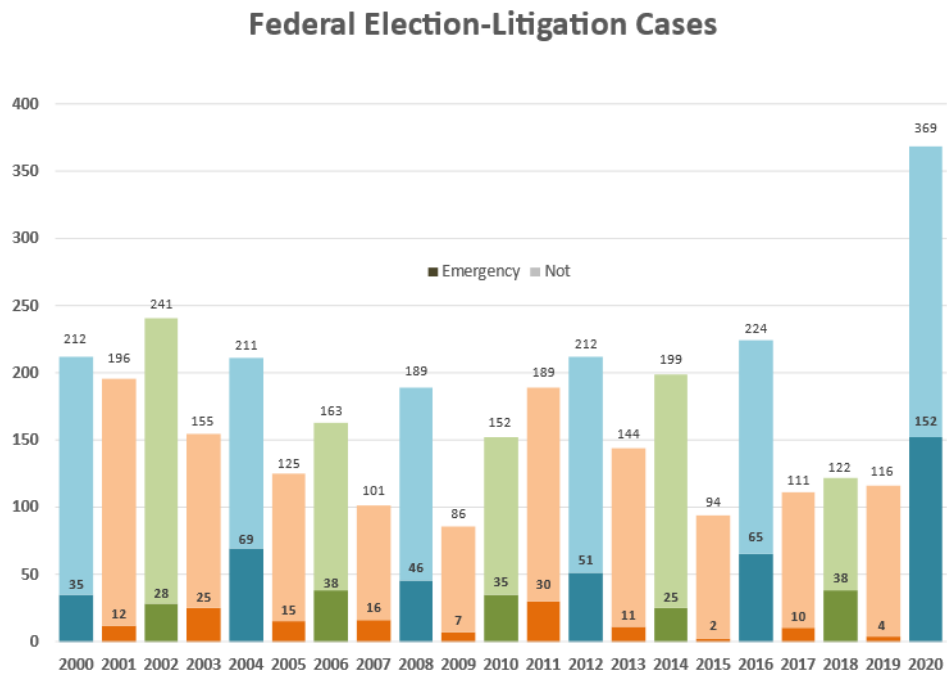
74. *See* "Injunction Against a State Law Singling Out One Municipality for a Change in Local Control," *infra* page 167.

75. *See* "Discrepancies Between the Residence Address and the Registration Address of a Ballot-Petition Signer," *infra* page 323.

76. *See* "Party Quota for a Board of Elections," *infra* page 271.

77. We are grateful to Christopher Krewson, Matt Sarago, Susanna McCrea, Susanna Carey, Geoffrey Erwin, Nathan Dotson, Yvonne Washington, Lee Lipscomb, Mark Trimble, George Cort, Bersaveh Belay, Vashty Gobinpersad, Donna Pitts-Taylor, and Tyeika Crawford for their contributions to this project. We are especially grateful to the more

ically available records to determine whether they should be included among the case studies.



Guidelines

Judges' experiences with emergency election litigation suggest the following guidelines for case management:[78]

Before the Case Arrives

- Make sure one or more district judges are available on election day and other days when litigation is especially likely.
- Collect local voting rules.
- Coordinate with state courts for awareness of cases.
- Follow the news for events that might trigger litigation.
- Follow social media for events that might trigger litigation.
- Share war stories with other judges.

After the Case Arrives

- Hold a status conference as soon as possible.

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than one hundred judges who shared their experiences and wisdom in telephone interviews.

78. These guidelines were developed in collaboration with Northern District of Ohio Judge Benita Y. Pearson and Professors Edward B. Foley and Richard L. Hasen.

- Ensure prompt service on defendants, who are likely to be government officials and therefore easy to locate.
- Decide whether conferences and proceedings will be in court, in chambers, on video, or by telephone, and whether the public will have access.
- Learn about relevant election operations.
- Be prepared for intervention motions and offers of amicus input.
- Carefully consider jurisdiction issues.
- Decide whether any injunction request is properly for a temporary restraining order, a preliminary injunction, or a permanent injunction.
- Decide whether you want to hear from witnesses. Consider remote testimony, especially from busy election officials.
- Consider possible time required for appeal.
- Consider ruling from the bench and following up with written reasons later, to allow for a prompt appeal, but not too much later, so that a reviewing court will have the benefit of your reasoning.
- Consider whether an issue that does not appear to be fully ripe may become nearly moot by the time that it is more clearly ripe.

Reasons for Decisions Only in Transcripts

As already observed, emergency controversies are not always resolved with written opinions. Sometimes the only part of the court record with the court's reasons for its decision is a transcript. The following are some examples:

- Transcript, *Georgia Republican Party v. Raffensperger*, No. 2:20-cv-135 (S.D. Ga. Dec. 18, 2020, filed Dec. 28, 2020), D.E. 32, *as reported in* "An Unsuccessful Attempt to Disqualify Runoff-Election Voters Who Voted in Other States in the Previous General Election," *infra* page 96.
- Transcript at 35, *12th Congressional District Republican Committee v. Raffensperger*, No. 1:20-cv-180 (S.D. Ga. Dec. 17, 2020, filed Jan. 1, 2021), D.E. 49, *as reported in* "Unsuccessful Challenges to Procedures for Accepting Absentee Ballots in Georgia's 2021 Senatorial Runoff Election," *infra* page 715.
- Transcript at 32–33, *Mi Familia Voter Education Fund v. Trump*, No. 1:20-cv-3030 (D.D.C. Oct. 29, 2020, filed Nov. 17, 2020), D.E. 25, *as reported in* "No Relief for a Last-Minute Speculative Complaint of Voter Suppression by the President," *infra* page 606.
- Transcript at 8–11, *Parnell v. Allegheny County Board of Elections*, No. 2:20-cv-1570 (W.D. Pa. Oct. 23, 2020, filed Oct. 26, 2020), D.E. 55, *as reported in* "Poll Watchers and Substitute Ballots," *infra* page 1171.

- Transcript at 36–49, *Harley v. Kosinski*, No. 1:20-cv-4664 (E.D.N.Y. Oct. 13, 2020, filed Apr. 9, 2021), D.E. 55, *as reported in* "Denied Complaint for Electronic Overseas Voting During a Global Pandemic," *infra* page 732.
- Transcript at 49–61, *Wilson v. Justice*, No. 2:20-cv-526 (S.D. W. Va. Aug. 24, 2020, filed Sept. 1, 2020), D.E. 16, *as reported in* "2020 Ballot-Petition Signature Requirements in West Virginia," *infra* page 404.
- Transcript at 25, *Eisen v. Cuomo*, No. 7:20-cv-5121 (S.D.N.Y. July 27, 2020, filed Aug. 5, 2020), D.E. 39, *as reported in* "No Relief from New York's Ballot-Petition Signature Requirements During the Covid-19 Pandemic," *infra* page 293.
- Transcript, *Robinson v. Board of Elections*, No. 1:20-cv-1364 (D.D.C. May 28, 2020, filed Dec. 17, 2020), D.E. 27, *as reported in* "No Additional Polling Place in Washington, D.C.'s Ward 8 During the Covid-19 Pandemic," *infra* page 983.
- Transcript at 4–5, *Joshua Cole for Delegate v. Virginia State Board of Elections*, No. 1:17-cv-1295 (E.D. Va. Nov. 17, 2017, filed Dec. 5, 2017), D.E. 26, *as reported in* "Litigating a Close Election," *infra* page 1173.
- Transcript, *Myers v. Johnson*, No. 4:16-cv-13255 (E.D. Mich. Sept. 13, 2016), *filed as* Ex. A, Defendants' Reply Brief, *id.* (Dec. 9, 2016), D.E. 23, *as reported in* "Signing a Ballot Petition Too Long Before It Is Filed," *infra* page 321.
- Transcript at 78, *Schintzius v. Showalter*, No. 3:16-cv-741 (E.D. Va. Sept. 8, 2016, filed Sept. 13, 2016), D.E. 31, *as reported in* "Discrepancies Between the Residence Address and the Registration Address of a Ballot-Petition Signer," *infra* page 323.
- Transcript at 4, 14–15, *Campanello v. New York State Board of Elections*, No. 2:16-cv-1892 (E.D.N.Y. Apr. 19, 2016, filed June 7, 2016), D.E. 17-3, *as reported in* "Unsuccessful Effort to Open a Primary Election Because of Allegedly Purged Party Registrations," *infra* page 106.
- Transcript at 90–91, *Herzfeld v. District of Columbia Board of Elections and Ethics*, No. 1:11-cv-721 (D.D.C. Apr. 15, 2011, filed Jan. 9, 2012), D.E. 42, *as reported in* "Election Day on the Last Day of Passover," *infra* page 674.
- Transcript at 162, *Gustafson v. Illinois State Board of Elections*, No. 1:06-cv-1159 (N.D. Ill. Mar. 9, 2006, filed Sept. 29, 2006), D.E. 79-2, *as reported in* "Equal Provision of Early Voting in Cook County," *infra* page 881.
- Transcript at 5–6, 9, *Zessar v. Helander*, No. 1:05-cv-1917 (N.D. Ill. Apr. 7, 2005, filed June 3, 2005), D.E. 19, *as reported in* "Rejecting Ab-

sentee Ballots Without Notice and an Opportunity to Be Heard," *infra* page 883.

- Transcript at 19, *Washington State Republican Party v. Reed*, No. 2:04-cv-2350 (W.D. Wash. Nov. 21, 2004, filed Dec. 3, 2004), D.E. 27, *as reported in* "Unequal Recount Procedures in a Gubernatorial Election," *infra* page 1260.
- Transcript, *Ohio Democratic Party v. Blackwell*, No. 2:04-cv-1055 (S.D. Ohio Nov. 2, 2004, filed Nov. 3, 2004), D.E. 11, *as reported in* "Long Lines at the Polls," *infra* page 951.
- Audio Transcript, *Matheson v. New York City Board of Elections*, No. 1:03-cv-4170 (E.D.N.Y. Aug. 27, 2003), *as reported in* "Failure to Qualify for a Primary Election Because of Filing Defects," *infra* page 370.
- Transcript at 66–71, *Phillips v. Galvin*, No. 1:00-cv-12067 (D. Mass. Oct. 12, 2000, filed Oct. 16, 2000), D.E. 9, *as reported in* "Disqualified Presidential Electors," *infra* page 461.
- Transcript at 72, 83–84, 88–89, 97, *Watson v. Miller*, No. 4:00-cv-40336 (E.D. Mich. Sept. 18, 2000, filed Sept. 19, 2000), D.E. 9, *as reported in* "Including on the Ballot Nominees of a Fractured Minor Party," *infra* page 463.

2. Registration Procedures

Most election jurisdictions in the United States require people to register as voters before they can vote. North Dakota is an exception.[79] Registration ensures eligibility before a vote is cast. Registration was not widespread before the Civil War, but after that it became more common, especially in cities where election officials and voters were less likely to know each other.[80]

Many jurisdictions that require voter registration require voters to register several weeks before an election. Many jurisdictions, however, allow voters to register and vote at the same time.[81] The National Voter Registration Act (NVRA),[82] also known as Motor Voter,[83] forbids local jurisdictions from requiring voter registration for a federal election more than thirty days before the election.[84] The NVRA also establishes certain method requirements for federal-election voter registration.[85]

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79. Secretary of State, North Dakota, vip.sos.nd.gov/PortalListDetails.aspx?ptlhPKID=81&ptlPKID=7 ("North Dakota is the only state that does not have voter registration.").

> North Dakota's system of voting, and lack of voter registration, is rooted in its rural character by providing small precincts. Establishing relatively small precincts is intended to ensure that election boards know the voters who come to the polls to vote on Election Day and can easily detect those who should not be voting in the precinct.

North Dakota….The Only State Without Voter Registration (2021), vip.sos.nd.gov/pdfs/Portals/votereg.pdf.

80. *See* Alexander Keyssar, The Right to Vote 151–59 (2000); *see also* Greater Birmingham Ministries v. Alabama, 161 F. Supp. 3d 1104 (N.D. Ala. 2016) (litigation over the validity of waiving a voter-identification requirement for voters known to poll workers).

81. *See* National Conference of State Legislatures, Same-Day Voter Registration, www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx.

82. Pub. L. No. 103-31, 107 Stat. 77 (1993), *as amended*, 52 U.S.C. §§ 20501–20511.

83. *See generally* Robert Timothy Reagan, Motor Voter: The National Voter Registration Act (Federal Judicial Center 2014).

84. 52 U.S.C. § 20507(a); *see* League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 243 (4th Cir. 2014); *see also* "States Cannot Require Voter Registration More Than Thirty Days Before a Federal Runoff Election," *infra* page 31; "When the Voter-Registration Deadline Falls on a Holiday," *infra* page 34.

85. Case studies in which this statute arose have "National Voter Registration Act" among their case-study topics.

This chapter describes several examples of emergency litigation over registration regulation.[86] Included are challenges to registration rejections on alleged technicalities, such as rejected applications that were not filled out precisely correctly if registration eligibility can nevertheless be ascertained from the application,[87] failure to use the latest version of a voter-registration form,[88] absence of an exact match—character, space, and hyphen for character, space, and hyphen—in another government database,[89] and rejection of voter-registration applications because students did not include on their applications dormitory names or room numbers in addition to street and mailing addresses.[90]

One case concerned local election officials' deviations from state law.[91] The district judge granted relief to a pro se plaintiff whose voter registration was wrongfully denied for lack of photo identification; the registration law did not require photo identification.[92]

Federal courts have sometimes been asked to curtail cancelation of voter registrations by voters who received driver's licenses before they became citizens and whose driver-license records had not been updated with their new citizenship status.[93]

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86. *See, e.g.*, "Segregating Ballots Because of Questionable Registrations," *infra* page 48; "Regulation of Third-Party Voter Registrations," *infra* page 50; "Preclearance of Landowner Voter-Registration Requirements," *infra* page 53; "Overly Burdensome Voter-Registration Rules," *infra* page 56; "Enhanced Requirements for Registering and Voting in Arizona," *infra* page 58; "Strict Voter-Registration Rules," *infra* page 64; "Identification Numbers and Voter Registration," *infra* page 65; "Denial of Voter-Registration Efforts," *infra* page 71; "Bundling Voter Registrations," *infra* page 75; "Blaming Candidacy Withdrawal on a Voter-Registration Challenge," *infra* page 80; "Challenge to a Voter-Registration Form Stating That Party Affiliation Is Required for Primary-Election Voting," *infra* page 81; "Voter Registration for Disabled Students," *infra* page 82; "Requiring Social Security Numbers for Voter Registration," *infra* page 84; "Changing Party Affiliation for a Primary Election," *infra* page 86.

87. *See* "Correcting Imperfect Voter Registrations," *infra* page 67; "A Party's Standing to Challenge Voter-Registration Procedures," *infra* page 70.

88. *See* "Superseded Registration Form," *infra* page 47.

89. *See* "Mismatches Between Voter-Registration Data and Other Government Data," *infra* page 26.

90. *See* "Improperly Requiring Dormitory Names on Students' Voter-Registration Forms," *infra* page 46.

91. *See* "Wrongfully Requiring Photo Identification for Voter Registration," *infra* page 55.

92. Minutes, Pakosz v. Orr, No. 1:06-cv-5992 (N.D. Ill. Nov. 6, 2006), D.E. 6.

93. *See, e.g.*, "Mismatches Between Voter-Registration Data and Other Government Data," *infra* page 26; "Purging Noncitizen Voter Registrations," *infra* page 112.

Online voter registration has presented new occasions for litigation.[94] A district judge applied the equal-protection principles of *Bush v. Gore*[95] to require the only county clerk in the state who refused to accept online registrations from the state's website to fall in line with the other county clerks because she was not able to provide the court with a sufficiently good reason for her idiosyncratic preference for paper registrations.[96]

One district judge extended voter registration because of the state registration website's crash.[97] Another district judge did not, because the state voluntarily extended the deadline.[98]

The court may also be asked to extend a voter-registration deadline because of a natural emergency, such as a hurricane[99] or a pandemic.[100]

In addition to court-imposed remedies, these cases sometimes are resolved by consent decrees,[101] interim consent orders,[102] and other agreements among the parties.[103]

Agreements are one thing, and actions are sometimes another. In one case, the plaintiffs voluntarily dismissed a 2004 action because of an

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94. *E.g.*, Stringer v. Pablos, 320 F. Supp. 3d 862 (W.D. Tex. 2018) (litigation arising from a state's not integrating voter registration into its online driver's license renewal and change of address).

95. 531 U.S. 98 (2000).

96. Mullins v. Cole, 218 F. Supp. 3d 488, 490 (S.D. W. Va. 2016), *as reported in* "A County's Improper Refusal to Accept Online Voter Registrations from the State's Website," *infra* page 32.

97. Order, New Va. Majority Educ. Fund v. Va. Dep't of Elections, No. 1:16-cv-1319 (E.D. Va. Oct. 20, 2016), D.E. 10, *as reported in* "Extending Voter Registration Because of a Website Crash," *infra* page 37.

98. Namphy v. DeSantis, 493 F. Supp. 3d 1130 (N.D. Fla. 2020), *as reported in* "No Remedy for the Malfunction of a Voter-Registration Website Because the State Provided a Small Remedy," *infra* page 18.

99. *See, e.g.*, "Clarifying a Voter-Registration Deadline Extension Because of a Hurricane," *infra* page 29; "Extending Voter-Registration Deadlines Because of a Hurricane,"*infra* page 39.

100. *See, e.g.*, "Suit to Extend the Voter-Registration Deadline in South Carolina Because of Covid-19 Was Too Late," *infra* page 21; "Extending the Voter-Registration Deadline in Arizona Because of a Pandemic," *infra* page 22; "Unsuccessful Challenge to Ohio's Changed Primary-Election Procedures During the Covid-19 Pandemic," *infra* page 24.

101. *See, e.g.*, "Improperly Requiring Dormitory Names on Students' Voter-Registration Forms," *infra* page 46; "Bundling Voter Registrations," *infra* page 75; "Requiring Social Security Numbers for Voter Registration," *infra* page 84.

102. *See, e.g.*, "Regulation of Third-Party Voter Registrations," *infra* page 50.

103. *See, e.g.*, "Superseded Registration Form," *infra* page 47; "Voter Registration for College Students," *infra* page 78.

agreement by Ohio's department of rehabilitation to notify felons of their right to vote upon release or parole, but Ohio's attorney general later declared the agreement unenforceable because the department was not a party to the lawsuit.[104] In a 2006 action over a computerized statewide voter-registration list mandated by the 2002 Help America Vote Act (HAVA),[105] the district judge appointed Alabama's governor as a special master to supervise compliance.[106]

HAVA requires election officials to offer provisional ballots to voters whose voter registrations are questioned at the polls so that the ballots can be counted if it turns out that the voters are entitled to vote.[107] This alleviates somewhat the possibility of a registration emergency.[108]

HAVA was enacted to address some of the issues that arose in the 2000 general election.[109] Section 303(a) specifies requirements for a computerized statewide voter-registration list.[110] States' compliance with these requirements was the subject of litigation for several years following enactment, occasionally under tight time pressure.[111]

No Remedy for the Malfunction of a Voter-Registration Website Because the State Provided a Small Remedy

Namphy v. DeSantis (Mark E. Walker, N.D. Fla. 4:20-cv-485)

> A voter-registration website malfunctioned on the last day of registration. A district judge determined that the secretary of state's remedy of extending the registration deadline by a few hours was inadequate, but not so inadequate as to require the court's intervention.

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104. *See, e.g.*, "The Right of Felons to Register to Vote After Release," *infra* page 72.

105. Pub. L. No. 107-252, 116 Stat. 1666 (2002), *as amended*, 52 U.S.C. §§ 20901–21145.

Case studies in which this statute arose have "Help America Vote Act (HAVA)" among their case-study topics.

106. Special-Master Order, United States v. Alabama, No. 2:06-cv-392 (M.D. Ala. Aug. 8, 2006), D.E. 64, *as reported in* "Computerized Voter-Registration List," *infra* page 61.

107. *See generally* Marie Leary & Robert Timothy Reagan, The Help America Vote Act (Federal Judicial Center 2012).

108. *See, e.g.*, "Strict Voter-Registration Rules," *infra* page 64.

109. Leary & Reagan, *supra* note 107, at 1.

110. 52 U.S.C. § 21083(a); *see* Bellitto v. ACLU, 935 F.3d 1192, 1199 (11th Cir. 2019) (holding that election officials properly maintained the registration list).

111. *See, e.g.*, "Suit Arising Under State Implementation of the Help America Vote Act Remanded to State Court," *infra* page 49; "Computerized Voter-Registration List," *infra* page 61.

Topics: Registration procedures; Covid-19.

According to a federal complaint filed in the Northern District of Florida on October 6, 2020, "On October 5, 2020, the last day to register to vote in the upcoming Presidential Election, Florida's online voter registration ('OVR') system crashed, going offline for several hours. This followed several days during which the system crashed intermittently."[112] The plaintiffs were four organizations and a person who was unable to register on October 5; the defendants were Florida's governor and its secretary of state.[113] With their complaint, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction extending the voter-registration deadline to midnight on the second day after the requested injunction.[114] On the case's second day, the individual plaintiff filed a voluntary dismissal.[115]

On the day that the case was filed, Judge Mark E. Walker set it for a telephonic scheduling conference at 8:30 on the following morning.[116] The case arose at a time of social distancing made necessary by a global Covid-19 infectious pandemic.[117] Contact information for the conference appeared in the public docket sheet.[118] On the evening before the conference, he denied immediate relief, noting that Florida had voluntarily extended the registration deadline to 7:00 p.m. on October 6 and deciding that no relief was necessary before the defendants could be heard.[119] At the scheduling conference, he set the case for a telephonic hearing at 8:00 a.m. on

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112. Complaint at 1, Namphy v. DeSantis, No. 4:20-cv-485 (N.D. Fla. Oct. 6, 2020), D.E. 1 [hereinafter *Namphy* Complaint]; *see* Namphy v. DeSantis, 493 F. Supp. 3d 1130, 1136 (N.D. Fla. 2020); *see also* Jeffrey Schweers, *Voter Registration Extended a Day; "Unprecedented" Overload Crashed Site; Lawsuit Filed*, Tallahassee Democrat, Oct. 7, 2020, at A2.

113. *Namphy* Complaint, *supra* note 112; *see Namphy*, 493 F. Supp. 3d at 1136.

114. Motion, *Namphy*, No. 4:20-cv-485 (N.D. Fla. Oct. 6, 2020), D.E. 3; *see Namphy*, 493 F. Supp. 3d at 1136.

115. Notice, *Namphy*, No. 4:20-cv-485 (N.D. Fla. Oct. 7, 2020), D.E. 25; *see* Order, *id.* (Oct. 8, 2020), D.E. 27 (noting that the case remained active as to the other plaintiffs); Amended Complaint, *id.* (Oct. 9, 2020), D.E. 37.

116. Order, *id.* (Oct. 6, 2020), D.E. 4.

117. *See Namphy*, 493 F. Supp. 3d at 1139, 1145–46.

118. Docket Sheet, *Namphy*, No. 4:20-cv-485 (N.D. Fla. Oct. 6, 2020) [hereinafter *Namphy* Docket Sheet] (D.E. 5).

119. Order, *id.* (Oct. 6, 2020), D.E. 10, 2020 WL 6597372; *see* Dara Kam, *Judge Weighs Extension of Voter Registration*, Jacksonville Times-Union, Oct. 9, 2020, at B5; Jeffrey Schweers, *Judge Looks at Overload of Fla. Voter Registration Website*, Tallahassee Democrat, Oct. 8, 2020, at A8.

October 8,[120] again posting contact information for the proceeding in the public docket sheet.[121] He ordered the secretary to make available as witnesses the director of Florida's division of elections and Florida's chief computer engineer.[122] In the event, Judge Walker did not take testimony from live witnesses, and he struck late filings: a declaration of someone who was unable to register and a spreadsheet of registration data.[123]

Judge Walker began the October 8 hearing with an admonition: "I'll remind the press this is in federal court, so you may not record these proceedings. The only record of these proceedings is the court reporter's record."[124] Later, he dismissed the governor as a party: "[T]here's no legal authority being pointed to that would suggest the Governor has the authority to extend the deadlines as were extended in this case."[125]

On October 9, Judge Walker denied the plaintiffs an injunction.[126]

> Notwithstanding the fact that cinemas across the country remain closed, somehow, I feel like I've seen this movie before. Just shy of a month from election day, with the earliest mail-in ballots beginning to be counted, Florida has done it again. In the final hours of Florida's voter registration period, during an election year coinciding with a prolonged and incredibly damaging public health emergency, Florida's voter registration website crashed, effectively preventing thousands of potential voters from safely registering to vote before the midnight deadline.
>
> With the public sounding the alarm, the Secretary of State decided to implement a half measure. She hastily and briefly extended the registration period and ordered Florida's supervisors of elections to accept applications submitted by the Secretary's new "book closing" deadline.

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120. Minutes, *Namphy*, No. 4:20-cv-485 (N.D. Fla. Oct. 7, 2020), D.E. 18; *see* Minutes, *id.* (Oct. 8, 2020), D.E. 30.

121. *Namphy* Docket Sheet, *supra* note 118 (D.E. 19).

122. Order, *Namphy*, No. 4:20-cv-485 (N.D. Fla. Oct. 7, 2020), D.E. 20.

123. Order, *id.* (Oct. 8, 2020), D.E. 32; Transcript at 72, *id.* (Oct. 8, 2020, filed Oct. 8, 2020), D.E. 33 [hereinafter *Namphy* Transcript]; *see* Spreadsheet, *id.* (Oct. 8, 2020), D.E. 29; Declaration, *id.* (Oct. 8, 2020), D.E. 28.

124. *Namphy* Transcript, *supra* note 123, at 3.

125. *Id.* at 19.

126. Namphy v. DeSantis, 493 F. Supp. 3d 1130 (N.D. Fla. 2020), *amending* Opinion, *Namphy*, No. 4:20-cv-485 (N.D. Fla. Oct. 9, 2020), D.E. 35 (issued at 2:07 a.m.); *see id.* at 1137 (dismissing the governor as a defendant); *see also* Arian Campo-Flores, *Court Backs Florida in Registration Dispute*, Wall St. J., Oct. 10, 2020, at A6; Dara Kam, *Judge Refuses to Extend Voter Registration Deadline*, Jacksonville Times-Union, Oct. 10, 2020, at B5; Jeffrey Schweers, *Voter Registration Won't Be Extended*, Ft. Myers News-Press, Oct. 10, 2020, at A6.

> The Secretary's "cure" had at least one major flaw; namely, she did not notify the public until—at the earliest—after noon on the date of her new "book closing" deadline. This left less than seven hours for potential voters to somehow become aware of the news and ensure that they properly submitted their voter registration applications, all while also participating in their normal workday, school, family and caregiving responsibilities.
>
> . . .
>
> . . . So, some potential voters could not take advantage of Defendant [Secretary of State] Lee's October 6th extension, not only because they lacked notice, but also because the extension was largely limited to working hours.[127]

But because the secretary did provide a remedy, Judge Walker determined that he should not.[128] "This is an incredibly close call, but Florida's interest in preventing chaos in its already precarious—and perennially chaotic—election outweighs the substantial burden imposed on the right to vote."[129]

The plaintiffs dismissed their case.[130]

Suit to Extend the Voter-Registration Deadline in South Carolina Because of Covid-19 Was Too Late

South Carolina Progressive Network Education Fund v. Andino (Mary Geiger Lewis, D.S.C. 3:20-cv-3503)

> Two days before South Carolina's voter-registration deadline, a voter-registration organization filed a federal complaint seeking an extension of the deadline to accommodate the social distancing made necessary by the global infectious Covid-19 pandemic. One week later, the district judge denied the organization immediate relief, because the suit had been brought too short a time before the election.
>
> *Topics:* Registration procedures; Covid-19; laches; intervention.

A voter-registration organization filed a federal complaint in the District of South Carolina on Friday, October 2, 2020, against state election offi-

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127. *Namphy*, 493 F. Supp. 3d at 1134–35, 1143.

128. *Id.* at 1143.

129. *Id.* at 1145.

130. Notice, *Namphy*, No. 4:20-cv-485 (N.D. Fla. Oct. 9, 2020), D.E. 38; *see* Order, *id.* (Oct. 13, 2020), D.E. 39 ("Inasmuch as the defendants have not filed an answer or motion for summary judgment, the Notice of Voluntary Dismissal is effective without an order.").

cials seeking an extension of the October 4 voter-registration deadline to accommodate social distancing and stay-at-home orders resulting from the global infectious Covid-19 pandemic.[131] With its complaint, the organization filed a motion for a temporary restraining order and a preliminary injunction.[132]

On the following day, Judge Mary Geiger Lewis set the case for hearing on October 6,[133] but the hearing was canceled on October 5.[134] On October 9, Judge Lewis denied the organization immediate relief: "the Court is unable to order the change in election law the [plaintiff] seeks so close to the November 3, 2020, election."[135] "The [plaintiff's] goals are laudable. They are as laudable as the untimeliness of the filings of both their lawsuit and their motions are troubling."[136]

The organization voluntarily dismissed its case on October 19.[137]

Extending the Voter-Registration Deadline in Arizona Because of a Pandemic

Mi Familia Vota v. Hobbs (Steven P. Logan, D. Ariz. 2:20-cv-1903)

> Because of social distancing made necessary by the global Covid-19 infectious pandemic, a district court extended the voter-registration deadline. The court of appeals stayed the injunction, but it allowed a grace period of two days before the stay went into effect.
>
> *Topics:* Registration procedures; Covid-19; interlocutory appeal; intervention.

Three voter-registration organizations filed a federal complaint in the District of Arizona against Arizona's secretary of state on September 30, 2020, seeking an extension of the deadline for voter registration from October 5 to no earlier than October 27 "to ensure that all Arizonans who want to register to vote in this year's Presidential election will have the time neces-

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131. Complaint, S.C. Progressive Network Educ. Fund v. Andino, No. 3:20-cv-3503 (D.S.C. Oct. 2, 2020), D.E. 1; S.C. Progressive Network Educ. Fund v. Andino, 493 F. Supp. 3d 460, 463–64 (D.S.C. 2020).

132. Motion, *S.C. Progressive Network Educ. Fund*, No. 3:20-cv-3503 (D.S.C. Oct. 2, 2020), D.E. 2; *S.C. Progressive Network Educ. Fund*, 493 F. Supp. 3d at 463–64.

133. Docket Sheet, *S.C. Progressive Network Educ. Fund*, No. 3:20-cv-3503 (D.S.C. Oct. 2, 2020) (D.E. 11).

134. *Id.* (D.E. 26).

135. *S.C. Progressive Network Educ. Fund*, 493 F. Supp. 3d at 469.

136. *Id.* at 470.

137. Notice, *S.C. Progressive Network Educ. Fund*, No. 3:20-cv-3503 (D.S.C. Oct. 19, 2020), D.E. 41.

sary to do so, notwithstanding the COVID-19 pandemic."[138] With their complaint, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction.[139]

Judge Steven P. Logan set the case for a telephonic status conference on October 1.[140] At the conference, he set the case for oral argument on Monday, October 5,[141] and posted contact information for the telephonic oral argument on the court's website.[142] He granted an intervention motion by the Republican National Committee and the National Republican Senatorial Committee.[143]

He consolidated a trial on the merits with the injunction hearing and issued a preliminary injunction on October 5 extending the voter-registration deadline until Friday, October 23: "Plaintiffs offer data that shows that they could not reach the same number of voters during the pandemic months."[144]

The court of appeals stayed the injunction on October 13 and delayed the effect of the stay for a grace period of two days.[145] The extension of the registration deadline imposed a significant administrative burden on Arizona's election officials, and the original deadline was not a severe burden on voters.[146]

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138. Complaint at 3, Mi Familia Vota v. Hobbs, No. 2:20-cv-1903 (D. Ariz. Sept. 30, 2020), D.E. 1; *see* Mi Familia Vota v. Hobbs, 977 F.3d 948, 950–51 (9th Cir. 2020); Mi Familia Vota v. Hobbs, 492 F. Supp. 3d 980, 983 (D. Ariz. 2020); *see also* Howard Fischer, *Federal Judge Asked to Extend Period for Voter Registration*, Ariz. Daily Star, Oct. 2, 2020, at B1.

139. Motion, *Mi Familia Vota*, No. 2:20-cv-1903 (D. Ariz. Sept. 30, 2020), D.E. 2; *Mi Familia Vota*, 492 F. Supp. 3d at 983.

140. Order, *Mi Familia Vota*, No. 2:20-cv-1903 (D. Ariz. Oct. 1, 2020), D.E. 8; *see Mi Familia Vota*, 492 F. Supp. 3d at 984; Minutes, *Mi Familia Vota*, No. 2:20-cv-1903 (D. Ariz. Oct. 5, 2020), D.E. 32.

141. Minutes, *Mi Familia Vota*, No. 2:20-cv-1903 (D. Ariz. Oct. 1, 2020), D.E. 11.

142. Order, *id.* (Oct. 2, 2020), D.E. 13; Order, *id.* (Oct. 2, 2020), D.E. 12 (specifying that oral argument would be telephonic); *see* Howard Fischer, *Hobbs: It's Too Late to Extend Voter Registration*, Ariz. Daily Star, Oct. 6, 2020, at B2.

143. Intervention Order, *Mi Familia Vota*, No. 2:20-cv-1903 (D. Ariz. Oct. 5, 2020), D.E. 25; Intervention Motion, *id.* (Oct. 2, 2020), D.E. 15; *Mi Familia Vota*, 977 F.3d at 950; *Mi Familia Vota*, 492 F. Supp. 3d at 983–84.

144. *Mi Familia Vota*, 492 F. Supp. 3d at 987; *see Mi Familia Vota*, 977 F.3d at 950; *see also* Jen Fifield & Andrew Oxford, *Voter Sign-Up Extension Met with Cheers, Concern*, Ariz. Republic, Oct. 7, 2020, at A14; Howard Fischer, *AZ Judge Extends Voter Registration Deadline*, Ariz. Daily Star, Oct. 7, 2020, at A1.

145. *Mi Familia Vota*, 977 F.3d 948; *see* Andres Oxford, *Register by Today to Vote in Election*, Ariz. Republic, Oct. 15, 2020, at A8.

146. *Mi Familia Vota*, 977 F.3d at 952–53.

A newspaper reported, "More than 35,000 people signed up to vote during [the] 10-day extension of Arizona's voter registration deadline . . . ."[147]

Appeals were dismissed voluntarily in 2021.[148]

Unsuccessful Challenge to Ohio's Changed Primary-Election Procedures During the Covid-19 Pandemic

League of Women Voters of Ohio v. LaRose (Michael H. Watson, S.D. Ohio 2:20-cv-1638)

> A district judge found that Ohio's primary-election accommodations for the Covid-19 pandemic in 2020 did not result in unconstitutionally cumbersome voting.
>
> *Topics:* Covid-19; registration procedures; absentee ballots; National Voter Registration Act; primary election; intervention.

Two voting-rights organizations and four voters filed a federal complaint in the Southern District of Ohio on March 30, 2020, seeking an expansion of the voter-registration period and easier vote-by-mail procedures during the Covid-19 infectious pandemic in 2020.[149] On March 16, Ohio's secretary of state postponed the state's March 16 primary election and forbade election officials from similarly extending the deadline for voter registrations.[150] The proscription was included in a statute enacted on March 27 that set the election for April 28 and created what plaintiffs described as unduly cumbersome procedures for voting by mail.[151] On March 31, the plaintiffs filed an amended complaint[152] and a motion for a temporary restraining order.[153]

Judge Michael H. Watson held a telephonic conference on March 31 and learned that the secretary was working to alleviate some of the plain-

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147. Andrew Oxford, *Extension Lets 35,000 New Voters Join Ranks*, Ariz. Republic, Oct. 17, 2020, at A8.

148. Order, Mi Familia Vota v. Hobbs, No. 20-16932 (9th Cir. Feb. 2, 2021), D.E. 59.

149. Complaint, League of Women Voters of Ohio v. LaRose, No. 2:20-cv-1638 (S.D. Ohio Mar. 30, 2020), D.E. 1 [hereinafter *League of Women Voters of Ohio* Complaint]; *see* Rick Rouan & Darrel Rowland, *Voting Rights Groups Sue Over Extended Primary*, Cincinnati Enquirer, Apr. 1, 2020, at A7.

150. Opinion at 2–3, *League of Women Voters of Ohio*, No. 2:20-cv-1638 (S.D. Ohio Apr. 3, 2020), D.E. 57 [hereinafter *League of Women Voters of Ohio* Opinion], 2020 WL 6115006.

151. *Id.* at 3–8; *League of Women Voters of Ohio* Complaint, *supra* note 149, at 10–13.

152. Amended Complaint, *League of Women Voters of Ohio*, No. 2:20-cv-1638 (S.D. Ohio Mar. 31, 2020), D.E. 5.

153. Temporary-Restraining-Order Motion, *id.* (Mar. 31, 2020), D.E. 4.

tiffs' concerns.[154] Judge Watson ordered a response to the pending motion by 3:00 p.m. on April 2 and a reply by 3:00 p.m. on April 3.[155]

Presiding over a time-sensitive case with changing facts is a challenge, and Judge Watson met the challenge by maintaining engagement with the parties and keeping up with the most current information.[156]

He allowed Ohio's attorney general to intervene to defend the constitutionality of its statute.[157] He also allowed the state's Democratic and Republican Parties to intervene as defendants, and he allowed the state's Libertarian Party to intervene as a plaintiff.[158]

He agreed with the secretary that Ohio had not changed the date of the election; it had merely forbidden in-person voting and extended the deadline for absentee voting; ballots already cast remained cast.[159] Although he recognized that the vote-by-mail procedures may or may not have been the best plan, Judge Watson concluded that they were not unconstitutional.[160]

On April 20, the plaintiffs stipulated dismissal of the case.[161]

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154. Order, *id.* (Mar. 31, 2020), D.E. 14 [hereinafter Mar. 31, 2020, *League of Women Voters of Ohio* Order].

Tim Reagan interviewed Judge Watson for this report by telephone on August 26, 2020.

155. Mar. 31, 2020, *League of Women Voters of Ohio* Order, *supra* note 154.

156. Interview with Judge Michael H. Watson, Aug. 26, 2020.

157. Order, *League of Women Voters of Ohio*, No. 2:20-cv-1638 (S.D. Ohio Apr. 1, 2020), D.E. 24; *see* Intervention Motion, *id.* (Apr. 1, 2020), D.E. 21.

158. Order, *id.* (Apr. 2, 2020), D.E. 38; *see* Intervention Motion, *id.* (Apr. 2, 2020), D.E. 32 (Ohio Republican Party); Intervention Motion, *id.* (Apr. 1, 2020), D.E. 29 (Libertarian Party of Ohio); Intervention Motion, *id.* (Apr. 1, 2020), D.E. 25 (Ohio Democratic Party); *see also* Intervention Complaint, *id.* (Apr. 2, 2020), D.E. 49.

159. *League of Women Voters of Ohio* Opinion, *supra* note 150, at 8–12.

"Voters with disabilities, such as visual impairment, and those who are unable to receive mail may cast ballots in person at their county voting center—typically the board of elections—on April 28." Rick Rouan, *Ohio's Extended Primary Explained*, Columbus Dispatch, Mar. 27, 2020, at 1B.

160. *League of Women Voters of Ohio* Opinion, *supra* note 150, at 13–27; *see* Rick Rouan, *Judge Denies Voter Advocates' Lawsuit to Change Ohio Primary*, Cincinnati Enquirer, Apr. 7, 2020, at B9.

161. Stipulation, *League of Women Voters of Ohio*, No. 2:20-cv-1638 (S.D. Ohio Apr. 20, 2020), D.E. 64.

Mismatches Between Voter-Registration Data and Other Government Data

Georgia Coalition for the Peoples' Agenda v. Kemp (Eleanor L. Ross, N.D. Ga. 1:18-cv-4727)

> A federal complaint challenged a statute that required the name on a voter-registration form to exactly match—character and space and hyphen for character and space and hyphen—how the name appeared in other government records. The complaint also challenged the flagging of voter-registration applications as potentially from noncitizens just because the applicants had not yet become citizens when they received their driver's licenses. One week after a motion for a preliminary injunction was filed and eleven days before a general election, the judge specified how voters could prove their citizenship and vote if their voter registrations had not become final because of citizenship questions.
>
> *Topics:* Registration procedures; citizenship; signature matching; laches; provisional ballots; Help America Vote Act (HAVA).

An October 11, 2018, federal complaint filed by six organizations in the Northern District of Georgia against Georgia's secretary of state challenged an exact-match protocol for approving voter registrations, according to which registrations were set aside as pending if the name on the voter-registration form did not exactly match, character for character, the name on driver's-license or social-security records.[162] The complaint alleged that the protocol disproportionately affected African American, Latino, and Asian American applicants.[163] The complaint also alleged that citizenship status was falsely questioned for voter applicants who became citizens after they received driver's licenses as noncitizens.[164]

The plaintiffs filed an amended complaint eight days later, which added two organizations as plaintiffs.[165] With the amended complaint, the

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162. Complaint, Ga. Coal. for the Peoples' Agenda v. Kemp, No. 1:18-cv-4727 (N.D. Ga. Oct. 11, 2018), D.E. 1 [hereinafter *Ga. Coal.for the Peoples' Agenda* Complaint]; *see* Mark Niesse, *Lawsuit Challenges Ga.'s "Exact Match" Law*, Atlanta J.-Const., Oct. 12, 2018, at 1A.

163. *Ga. Coal. for the Peoples' Agenda* Complaint, *supra* note 162, at 2.

164. *Id.* at 3.

"[I]f a person receives a Georgia driver's license based on lawful status in the United States but is not yet a citizen, the [department of driver services] files will reflect that the person is not a citizen." Ga. Coal. for the People's Agenda v. Kemp, 347 F. Supp. 3d 1251, 1260 (N.D. Ga. 2018).

165. Amended Complaint, *Ga. Coal. for the Peoples' Agenda*, No. 1:18-cv-4727 (N.D.

plaintiffs filed an emergency motion for a preliminary injunction protecting new voter registrations from "outdated, inaccurate [citizenship] information in the database used in the 'exact match' system."[166] That day, Judge Eleanor L. Ross set the case for hearing on October 29.[167]

Judge Ross ordered the secretary to respond, should he choose to, by October 24 at noon.[168] Two days later, the secretary requested an extension of two days to accommodate his responsibilities related to a hearing in two other cases to be heard on October 23.[169]

> The Court is . . . cognizant of the two other pending cases against Defendant with hearings scheduled this week. Nevertheless, the Court chose the particular briefing and hearing schedule for this case based on the Court's own trial calendar and availability of judicial resources that will be necessary to issue an order on Plaintiffs' Emergency Motion prior to [election day on] November 6, 2018. Therefore, the Court **DENIES** Defendant's Motion for an Extension of Time.[170]

An Earlier Case

On September 14, 2016, three of the plaintiffs in the 2018 case filed a federal complaint in the Northern District against the secretary, challenging his exact match policy and alleging, "Insistence on digit-by-digit and character-by-character exactitude when comparing information from one database with information in a different database is a notoriously unreliable method of verification in the elections context."[171] That case was resolved

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Ga. Oct. 19, 2018), D.E. 15; *Ga. Coal. for the People's Agenda*, 347 F. Supp. 3d at 1255; *see* Second Amended Complaint, *Ga. Coal. for the Peoples' Agenda*, No. 1:18-cv-4727 (N.D. Ga. Dec. 20, 2019), D.E. 57.

166. Emergency Preliminary-Injunction Motion, *Ga. Coal. for the Peoples' Agenda*, No. 1:18-cv-4727 (N.D. Ga. Oct. 19, 2018), D.E. 17; *Ga. Coal. for the People's Agenda*, 347 F. Supp. 3d at 1255, 1258.

167. Order, *Ga. Coal. for the Peoples' Agenda*, No. 1:18-cv-4727 (N.D. Ga. Oct. 19, 2018), D.E. 19.

168. *Id.*

169. Extension Motion, *id.* (Oct. 21, 2018), D.E. 20; *see* Martin v. Crittenden, 347 F. Supp. 3d 1302 (N.D. Ga. 2018) (October 24, 2018, injunction requiring election officials to regard mail ballots with apparently mismatched signatures as provisional and requiring them to provide voters with opportunities to resolve the discrepancies); Minutes, Ga. Muslim Voter Project v. Kemp, No. 1:18-cv-4789 (N.D. Ga. Oct. 23, 2018), D.E. 27; Minutes, Martin v. Kemp, No. 1:18-cv-4776 (N.D. Ga. Oct. 23, 2018), D.E. 22; *see also* Tyler Estep, *Judge Mulls Action on Ga. Absentee Ballots*, Atlanta J.-Const., Oct. 24, 2018, at 6A.

170. Order, *Ga. Coal. for the Peoples' Agenda*, No. 1:18-cv-4727 (N.D. Ga. Oct. 22, 2018), D.E. 21.

171. Complaint at 2, Ga. State Conference of the NAACP v. Kemp, No. 2:16-cv-219

by settlement in February 2017.[172] The legislature restored the policy by statute.[173]

The 2018 Case

Four days after the October 29, 2018, hearing,[174] Judge Ross ordered that a voter applicant whose registration status was pending because of uncertainty about citizenship be able to vote either by providing proof of citizenship at the polling place, by providing the county registrar with proof of citizenship in advance, or by casting a provisional ballot and providing proof of citizenship within three days following the election.[175]

Judge Ross denied a laches defense:

> Plaintiffs . . . assert that they did not delay in bringing this action because this case is based on new facts that Plaintiffs have developed over time, including individual stories that were not necessarily indicative of a policy problem until Plaintiffs could gather sufficient data to identify a pattern. The Court finds this argument certainly plausible . . . .
>
> Additionally, the Court does not find that granting Plaintiffs injunctive relief this close to Election Day will cause undue prejudice to Defendant or the public, particularly where the relief sought by Plaintiffs is very limited and targeted.[176]

On September 29, 2022, Judge Ross denied the defendants summary judgment against a July 24, 2020, third amended complaint.[177] She admin-

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(N.D. Ga. Sept. 14, 2016), D.E. 1; *see* Kristina Torres, *Suit: Ga. Blocks Minority Voters*, Atlanta J.-Const., Sept. 15, 2016, at 1A; Vanessa Williams, *As Race in Georgia Narrows, Voting Rights Battles Heat Up*, Wash. Post, Oct. 25, 2016, at A4.

172. *See* Stipulation, *Ga. State Conference of the NAACP*, No. 2:16-cv-219 (N.D. Ga. Mar. 28, 2017), D.E. 60; *see also* Jim Galloway, *State's Voter Security Fight Begins Anew Today*, Atlanta J.-Const., Nov. 7, 2018, at 1B.

"The state will no longer reject applications that don't exactly match personal identification information in state and federal databases as part of the agreement, which was finalized late Thursday[, February 10, 2017]." Kristina Torres, *Georgia Settles Voter Registration Lawsuit*, Atlanta J.-Const., Feb. 11, 2017, at 1B.

173. *See* Galloway, *supra* note 172.

174. Transcript, *Ga. Coal. for the Peoples' Agenda*, No. 1:18-cv-4727 (N.D. Ga. Oct. 29, 2018, filed Jan. 17, 2019), D.E. 38; Minutes, *id.* (Oct. 29, 2018), D.E. 30; Ga. Coal. for the People's Agenda v. Kemp, 347 F. Supp. 3d 1251, 1255 (N.D. Ga. 2018).

175. *Ga. Coal. for the People's Agenda*, 347 F. Supp. 3d at 1269–70; *see* Amy Gardner, *Fears for Ballot Integrity and Access Are Growing*, Wash. Post, Nov. 5, 2018, at A1; Mark Niesse, *Ruling Eases Voting for New Citizens*, Atlanta J.-Const., Nov. 3, 2018, at 1A.

176. *Ga. Coal. for the People's Agenda*, 347 F. Supp. 3d at 1259.

177. Opinion, *Ga. Coal.for the Peoples' Agenda*, No. 1:18-cv-4727 (N.D. Ga. Sept. 29, 2022), D.E. 160; *see* Third Amended Complaint, *id.* (July 24, 2020), D.E. 88.

istratively closed the case on March 28, 2023, on telephonic representations by the parties of an effort to settle it.[178]

Further Litigation

Judge Steve C. Jones conducted a bench trial from April 11 to June 23, 2022,[179] in a November 27, 2018, action generally challenging Georgia's oversight of elections, including a challenge to the exact-match policy.[180] He did not find any flaws in the way that Georgia conducted elections requiring a judicial remedy.[181]

Clarifying a Voter-Registration Deadline Extension Because of a Hurricane

Florida Democratic Party v. Detzner (4:18-cv-463) and New Florida Majority Education Fund v. Detzner (4:18-cv-466) (Robert L. Hinkle, N.D. Fla.)

> A secretary of state extended a voter-registration deadline to accommodate closed offices because of a hurricane on the last day of registration. A federal judge declined to extend the deadline further, but he did issue an order stating that the secretary's ex-

178. Order, *id.* (Mar. 28, 2023), D.E. 176; *see* Order, *id.* (Aug. 17, 2023), D.E. 183 (giving the parties until October 17 to decide whether to settle or pursue the case).

179. Minutes, Fair Fight Action v. Crittenden, No. 1:18-cv-5391 (N.D. Ga. June 23, 2022), D.E. 852; Minutes, *id.* (Apr. 11, 2022), D.E. 789; Fair Fight Action, Inc. v. Raffensperger, 634 F. Supp. 3d 1128, 1148 (N.D. Ga. 2022) ("[a]fter a delay in the start of trial due to the Omicron variant of COVID-19"); *id.* at 1143("what is believed to have been the longest voting rights bench trial in the history of the Northern District of Georgia").

180. Docket Sheet, *Fair Fight Action*, No. 1:18-cv-5391 (N.D. Ga. Nov. 27, 2018); Second Amended Complaint, *id.* (Dec. 3, 2020), D.E. 582; Amended Complaint, *id.* (Feb. 19, 2019), D.E. 41; Complaint at 39–41, *id.* (Nov. 27, 2018), D.E. 1; *see* Fair Fight Action v. Raffensperger, 413 F. Supp. 3d 1251 (N.D. Ga. 2019) (denying a motion to dismiss the amended complaint on standing, mootness, and other grounds, but dismissing the state election board from some claims for sovereign immunity); Opinion, *Fair Fight Action*, No. 1:18-cv-5391 (N.D. Ga. Nov. 15, 2021), D.E. 636 (denying the state summary judgment on whether requiring an exact match between names in voter registrations and other databases is racially discriminatory); Opinion, *id.* (Mar. 31, 2021), D.E. 617 (narrowing claims); Opinion, *id.* (Feb. 16, 2021), D.E. 612 (narrowing claims, some as moot); Opinion, *id.* (Dec. 27, 2019), D.E. 188 (denying a preliminary injunction to restore voter registrations that were canceled for inactivity); *see also* Valerie Bauerlein, *Suit Alleges Georgia Curbed Black Voters*, Wall St. J., Nov. 28, 2018, at A4; Richard Fausset, *Supporters of Candidate Who Lost Georgia Race Take the State to Court*, N.Y. Times, Nov. 28, 2018, at A19; Vanessa Williams, *Lawsuit by Abrams's PAC Alleges Voter Suppression in Georgia*, Wash. Post, Nov. 30, 2018, at A4.

181. *Fair Fight Action, Inc.*, 634 F. Supp. 3d 1128; *see* Matthew Brown, *Judge Upholds Ga. Law in Challenge Brought by Abrams After 2018 Loss*, Wash. Post, Oct. 2, 2022, at A8.

> tension must mean until the first day that all offices in a county were open following the deadline day if any of the county's offices were closed for even part of the deadline day.
>
> *Topics:* Registration procedures; case assignment.

A political party filed a federal complaint in the Northern District of Florida on October 9, 2018, Florida's voter-registration deadline for the 2018 general election, seeking more of an extension of the deadline than Florida's secretary of state had provided to accommodate an approaching hurricane.[182] On the next day, three organizations filed a federal complaint in the same district seeking similar relief.[183] The organizations notified the court that their case was related to the political party's case.[184] Judge Mark E. Walker reassigned the second case to Judge Robert L. Hinkle, who had been assigned the first case.[185]

On the day before the deadline, noting that "thirty-five Florida counties are currently under a declared state of emergency due to the approach of Hurricane Michael," the secretary authorized any elections office closed on October 9 "to accept paper voter registration applications for the 2018 General Election on the next day that his or her office is reopened. This will ensure that each Supervisor of Elections Office has the same amount of days to register voters at their offices."[186]

With their complaints, the plaintiffs in both cases filed motions for a temporary restraining order.[187]

On October 10, Judge Hinkle determined that the party was not entitled to immediate relief "so long as the directive is properly understood."[188]

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182. Complaint, Fla. Democratic Party v. Detzner, No. 4:18-cv-463 (N.D. Fla. Oct. 9, 2018), D.E. 1 [hereinafter *Fla. Democratic Party* Complaint].

183. Complaint, New Fla. Majority Educ. Fund v. Detzner, No. 4:18-cv-466 (N.D. Fla. Oct. 10, 2018), D.E. 1.

184. Notice of Related Case, *id.* (Oct. 10, 2018), D.E. 2.

185. Reassignment Order, *id.* (Oct. 11, 2018), D.E. 6.

186. Fla. Sec'y of State Directive 2018-03 (Oct. 8, 2018), www.flgov.com/wp-content/uploads/2018/10/Directive-2018-03.pdf; *see Fla. Democratic Party* Complaint, *supra* note 182, at 9–10.

187. Motion, *New Fla. Majority Educ. Fund*, No. 4:18-cv-466 (N.D. Fla. Oct. 10, 2018), D.E. 3; Motion, *Fla. Democratic Party*, No. 4:18-cv-463 (N.D. Fla. Oct. 9, 2018), D.E. 3; *see* Amended Motion, *New Fla. Majority Educ. Fund*, No. 4:18-cv-466 (N.D. Fla. Oct. 11, 2018), D.E. 4 ("Hurricane Michael made landfall in Florida the afternoon of October 10, 2018. It is reported that the entire Panhandle in Florida was affected.").

188. Injunction Order at 3, *Fla. Democratic Party*, No. 4:18-cv-463 (N.D. Fla. Oct. 10, 2018), D.E. 10 [hereinafter *Fla. Democratic Party* Injunction Order]; *see* Jim Saunders, *Federal Judge Rules Against Extending Voter Registration*, Ft. Lauderdale Sun-Sentinel, Oct. 12, 2018, at B1.

First, what the directive "authorizes" must be understood by local election officials as a requirement.[189] Second, if any office in a county is closed for even part of the day on October 9, then registration applications must be accepted until the first day that all offices in the county are open for all regular hours of business.[190] "If . . . a supervisor fails to heed the Secretary's directive as properly understood, the Party of course may renew its motion for a temporary restraining order."[191]

On October 16, Judge Hinkle consolidated the cases[192] and applied the reasoning of his order in the first case to the second case.[193]

The cases were dismissed voluntarily in December.[194]

States Cannot Require Voter Registration More Than Thirty Days Before a Federal Runoff Election

Georgia State Conference of the NAACP v. Georgia (Timothy C. Batten, Sr., N.D. Ga. 1:17-cv-1397)

> Granting a preliminary injunction, a federal district judge found that a state statute requiring voter registration five Mondays before an election to be eligible to vote in a later runoff election was inconsistent with the National Voter Registration Act's requirement that voter registrations for federal elections be accepted until no more than thirty days before an election.
>
> *Topics:* Registration procedures; National Voter Registration Act; recusal; attorney fees.

One of Georgia's members of Congress became secretary of health and human services in February 2017, so a special election was held on April 18 to fill the vacancy.[195] Because no candidate received a majority of the vote, a runoff election was scheduled for June 20.[196] Five voting-rights organizations filed a federal complaint in the Northern District of Georgia on Thursday, April 20, against Georgia and its secretary of state challenging a Georgia statute requiring voter registration by the fifth Monday be-

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189. *Fla. Democratic Party* Injunction Order, *supra* note 188, at 3.

190. *Id.* at 3–4.

191. *Id.* at 4.

192. Order, *Fla. Democratic Party*, No. 4:18-cv-463 (N.D. Fla. Oct. 16, 2018), D.E. 12.

193. Order, New Fla. Majority Educ. Fund v. Detzner, No. 4:18-cv-466 (N.D. Fla. Oct. 16, 2018), D.E. 12.

194. Dismissal Order, *id.* (Dec. 12, 2018), D.E. 19; Dismissal Order, *Fla. Democratic Party*, No. 4:18-cv-463 (N.D. Fla. Dec. 12, 2018), D.E. 18.

195. Opinion at 2, Ga. State Conference of NAACP v. Georgia, No. 1:17-cv-1397 (N.D. Ga. May 4, 2017), D.E. 29 [hereinafter *Ga. State Conference of NAACP* Opinion].

196. *Id.*

fore an election to be eligible to vote in the later runoff election, alleging a violation of the National Voter Registration Act of 1993, which requires voter registrations for federal elections to be accepted up to thirty days before the election.[197] With their complaint, the plaintiffs filed an emergency motion for a preliminary injunction.[198]

On the day that the case was filed, Judge Eleanor L. Ross found that she had a conflict in the case, and so she recused herself.[199] On Monday, Judge Timothy C. Batten, Sr., granted expedited consideration and set the case for hearing on May 4.[200] On the day of the hearing, he granted the plaintiffs an injunction requiring Georgia to accept voter registrations for the June 20 runoff election until May 21.[201]

Pursuant to an October 17, 2017, consent decree, Georgia would not require registration for a federal election more than thirty days before an election, even a runoff election.[202] Judge Batten awarded the plaintiffs $122,171.54 in attorney fees and expenses on April 11, 2018.[203]

A County's Improper Refusal to Accept Online Voter Registrations from the State's Website

Mullins v. Cole (Robert C. Chambers, S.D. W. Va. 3:16-cv-9918)

> A district judge determined that a county clerk's refusal to accept online voter registrations from the state's website violated equal protection. The judge issued a preliminary injunction five days after the complaint was filed.
>
> *Topics:* Registration procedures; equal protection; class action; student registration; attorney fees.

According to a federal class-action complaint filed on Thursday, October 20, 2016, in the Southern District of West Virginia's Huntington courthouse,

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197. Complaint, *id.* (Apr. 20, 2017), D.E. 1; *see* Amended Complaint, *id.* (Apr. 25, 2017), D.E. 17; *see also* Pub. L. No. 103-31, 107 Stat. 77 (1993), *as amended*, 52 U.S.C. §§ 20501–20511. *See generally* Robert Timothy Reagan, Motor Voter: The National Voter Registration Act (Federal Judicial Center 2014).

198. Preliminary-Injunction Motion, *Ga. State Conference of NAACP*, No. 1:17-cv-1397 (N.D. Ga. Apr. 20, 2017), D.E. 2.

199. Recusal Order, *id.* (Apr. 20, 2017), D.E. 3.

200. Order, *id.* (Apr. 24, 2017), D.E. 16; *see* Minutes, *id.* (May 4, 2017), D.E. 30.

201. *Ga. State Conference of NAACP* Opinion, *supra* note 195; *see* Chris Joyner, *6th District Sees Latest Voting Rights Skirmish*, Atlanta J.-Const., May 19, 2017, at 1B.

202. Consent Decree, *Ga. State Conference of NAACP*, No. 1:17-cv-1397 (N.D. Ga. Oct. 17, 2017), D.E. 42.

203. Opinion, *id.* (Apr. 11, 2018), D.E. 52, 2018 WL 2271244.

> Plaintiff . . . recently moved to Cabell County[, West Virginia,] to attend Marshall University and used the Secretary of State's website to update her voter registration information prior to the October 18[, 2016,] deadline, but that information was not and will not be processed by Defendant [Clerk of Cabell County] without action from this Court.[204]

"Of the fifty-five counties in West Virginia, all but Cabell County allow residents to register using the online system."[205] With her complaint, the plaintiff filed a motion for a temporary restraining order.[206]

On Friday, Judge Robert C. Chambers ordered hand service on the defendant clerk by 5:00 p.m. that day, ordered a response to the motion filed by noon on Monday, and set the case for hearing Tuesday morning.[207] "Although [the plaintiff] filed her motion as a request for a temporary restraining order, the Court held a full adversary hearing on the motion. . . . [, converting] the action into one for a preliminary injunction at the hearing."[208]

At the hearing, Judge Chambers granted the plaintiff a preliminary injunction, with an opinion to follow.[209] The clerk "agreed to treat all otherwise qualified individuals who timely used the West Virginia Secretary of State's online voter registration system to register to vote in Cabell County as members of the class."[210]

Judge Chambers issued his opinion on November 21.[211] "The constitution prohibits people from being classified in such a way that it unneces-

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204. Complaint at 6, Mullins v. Cole, No. 3:16-cv-9918 (S.D. W. Va. Oct. 20, 2016), D.E. 1; *see* Mullins v. Cole, 218 F. Supp. 3d 488, 489 (S.D. W. Va. 2016); *see also* Kate White, *ACLU Files Suit Over Cabell Voter Registration*, Charleston Gazette-Mail, Oct. 21, 2016, at 1C.

205. *Mullins*, 218 F. Supp. 3d at 490.

206. Temporary-Restraining-Order Motion, *Mullins*, No. 3:16-cv-9918 (S.D. W. Va. Oct. 20, 2016), D.E. 3; *Mullins*, 218 F. Supp. 3d at 489.

207. Order, *Mullins*, No. 3:16-cv-9918 (S.D. W. Va. Oct. 21, 2016), D.E. 7; *Mullins*, 218 F. Supp. 3d at 489; *see* Minutes, *Mullins*, No. 3:16-cv-9918 (S.D. W. Va. Oct. 25, 2016), D.E. 16; *see also Judge Sets Hearing for Case Against Cabell Clerk*, Charleston Gazette-Mail, Oct. 22, 2016, at 8A; Kate White, *Clerk's Lawyer Replies to Voter Suit*, Charleston Gazette-Mail, Oct. 25, 2016, at 1C.

208. *Mullins*, 218 F. Supp. 3d at 491.

209. Preliminary Injunction, *Mullins*, No. 3:16-cv-9918 (S.D. W. Va. Oct. 25, 2016), D.E. 17 [hereinafter *Mullins* Preliminary Injunction]; *Mullins*, 218 F. Supp. 3d at 489–90; *see Cabell Clerk Ordered to Honor Online Voter Registrations*, Charleston Gazette-Mail, Oct. 26, 2016, at 1C.

210. *Mullins* Preliminary Injunction, *supra* note 209, at 1.

211. *Mullins*, 218 F. Supp. 3d 488.

sarily abridges the right to vote."[212] He found the county clerk's preference for paper applications over electronic ones insufficient to justify disparate treatment.[213]

An award of attorney fees and costs was resolved by settlement.[214]

When the Voter-Registration Deadline Falls on a Holiday

Arizona Democratic Party v. Reagan (Steven P. Logan, D. Ariz. 2:16-cv-3618)

> The state's voter-registration deadline fell on a holiday, and a political party sued the state's secretary of state in federal court to have the deadline extended by one day, but the party did not sue until more than a week after the deadline passed. The district judge determined that the secretary's not giving voters an extra day to register violated state law and the National Voter Registration Act, but the judge determined that the party filed the case too late to merit injunctive relief.
>
> *Topics:* Registration procedures; laches; National Voter Registration Act.

A political party and its national committee filed a federal complaint in the District of Arizona on October 19, 2016, against Arizona's secretary of state seeking a one-day extension of the voter-registration deadline because the original deadline of October 10 fell on Columbus Day, a federal and state holiday.[215] With its complaint, the party filed a motion for a temporary restraining order and a preliminary injunction.[216]

"Having considered Plaintiffs' filings, the Court will exercise its discretion to advance the trial on the merits in this action and consolidate a hearing on permanent injunction with a hearing on the pending requests for a temporary restraining order and preliminary injunction."[217] On October 20, Judge Steven P. Logan set the case for hearing on October 21 with briefing accepted until October 25.[218] Later, Judge Logan agreed to

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212. *Id.* at 492.

213. *Id.* at 493–95.

214. Order, *Mullins*, No. 3:16-cv-9918 (S.D. W. Va. Mar. 15, 2017), D.E. 30.

215. Complaint, Ariz. Democratic Party v. Reagan, No. 2:16-cv-3618 (D. Ariz. Oct. 19, 2016), D.E. 1; *see Democrats Sue Over Voter Deadline*, Ariz. Republic, Oct. 21, 2016, at A4; Howard Fischer, *AZ Dems Ask Court to Extend Voter Registration Deadline*, Ariz. Daily Star, Oct. 21, 2016, at A2; Howard Fischer, *AZ Dems Sue Over Voter Registration Deadline Issue*, Ariz. Daily Star, Oct. 22, 2016, at A9.

216. Motion, *Ariz. Democratic Party*, No. 2:16-cv-3618 (D. Ariz. Oct. 19, 2016), D.E. 2.

217. Order at 2, *id.* (Oct. 20, 2016), D.E. 8.

218. *Id.* at 3; *see* Transcript, *id.* (Oct. 21, 2016, filed Oct. 21, 2016), D.E. 30; Minutes,

receive additional briefing on a quoted remark by the secretary in news media: "We . . . hope to add an additional 2,069 potential voters if the court allows those who registered after the statutory deadline to be added to the rolls."[219]

On November 3, five days before the election, Judge Logan decided, "the Court finds that the Committees prevail on the merits of their claims, in part, but concludes that they are not entitled to relief."[220]

> The Committees did not file their complaint in this action until more than a week after the voter registration deadline had passed, and only a few weeks before the general election is to take place. This delay was unreasonable. . . .
>
> . . . Instead, had the Committees filed suit promptly, a motion for preliminary, prohibitory injunction could have been briefed and decided without unreasonable burden on the Secretary, the Court, or the voters and the election process.[221]

A more promptly filed complaint would likely have yielded relief because Judge Logan determined that the voter-registration deadline's falling on a holiday in this case resulted in a violation of the National Voter Registration Act's requirement that voter registration applications be accepted until at most thirty days before the election.[222]

> Here, the Secretary set the voter registration deadline on October 10, 2016, the twenty-ninth day before the November 8, 2016 general election. Post offices were closed on Sunday, October 9th and on Columbus Day, October 10th. [Motor Vehicle Division (MVD)] offices were also closed from Saturday, October 8th through Columbus Day. Therefore, in effect, the deadline to register by postmarked mail was Saturday, October 8, 2016—31 days before the election. The deadline to register in-person at the MVD was Friday, October 7, 2016—32 days before the election. The voter registration deadline therefore did not ensure that any applicant who registered to vote "not later" than 30 days before November 8, 2016 was eligible to vote in the general election.[223]

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id. (Oct. 21, 2016), D.E. 17.

219. Order, *id.* (Oct. 31, 2016), D.E. 35.

220. Opinion at 2, *id.* (Nov. 3, 2016), D.E. 39 [hereinafter *Ariz. Democratic Party* Opinion], 2016 WL 6523427; *see* Howard Fischer, *Judge: 2,000 Late Registered Voters Are Out*, Ariz. Daily Star, Nov. 4, 2016, at A6.

221. *Ariz. Democratic Party* Opinion, *supra* note 220, at 31.

222. *Id.* at 23–26; *see* Pub. L. No. 103-31, 107 Stat. 77 (1993), *as amended*, 52 U.S.C. §§ 20501–20511; *see also* Robert Timothy Reagan, Motor Voter: The National Voter Registration Act (Federal Judicial Center 2014).

223. *Ariz. Democratic Party* Opinion, *supra* note 220, at 24.

The National Voter Registration Act specifies the thirty-day rule for four different situations:

> In the administration of voter registration for elections for Federal office, each State shall—
>
> (1) ensure that any eligible applicant is registered to vote in an election—
>
> (A) in the case of registration with a motor vehicle application under section 20504 of this title, if the valid voter registration form of the applicant is submitted to the appropriate State motor vehicle authority not later than the lesser of 30 days, or the period provided by State law, before the date of the election;
>
> (B) in the case of registration by mail under section 20505 of this title, if the valid voter registration form of the applicant is postmarked not later than the lesser of 30 days, or the period provided by State law, before the date of the election;
>
> (C) in the case of registration at a voter registration agency, if the valid voter registration form of the applicant is accepted at the voter registration agency not later than the lesser of 30 days, or the period provided by State law, before the date of the election; and
>
> (D) in any other case, if the valid voter registration form of the applicant is received by the appropriate State election official not later than the lesser of 30 days, or the period provided by State law, before the date of the election . . . .[224]

Judge Logan also determined that the secretary's decision not to accept voter registrations submitted the day after a deadline that fell on a holiday violated Arizona law.[225] As a constitutional matter, however, "the de minimus burden imposed by the deadline does not outweigh the State's important regulatory and administrative interests."[226] "The holiday deadline did not limit the methods of voter registration; it merely imposed a timeframe in which voters had to act in order to register to vote in the general election."[227]

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224. 52 U.S.C. § 20507(a).

225. *Ariz. Democratic Party* Opinion, *supra* note 220, at 26–30.

226. *Id.* at 22.

227. *Id.* at 16.

Extending Voter Registration Because of a Website Crash

New Virginia Majority Education Fund v. Virginia Department of Elections (Claude M. Hilton, 1:16-cv-1319) and New Virginia Majority Education Fund v. Virginia Department of Elections (John A. Gibney, Jr., 3:20-cv-801) (E.D. Va.)

> On the last day of voter registration in 2016, a commonwealth's online registration website crashed, and commonwealth officials had no authority to extend the registration deadline as a remedy. Two organizations and two prospective voters filed a federal complaint, and the district judge granted a brief extension to voter registration, to which state officials agreed. Again in 2020, a federal district judge granted a registration extension because the website crashed on the last day of registration.
>
> *Topics:* Registration procedures; voting technology.

In 2016 and in 2020, Virginia's voter-registration website crashed on the last day of registration, and Virginia's election officials needed a court order to extend the registration deadline.

2016

Heavy use of Virginia's online voter-registration site on Monday, October 17, 2016, the deadline for the November 8 general election, caused the system to crash temporarily.[228] On October 18, two organizations and two prospective voters who were unable to register because of the crash filed a federal complaint in the Eastern District of Virginia's Alexandria courthouse against state election officials asking the court to order reopening of online voter registration in Virginia for three days.[229] With their complaint, the plaintiffs filed an emergency motion for a preliminary injunction.[230]

On October 19, Judge Claude M. Hilton set the case for hearing on Thursday morning, October 20.[231] According to news media, "Gov. Terry McAuliffe said Wednesday he agreed with the lawsuit's request to extend

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228. *See* Graham Moomaw, *Suit: Extend Va.'s Voter Registration*, Richmond Times-Dispatch, Oct. 19, 2016, at 1A.

229. Complaint, New Va. Majority Educ. Fund v. Va. Dep't of Elections, No. 1:16-cv-1319 (E.D. Va. Oct. 18, 2016), D.E. 1; *see* Moomaw, *supra* note 228; Laura Vozzella, *Lawsuit Filed to Extend Va.'s Voter Registration*, Wash. Post, Oct. 19, 2016, at B1; Patrick Wilson, *Group Files Lawsuit Against Virginia Election Officials Over Voter Registration Crash*, Norfolk Virginian-Pilot, Oct. 20, 2016, at 4.

230. Preliminary-Injunction Motion, *New Va. Majority Educ. Fund*, No. 1:16-cv-1319 (E.D. Va. Oct. 18, 2016), D.E. 3.

231. Docket Sheet, *id.* (Oct. 18, 2016).

voter registration and had asked Attorney General Mark Herring to reach out to the federal court to ask for an expedited decision."[232] "Election officials and Gov. Terry McAuliffe's office said Tuesday that they had no authority to extend the deadline, which is set by state law and passed at 11:59 p.m. Monday."[233]

According to the 11:00 a.m. hearing minutes, "The court grants the motion, but with a reduced extension period than sought."[234] Judge Hilton reopened registration from Thursday following the hearing to the end of Friday.[235]

More than 27,000 Virginians registered to vote during the extension.[236]

2020

The website crashed again in 2020, when sewer-installation workers struck a communication cable.[237]

An October 13, 2020, federal complaint filed in the Eastern District of Virginia's Richmond courthouse alleged, "The outage of Virginia's Citizen Portal online voter registration system on the final day of voter registration on October 13, 2020, necessitates a brief but vitally important extension of the Virginia voter registration deadline."[238]

The defendant commonwealth election officials responded that day: "Defendants agree with Plaintiffs that an order from this Court would vindicate the public interests of ensuring access to the voting booth and election integrity."[239] Also on the day that the complaint was filed, the plaintiffs filed a consent motion for a temporary restraining order and emer-

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232. Wilson, *supra* note 229; *see also* Travis Fain, *McAuliffe Backs Registration Extension*, Newport News Daily Press, Oct. 20, 2016, at A3; Laura Vozzella, *Judge to Consider More Time to Register*, Wash. Post, Oct. 20, 2016, at B5.

233. Moomaw, *supra* note 228; *see also* Vozzella, *supra* note 232.

234. Minutes, *New Va. Majority Educ. Fund*, No. 1:16-cv-1319 (E.D. Va. Oct. 20, 2016), D.E. 9; *see* Rachel Weiner, *Judge Extends Voter Registration Deadline to Midnight Friday*, Wash. Post, Oct. 21, 2016, at B2.

235. Order, *New Va. Majority Educ. Fund*, No. 1:16-cv-1319 (E.D. Va. Oct. 20, 2016), D.E. 10; *see* Patrick Wilson, *Judge Orders Virginia to Immediately Reopen Voter Registration After Website Crash*, Norfolk Virginian-Pilot, Oct. 21, 2016, at 10.

236. *See* Katherine Hafner, *Nearly 28,000 Virginians Registered to Vote After the Deadline Was Extended*, Norfolk Virginian-Pilot, Oct. 23, 2016, at 11; *More Than 27,000 Virginians Register to Vote After Court-Mandated Extension*, Newport News Daily Press, Oct. 23, 2016, at A5.

237. *See* Sabrina Moreno, *Suit Seeks Extension After Voter Registration Site Outage*, Richmond Times-Dispatch, Oct. 14, 2020, at 1A.

238. Complaint at 1, New Va. Majority Educ. Fund v. Va. Dep't of Elections, No. 3:20-cv-801 (E.D. Va. Oct. 13, 2020), D.E. 1.

239. Response Brief at 1, *id.* (Oct. 13, 2020), D.E. 2.

gency injunction relief extending the registration deadline to 11:59 p.m. on October 15.[240]

At an eighteen-minute hearing on the morning of October 14, Judge John A. Gibney, Jr., granted the requested relief, ordering a press release issued by 11:30 a.m.[241]

Extending Voter-Registration Deadlines Because of a Hurricane

Florida Democratic Party v. Scott (4:16-cv-626) and League of Women Voters of Florida v. Scott (4:16-cv-633) (Mark E. Walker, N.D. Fla.) and Georgia Coalition for the Peoples' Agenda v. Deal (4:16-cv-269) and Bethea v. Deal (2:16-cv-140) (William T. Moore, Jr., S.D. Ga.)

> District judges in Florida and Georgia extended voter registration by one week in advance of the 2016 general election because of evacuations and government office closings resulting from Hurricane Matthew. In Florida, the judge extended the deadline statewide; in Georgia, the judge extended the deadline only for one county, because only offices in that county did not open again after the hurricane until after the original deadline.
>
> *Topics:* Registration procedures; intervention; case assignment; recusal.

In October 2016, federal judges in Florida and Georgia extended voter-registration deadlines by one week because of Hurricane Matthew. A North Carolina state judge also extended voter registration in some counties.[242]

Florida

"Nearly eight million Floridians, not counting tourists, sat in [Hurricane] Matthew's potential path under hurricane or tropical storm warnings. A half-million were urged to evacuate their homes."[243] So the *Miami Herald*

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240. Consent Motion, *id.* (Oct. 13, 2020), D.E. 3.

241. Order, *id.* (Oct. 14, 2020), D.E. 10, 2020 WL 6051855; Minutes, *id.* (Oct. 14, 2020), D.E. 11; *see* Frank Green, *Judge Orders Extension for Va. Voter Registration*, Richmond Times-Dispatch, Oct. 15, 2020, at 1A.

242. Court Extends Voter Registration in 37 Counties, www.ncsbe.gov/Elections/Hurricane-Matthew/Press-Release-10-14-2016, *archived at* web.archive.org/web/20161202232048/www.ncsbe.gov/Elections/Hurricane-Matthew/Press-Release-10-14-2016; *see* Lynn Bonner, *NC Voter Registration Deadline Extended in 36 Counties*, Raleigh News & Observer, Oct. 14, 2016.

243. Jacqueline Charles, Mimi Whitefield & Jenny Staletovich, *Bracing for Matthew*, Miami Herald, Oct. 6, 2016, at 1A.

reported on October 6, 2016.[244] Two days later, the *Herald* reported, "More than a million statewide lost power."[245]

On Sunday, October 9, the Florida Democratic Party filed a federal complaint in the Northern District of Florida against Florida's governor and Florida's secretary of state, seeking an extension of at least a week from the October 11 deadline for voter registration in light of the hurricane.[246] With its complaint, the party filed a motion for a temporary restraining order.[247]

The court assigned the case to Judge Mark E. Walker, who learned he had it on Columbus Day, the day after the case was filed, when Judge Walker performed his customary morning docket check.[248] He had intended to go into the office on the federal holiday anyway, but because of the filing he asked a law clerk to join him.[249]

Judge Walker included a temporary restraining order in a sixteen-page opinion issued on October 10 and posted to the docket from home by Judge Walker's courtroom deputy.[250] Judge Walker found that the secretary of state was a proper defendant as Florida's chief election officer, but the governor was not, because although Florida law gave the governor the power to reschedule an election in case of emergency, it did not give him the power to extend the deadline for voter registration.[251] Judge Walker

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244. *Id.*

245. Glenn Garvin, *More Than a Million Statewide Lost Power*, Miami Herald, Oct. 8, 2016, at 4A; *see also* Jenny Staletovich, Mary Ellen Klas, Nancy San Martin & Jay Weaver, *Storm Surge Becomes Biggest Threat*, Miami Herald, Oct. 8, 2016, at 1A ("Hurricane Matthew saved its worst Florida lashing for last as its eyewall skirted the state's northeastern coastline on Friday, whipping up pounding waves and surging tides that washed over beachfront communities.").

246. Complaint, Fla. Democratic Party v. Scott, No. 4:16-cv-626 (N.D. Fla. Oct. 9, 2016), D.E. 3; *see* Transcript at 7, *id.* (Oct. 12, 2016, filed Oct. 16, 2016), D.E. 31 [hereinafter *Fla. Democratic Party* Transcript]; *see also* Steve Bousquet, *Democrats Sue Scott Over Voter Registration Deadline*, Miami Herald, Oct. 10, 2016, at 6A; Patricia Mazzei & Kristen M. Clark, *Florida Says No to Clinton Request for More Days to Register to Vote*, Miami Herald, Oct. 7, 2016, at 5A.

247. Temporary-Restraining-Order Motion, *Fla. Democratic Party*, No. 4:16-cv-626 (N.D. Fla. Oct. 9, 2016), D.E. 4.

248. Interview with Judge Mark E. Walker, Oct. 31, 2016.

Tim Reagan interviewed Judge Walker for this report by telephone.

249. *Id.*

250. Fla. Democratic Party v. Scott, 215 F. Supp. 3d 1250 (N.D. Fla. 2016); *see* Steve Bousquet, *Judge Extends Voter Registration Deadline, Rebukes State for "Irrational" Decision*, Miami Herald, Oct. 11, 2016, at 2A.

251. *Fla. Democratic Party*, 215 F. Supp. 3d at 1254–55; *see* Steve Bousquet, *Reversing*

extended the deadline for registration until 5:00 p.m. on October 12 and scheduled a preliminary-injunction hearing for 10:00 a.m. on October 12.[252] He concluded, "Quite simply, it is wholly irrational in this instance for Florida to refuse to extend the voter-registration deadline when the state already allows the Governor to suspend or move the election date due to an unforeseen emergency."[253]

Judge Walker granted intervention motions on October 11 to (1) Mi Familia Vota Education Fund and the New Florida Majority[254] and (2) a prospective citizen whose citizenship ceremony was postponed to October 15 because of the hurricane.[255] Judge Walker was able to grant intervention motions quickly because his law clerk checked the docket for filings frequently during the emergency litigation.[256]

On October 12, Judge Walker consolidated the case with an October 11 action by the League of Women Voters to extend voter registration until October 18.[257] The court originally assigned the case to Judge Robert L. Hinkle, who ordered it reassigned to Judge Walker as related to the Democratic Party's action.[258]

At the October 12 hearing, "Defendants took no position."[259] Some parties appeared by telephone, and members of the news media were permitted to listen but not record the proceeding.[260]

Scott, Federal Judge Could Reshape Florida Election, Miami Herald, Oct. 12, 2016, at 8A; *see also* Steve Bousquet, *Judge Extends Florida's Voter Sign-Up Deadline*, Miami Herald, Oct. 13, 2016, at 1A [hereinafter *Judge Extends Deadline*] ("Had [the governor] extended the deadline, the judge said in court [at the preliminary-injunction hearing], the action likely would have been challenged.").

252. *Fla. Democratic Party*, 215 F. Supp. 3d at 1259.

253. *Id.* at 1257.

254. Order, Fla. Democratic Party v. Scott, No. 4:16-cv-626 (N.D. Fla. Oct. 11, 2016), D.E. 20; *see* Intervention Motion, *id.* (Oct. 11, 2016), D.E. 18.

255. Order, *id.* (Oct. 11, 2016), D.E. 25; *see* Intervention Motion, *id.* (Oct. 11, 2016), D.E. 22.

256. Interview with Judge Mark E. Walker, Oct. 31, 2016.

257. Order, League of Women Voters of Florida v. Scott, No. 4:16-cv-633 (N.D. Fla. Oct. 12, 2016), D.E. 15; *see* Preliminary-Injunction Motion, *id.* (Oct. 11, 2016), D.E. 4; Complaint, *id.* (Oct. 11, 2016), D.E. 1.

It was unclear why the League filed a separate action instead of intervening in the pending case. Interview with Judge Mark E. Walker, Oct. 31, 2016.

258. Order, *League of Women Voters of Florida*, No. 4:16-cv-633 (N.D. Fla. Oct. 11, 2016), D.E. 14; *see* Notice of a Prior or Similar Case, *id.* (Oct. 11, 2016), D.E. 3.

259. Opinion, *Fla. Democratic Party*, No. 4:16-cv-626 (N.D. Fla. Oct. 12, 2016), D.E. 29 [hereinafter *Fla. Democratic Party* Preliminary-Injunction Opinion]; *Fla. Democratic Party* Transcript, *supra* note 246, at 8.

A fan of Federal Rule of Evidence 614's provision for a judge calling and examining a witness, Judge Walker wanted testimony from a county supervisor of elections, and he had the clerk's office arrange for the local supervisor to appear.[261] The witness waived service of a subpoena.[262]

Leon County's supervisor of elections testified "that storms of this magnitude impose 'tremendous strain' on elections offices."[263] With a three-page opinion, Judge Walker extended the voter-registration deadline to October 18.[264] On October 13, he ordered the parties to notify the court by October 14 "if they wish to seek further action in this case."[265]

On October 18, the Democratic Party filed a motion to enforce the injunction, claiming that "[w]ithin days, Plaintiff began receiving reports that Florida state and local election officials have indicated that they are unlikely to complete the verification process for all voter-registration applications before early voting begins in many counties on October 24."[266] The party sought a complete list of all registered voters, with weekly updates for registrations verified after October 23.[267] The secretary argued that the "baseless" motion "should be rejected out of hand."[268]

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260. *Fla. Democratic Party* Transcript, *supra* note 246, at 1–4.

261. Interview with Judge Mark E. Walker, Oct. 31, 2016; *see Fla. Democratic Party* Transcript, *supra* note 246, at 22–25; Minutes, *Fla. Democratic Party*, No. 4:16-cv-626 (N.D. Fla. Oct. 12, 2016), D.E. 28.

262. Interview with Judge Mark E. Walker, Oct. 31, 2016.

263. *Fla. Democratic Party* Preliminary-Injunction Opinion, *supra* note 259, at 2 n.2; *Fla. Democratic Party* Transcript, *supra* note 246, at 24.

264. *Fla. Democratic Party* Preliminary-Injunction Opinion, *supra* note 259, at 3 ("Hopefully it is not lost on anyone that the right to have a voice is why this great country exists in the first place."); *see* Steve Bousquet, *Judge Extends Deadline*, *supra* note 251; Jonathan Drew, *Judge Orders Storm-Ravaged Counties to Extend Voter Registration Deadlines*, Miami Herald, Oct. 15, 2016, at 18A; William Wan, *Matthew Victims' New Challenge: Getting to Vote*, Wash. Post, Oct. 13, 2016, at A2; Michael Wines, *Florida Voter Registration Extended After Storm*, N.Y. Times, Oct. 13, 2016, at A12.

265. Order, League of Women Voters of Florida v. Scott, No. 4:16-cv-633 (N.D. Fla. Oct. 13, 2016), D.E. 18; Order, *Fla. Democratic Party*, No. 4:16-cv-626 (N.D. Fla. Oct. 13, 2016), D.E. 30.

266. Enforcement Motion, *Fla. Democratic Party*, No. 4:16-cv-626 (N.D. Fla. Oct. 18, 2016), D.E. 32 [hereinafter *Fla. Democratic Party* Enforcement Motion]; *see* Steve Bousquet, *Hurricane Matthew Ripple Effect: Big Changes to the Florida Voter Rolls*, Miami Herald, Oct. 20, 2016, at 1A.

267. *Fla. Democratic Party* Enforcement Motion, *supra* note 266, at 2–3.

268. Motion Opposition, *Fla. Democratic Party*, No. 4:16-cv-626 (N.D. Fla. Oct. 19, 2016), D.E. 44.

Judge Walker granted motions by the Republican Party[269] and Florida's senate[270] to intervene in opposition to the Democratic Party's motion, and Judge Walker granted a motion to appear as an amicus curiae filed by the state's Association of Supervisors of Elections, which sought participation so that any remedy imposed by the court would be informed by the association's expertise.[271]

At an October 20 hearing, Judge Walker received testimony from the supervisor of elections for Hillsborough County, the county that includes Tampa.[272] Judge Walker wanted testimony from a witness with experience in one of Florida's four largest counties.[273]

Judge Walker denied the enforcement motion.[274] Realizing the importance of monitoring orders as well as issuing them,[275] however, Judge Walker "asked [the defendant] to keep a running tally on the Florida Department of State website tabulating the number of pending voter-registration applications and the number of processed voter-registration applications."[276] Noting a slowdown in application processing and concluding that "almost 25,000 voters may or may not have their vote counted in the 2016 General Election," Judge Walker ordered Florida's secretary of state to present a witness on October 28 to testify at a telephonic hearing about Florida's ability to process voter-registration applications.[277]

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269. Order, *id.* (Oct. 19, 2016), D.E. 49; *see* Intervention Motion, *id.* (Oct. 19, 2016), D.E. 47.

270. Order, *id.* (Oct. 20, 2016), D.E. 51; *see* Intervention Motion, *id.* (Oct. 19, 2016), D.E. 50.

271. Order, *id.* (Oct. 19, 2016), D.E. 45; *see* Amicus Curiae Motion, *id.* (Oct. 19, 2016), D.E. 38.

272. Minutes, *id.* (Oct. 20, 2016), D.E. 52.

273. Interview with Judge Mark E. Walker, Oct. 31, 2016 (noting also that comments to news media following the earlier hearing by Leon County's supervisor of elections made him less desirable as a witness).

274. Order, *Fla. Democratic Party*, No. 4:16-cv-626 (N.D. Fla. Oct. 20, 2016), D.E. 54; *see* Steve Bousquet, *Judge Rejects Democrats' Request to Speed Fla. Voter Verification*, Miami Herald, Oct. 21, 2016, at 3A.

275. Interview with Judge Mark E. Walker, Oct. 31, 2016.

276. Order at 2, *Fla. Democratic Party*, No. 4:16-cv-626 (N.D. Fla. Oct. 27, 2016), D.E. 57.

277. *Id.* at 2–4; Transcript, *id.* (Oct. 28, 2016, filed Oct. 31, 2016), D.E. 60 (noting that Judge Walker was presiding from another city because he was conducting a trial there); *see* Steve Bousquet, *Judge Fears 25,000 Voters Won't Be Eligible for Election*, Miami Herald, Oct. 28, 2016, at 5A.

Georgia

Georgia's voter-registration deadline was October 11 also.[278] Late at night on October 12, three organizations promoting voter registration filed a federal complaint against Georgia's governor and Georgia's secretary of state in the Southern District of Georgia's Savannah courthouse, seeking an extension of the voter-registration deadline for residents of Chatham County, Georgia's seaside county on the South Carolina border that includes Savannah.[279] In their complaint, the plaintiffs observed, "Chatham County government offices, which opened today, were last open on Wednesday, October 5."[280] With their complaint, the plaintiffs filed an emergency motion for a preliminary injunction.[281]

On Thursday, October 13, Judge William T. Moore, Jr., the only district judge sitting in Savannah, set the case for hearing at 10:00 a.m. on the following day and ordered the clerk of court to serve defendants with copies of the case's electronically filed papers.[282] Judge Moore would have held the hearing on Thursday afternoon, but lawyers for both sides were in Atlanta, and the lawyers requested a Friday morning proceeding.[283]

Following the October 14 hearing, Judge Moore extended the voter-registration deadline in the county by one week.[284]

> While this Court harbors significant reservations concerning the ultimate merits of Plaintiffs' claims, the Court concludes that Plaintiffs have established a sufficient likelihood of success to warrant injunctive relief. An individual's ability to participate in local and national elections is arguably the most cherished right enshrined in our constitution. In-

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278. 2016 Elections and Voter Registration Calendar, sos.ga.gov/index.php/elections/2016_election_dates, *archived at* web.archive.org/web/20161225210158/sos.ga.gov/index.php/elections/2016_election_dates.

279. Complaint, Ga. Coal. for the People's Agenda, Inc. v. Deal, No. 4:16-cv-269 (S.D. Ga. Oct. 12, 2016), D.E. 1 [hereinafter *Ga. Coal. for the People's Agenda, Inc.* Complaint]; *see* Kristina Torres, *Registration Deadline Hearing Set*, Atlanta J.-Const., Oct. 14, 2016, at 1B.

280. *Ga. Coal. for the People's Agenda, Inc.* Complaint, *supra* note 279, at 2.

281. Preliminary-Injunction Motion, *Ga. Coal. for the People's Agenda, Inc.*, No. 4:16-cv-269 (S.D. Ga. Oct. 12, 2016), D.E. 2.

282. Order, *id.* (Oct. 13, 2016), D.E. 6; *see* Minutes, *id.* (Oct. 14, 2016), D.E. 12; *see also* Torres, *supra* note 279.

Tim Reagan interviewed Judge Moore for this report by telephone on October 31, 2016.

283. Interview with Judge William T. Moore, Jr., Oct. 31, 2016.

284. Ga. Coal. for the Peoples' Agenda, Inc. v. Deal, 214 F. Supp. 3d 1344 (S.D. Ga. 2016); *see* Drew, *supra* note 264; Aaron Gould Sheinin, *County Told to Reopen Voter Signup*, Atlanta J.-Const., Oct. 15, 2016, at 1A.

> deed, our founding fathers felt so strongly about their right to participate in the electoral process that when deprived of it they took up arms against their sovereign, risking life and home for over eight years, to obtain that right.
>
> In the final analysis, Defendants may not be under any obligation to provide Chatham County residents with an extension. Only time will tell. What is clear to the Court, however, is that granting the extension would have been the right thing to do.[285]

On October 17, an organization and a prospective voter filed a federal complaint in the Southern District of Georgia's Brunswick courthouse against the governor and the secretary of state seeking a reopening of voter registration statewide.[286] With their complaint, the plaintiffs filed a motion for a temporary restraining order.[287]

Judge Lisa Godbey Wood, the only district judge sitting in Brunswick—the county seat of the coastal Glynn County—was in Athens for the week teaching a seminar at the University of Georgia.[288] She asked Judge Moore if he would take the case. [289] On October 18, Judge Moore set the case for hearing on the following day.[290] The parties agreed to a Savannah hearing.[291]

Following an October 19 hearing, Judge Moore denied relief in the second case, observing, "While all other counties were able to open their [Board of Elections] offices prior to the registration deadline, the Chatham County [Board of Elections] office did not reopen until October 12, [the day after the original registration deadline]."[292] Judge Moore accepted a voluntary dismissal of the second case on November 1[293] and a stipulated dismissal of the first case on March 15, 2017.[294]

Discussion in both cases highlighted hurricane difficulties in Georgia's six coastal counties, but the evidence supported relief only for Chatham

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285. *Ga. Coal. for the Peoples' Agenda, Inc.*, 214 F. Supp. 3d at 1345.

286. Complaint, Bethea v. Deal, No. 2:16-cv-140 (S.D. Ga. Oct. 17, 2016), D.E. 1; *see* Amended Complaint, *id.* (Oct. 18, 2016), D.E. 10.

287. Temporary-Restraining-Order Motion, *id.* (Oct. 17, 2016), D.E. 2.

288. Interview with Judge William T. Moore, Jr., Oct. 31, 2016.

289. *Id.*; *see* Recusal Order, *Bethea*, No. 2:16-cv-140 (S.D. Ga. Oct. 18, 2016), D.E. 8.

290. Order, *Bethea*, No. 2:16-cv-140 (S.D. Ga. Oct. 18, 2016), D.E. 9.

291. Interview with Judge William T. Moore, Jr., Oct. 31, 2016.

292. Opinion at 2, *Bethea*, No. 2:16-cv-140 (S.D. Ga. Oct. 19, 2016), D.E. 16 [hereinafter *Bethea* Opinion], 2016 WL 6123241; Minutes, *id.* (Oct. 19, 2016), D.E. 13.

293. Order, *id.* (Nov. 1, 2106), D.E. 18; *see* Voluntary Dismissal, *id.* (Oct. 24, 2016), D.E. 17.

294. Order, Ga. Coal. for the People's Agenda, Inc. v. Deal, No. 4:16-cv-269 (S.D. Ga. Mar. 15, 2017), D.E. 31; *see* Stipulated Dismissal, *id.* (Mar. 10, 2017), D.E. 30.

County in the first case and for no additional counties in the second case.[295] Litigation in both cases was stronger on argument than on evidence.[296]

Improperly Requiring Dormitory Names on Students' Voter-Registration Forms

Pitcher v. Dutchess County Board of Elections (Kenneth M. Karas, S.D.N.Y. 7:12-cv-8017)

> A federal complaint challenged the rejection of students' voter-registration applications for failure to list dormitory names or room numbers despite the inclusion of valid street and mailing addresses. On the day before the election, the district judge ordered acceptance of registration applications for the student plaintiffs and others similarly situated. Several months later, the suit was closed by consent decree and a stipulated award of attorney fees.
>
> *Topics:* Student registration; registration procedures; class action; attorney fees.

Four students filed a federal class-action complaint on October 31, 2012, claiming wrongful rejection of their voter-registration applications for the November 6 general election because the students did not include on their applications dormitory names or room numbers in addition to the students' street and mailing addresses.[297]

On the day that the complaint was filed, Judge Kenneth M. Karas issued an order that the defendants show cause on November 5 why relief should not be granted.[298]

On November 5, Judge Karas ordered the county election officials to register student applicants whose registrations were rejected for failure to provide a dormitory name or room number.[299]

The case was resolved by consent decree on May 13, 2013.[300] County election officials agreed not to require dormitory names or room numbers

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295. Interview with Judge William T. Moore, Jr., Oct. 31, 2016; *see Bethea* Opinion, *supra* note 292, at 3.

296. Interview with Judge William T. Moore, Jr., Oct. 31, 2016.

297. Complaint, Pitcher v. Dutchess Cty. Bd. of Elections, No. 7:12-cv-8017 (S.D.N.Y. Oct. 31, 2012), D.E. 1.

298. Order, *id.* (Oct. 31, 2012), D.E. 3.

299. Preliminary Injunction, *id.* (Nov. 5, 2012), D.E. 6; Consent Decree at 2, *id.* (May 13, 2013), D.E. 18 [hereinafter *Pitcher* Consent Decree]; *see College Students in Suit Get Right to Vote in Election Today*, Westchester J. News, Nov. 6, 2012, at B1.

300. *Pitcher* Consent Decree, *supra* note 299.

for students registering to vote so long as communications with the voters were not returned as undeliverable and unless the state changed its election law to require dormitory names or room numbers for student voters.[301] The parties also agreed that the county's board of elections would pay an award of attorney fees and costs totaling $37,237.50 to the plaintiffs and $20,797.50 to codefendants.[302]

Superseded Registration Form

Brown v. Rokita (Richard L. Young, S.D. Ind. 1:08-cv-1484)

> On the day before the 2008 general election, a voter filed a class action challenging the nullification of her voter registration because she had not used the latest version of the voter-registration form. At a temporary-restraining-order hearing that day, the parties announced an agreement that would permit voters who submitted old registration forms to cast provisional ballots that would be counted if the registration applications included all necessary information.
>
> *Topics:* Registration procedures; provisional ballots.

On the day before the 2008 general election, a voter in Marion County, Indiana, the county that includes Indianapolis, filed a class action challenging the nullification of her voter registration because she had not used the latest version of the voter-registration form.[303] With her complaint, she filed a motion for a temporary restraining order.[304]

Judge Richard L. Young drew the case and held a hearing on the motion on the day that it was filed.[305] At the hearing, the parties announced that they had reached an agreement.[306] Provisional ballots cast by voters who used superseded registration forms would be accepted so long as the voter met eligibility requirements and the registration application included all necessary information.[307] A hand-written agreement was filed with the court that day.[308]

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301. *Id.* at 3.

302. *Id.* at 4.

303. Complaint, Brown v. Rokita, No. 1:08-cv-1484 (S.D. Ind. Nov. 3, 2008), D.E. 2.

304. Temporary-Restraining-Order Motion, *id.* (Nov. 3, 2008), D.E. 9.

305. Minutes, *id.* (Nov. 3, 2008), D.E. 13 [hereinafter *Brown* Minutes]; Interview with Judge Richard L. Young, July 24, 2012 (noting that if he had not been available the motion could have been heard by the motions judge on duty for that week).

Tim Reagan interviewed Judge Young for this report by telephone on July 24, 2012.

306. *Brown* Minutes, *supra* note 305.

307. Agreement, *Brown*, No. 1:08-cv-1484 (S.D. Ind. Nov. 3, 2008), D.E. 14.

308. *Id.*

Judge Young signed a stipulated dismissal on February 4, 2009.[309]

Segregating Ballots Because of Questionable Registrations

Atsaves v. Helander (Virginia M. Kendall, N.D. Ill. 1:08-cv-6199)

> A voter-registration team removed from state court an action seeking to segregate votes by voters registered by the team for investigation of improper registration. The district judge determined that the case did not present a federal question because the Help America Vote Act did not afford private rights of action, and relief from section 1983 requires willful and wanton conduct, which the plaintiffs had not alleged.
>
> *Topics:* Help America Vote Act (HAVA); 42 U.S.C. § 1983; registration procedures; intervention; removal; matters for state courts.

One week before the 2008 general election, the Republican Party, a candidate, and two voters filed a complaint in Illinois's circuit court for Lake County, seeking to have voter-registration applications filed by a specific voter-registration team segregated for investigation of improper registration.[310] The team removed the action to the U.S. District Court for the Northern District of Illinois on the following day.[311] The other defendant was Lake County's clerk.[312] Another two days later, on Friday, the plaintiffs filed in the federal court a motion for a temporary restraining order or a preliminary injunction.[313]

Also on Friday, the Democratic Party and a voter moved to intervene in support of the defendants.[314]

Judge Virginia M. Kendall heard the matter on Friday, October 31.[315] At the hearing, the county clerk both consented to removal[316] and argued that the case did not belong in federal court.[317] At the conclusion of the

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309. Order, *id.* (Feb. 4, 2009), D.E. 27.

310. Complaint, Atsaves v. Helander, No. 08 CH 4132 (Ill. Cir. Ct. Lake Cty. Oct. 28, 2008) [hereinafter *Atsaves* Complaint], *attached to* Notice of Removal, Atsaves v. Helander, No. 1:08-cv-6199 (N.D. Ill. Oct. 29, 2008), D.E. 1 [hereinafter *Atsaves* Notice of Removal]; *see* Russell Lissau, *Suing Over the Ballots*, Chi. Daily Herald, Oct. 29, 2008, at 1.

311. *Atsaves* Notice of Removal, *supra* note 310.

312. *Atsaves* Complaint, *supra* note 310.

313. Motion, *Atsaves*, No. 1:08-cv-6199 (N.D. Ill. Oct. 31, 2008), D.E. 9.

314. Intervention Motion, *id.* (Oct. 31, 2008), D.E. 15; Intervention Motion, *id.* (Oct. 31, 2008), D.E. 13.

315. Minutes, *id.* (Oct. 31, 2008), D.E. 14 [hereinafter *Atsaves* Minutes].

316. Transcript at 6–7, *id.* (Oct. 31, 2008, filed June 8, 2011), D.E. 18 [hereinafter *Atsaves* Transcript].

317. *Id.* at 11–14.

hearing, Judge Kendall ruled that the case did not present a federal question because the Help America Vote Act does not afford private rights of action, and relief from section 1983 requires willful and wanton conduct, which the plaintiffs had not alleged.[318] She denied the motions to intervene as moot and remanded the case to state court.[319]

The state court declined to hear the case before election day.[320]

Suit Arising Under State Implementation of the Help America Vote Act Remanded to State Court

Ohio ex rel. Mahal v. Brunner (George C. Smith, S.D. Ohio 2:08-cv-983)

> A state's secretary of state removed a mandamus action filed with the state's supreme court concerning the state's compliance with the Help America Vote Act (HAVA). The district court immediately remanded the case, because the mandamus action sought enforcement of the state's HAVA-implementing legislation, which meant that the case arose under state law.
>
> *Topics:* Matters for state courts; removal; Help America Vote Act (HAVA).

On Friday, October 17, 2008, an Ohio voter filed a mandamus action with Ohio's supreme court complaining that Ohio's secretary of state was not complying with the Help America Vote Act (HAVA)[321] by adequately maintaining a statewide voter-registration database.[322] On Monday, the secretary of state removed the action to the U.S. District Court for the Southern District of Ohio, which assigned the case to Judge George C. Smith.[323]

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318. *Atsaves* Minutes, *supra* note 315; *Atsaves* Transcript, *supra* note 316, at 44–47; *see* 42 U.S.C. § 1983; Help America Vote Act, Pub. L. No. 107-252, 116 Stat. 1666 (2002), *as amended*, 52 U.S.C. §§ 20901–21145; Marie Leary & Robert Timothy Reagan, The Help America Vote Act (Federal Judicial Center 2012); Symposium, *HAVA @ 10*, 12 Election L.J. 111 (2013); *see also* Mick Zawislak, *GOP Suit Back in Lower Court*, Chi. Daily Herald, Nov. 1, 2008, at 1.

319. *Atsaves* Minutes, *supra* note 315; Notice, *Atsaves*, No. 1:08-cv-6199 (N.D. Ill. Nov. 5, 2008), D.E. 16.

320. *See* Russell Lissau, *Republicans Say Suit Not Dead Yet*, Chi. Daily Herald, Nov. 4, 2008, at 1

321. Pub. L. No. 107-252, 116 Stat. 1666 (2002), *as amended*, 52 U.S.C. §§ 20901–21145. *See generally* Leary & Reagan, *supra* note 109; Symposium, *HAVA @ 10*, 12 Election L.J. 111 (2013).

322. Mandamus Petition, State *ex rel.* Mahal v. Brunner, No. 08-2027 (S.D. Ohio Oct. 17, 2008), *filed as* Complaint, Ohio *ex rel.* Mahal v. Brunner, No. 2:08-cv-983 (S.D. Ohio Oct. 20, 2008), D.E. 4.

323. Notice of Removal, *Mahal*, No. 2:08-cv-983 (S.D. Ohio Oct. 20, 2008), D.E. 2.

Judge Smith remanded the case on the day that it was removed.[324] He determined that it was a case arising under state law because the mandamus petition sought enforcement of Ohio's HAVA-implementing legislation.[325]

Regulation of Third-Party Voter Registrations

League of Women Voters of Florida v. Browning (Cecilia M. Altonaga, S.D. Fla. 1:08-cv-21243)

> On April 28, 2008, the League of Women Voters filed a federal action in the Southern District of Florida challenging Florida's regulation of voter registration as so burdensome as to cause the League to suspend its voter-registration efforts. On the following day, the district judge held a hearing, ordered the parties to submit a proposed consent order on the next day, and set a preliminary-injunction hearing for June 19. On August 6, the court denied the League a preliminary injunction. Similar cases were filed in 2006 in the Southern District and in 2011 in the Northern District.
>
> *Topics:* Registration procedures; case assignment.

The League of Women Voters and other organizations filed a federal complaint on April 28, 2008, in the Southern District of Florida's Miami courthouse claiming that burdensome Florida regulation of voter registration caused the League to suspend its voter-registration activities.[326] With their complaint, the plaintiffs filed a motion for a temporary restraining order.[327] On the following day, Judge Cecilia M. Altonaga set a hearing on the motion for 4:30 that afternoon.[328]

Judge Smith died on April 15, 2020. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

324. Order, *Mahal*, No. 2:08-cv-983 (S.D. Ohio Oct. 20, 2008), D.E. 5, 2008 WL 4647701.

325. *Id.*

326. Complaint, League of Women Voters of Fla. v. Browning, No. 1:08-cv-21243 (S.D. Fla. Apr. 28, 2008), D.E. 1; League of Women Voters of Fla. v. Browning, 575 F. Supp. 2d 1298, 1302 (S.D. Fla. 2008); *see* Damien Cave, *Voting Group Sues Florida Over Penalties*, N.Y. Times, Apr. 29, 2008, at A11; Gary Fineout, *Groups Oppose Voter Registration Law*, Miami Herald, Apr. 29, 2008, at B8.

327. Temporary-Restraining-Order Motion, *League of Women Voters of Fla.*, No. 1:08-cv-21243 (S.D. Fla. Apr. 28, 2008), D.E. 2.

328. Order, *id.* (Apr. 29, 2008), D.E. 4.

Tim Reagan interviewed Judge Altonaga for this report by telephone on October 10, 2012.

When Judge Altonaga got a motion for a temporary restraining order, it was her practice to schedule a hearing as soon as possible.[329] The hearing was set for the afternoon to accommodate her other matters that day.[330]

A May 18, 2006, federal complaint in Miami by the League[331] resulted in an August 28, 2006, preliminary injunction by Judge Patricia A. Seitz against Florida's 2005 third-party voter registration law.[332] Judge Seitz held that the law's "combination of heavy, strict, joint and several liability fines is unconstitutional as it chills Plaintiffs' First Amendment speech and association rights" and that the law unconstitutionally discriminated in favor of political parties by exempting them from the fines.[333]

In 2007, Florida amended the voter-registration law by

> (1) significantly reducing the amount of fines; (2) implementing a $1,000 annual limit or cap on the amount of fines that may be levied against a "third-party voter registration organization, including affiliate organizations"; (3) removing the exception for political parties under the Original Law; and (4) adding a provision waiving the applicable fine upon "a showing that the failure to deliver the voter registration application promptly is based upon force majeure or impossibility of performance."[334]

The plaintiffs in the 2008 case filed a notice on that case's second day that it was related to the 2006 case.[335] Judge Altonaga contacted Judge Seitz

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329. Interview with Judge Cecilia M. Altonaga, Oct. 10, 2012.

330. *Id.*

331. Complaint, League of Women Voters of Fla. v. Browning, No. 1:06-cv-21265 (S.D. Fla. May 18, 2006), D.E. 1; *see* Amended Complaint, *id.* (Sept. 29, 2006), D.E. 67; *see also* Steve Bousquet, *Voter Groups Sue State Over Tardiness Law*, St. Petersburg Times, May 19, 2006, at 6B.

332. League of Women Voters of Fla. v. Cobb, 447 F. Supp. 2d 1314 (S.D. Fla. 2006); League of Women Voters of Fla. v. Browning, 575 F. Supp. 2d 1298, 1300, 1302, 1304 (S.D. Fla. 2008); *see* Vanessa Blum, *Federal Judge Declares New Voter Registration Law Unconstitutional*, S. Fla. Sun-Sentinel, Aug. 29, 2006, at 1B; Alisa Ulferts, *Judge Rejects "Chilling" Voter Registration Law*, St. Petersburg Times, Aug. 29, 2006, at 1A; Jay Weaver, *Ruling Helps Voter Registration Groups*, Miami Herald, Aug. 29, 2006, at B3.

333. *League of Women Voters of Fla.*, 447 F. Supp. 2d at 1316, 1331–42.

The district court awarded the plaintiffs $341,558.99 in attorney fees and costs. Order, *League of Women Voters of Fla.*, No. 1:06-cv-21265 (S.D. Fla. Mar. 16, 2009), D.E. 129; *see* Order, League of Women Voters of Fla. v. Browning, No. 09-12202 (11th Cir. July 1, 2009) (dismissing as settled an appeal of the attorney fee award), *filed as* Order, *League of Women Voters of Fla.*, No. 1:06-cv-21265 (S.D. Fla. July 7, 2009), D.E. 157.

334. *League of Women Voters of Fla.*, 575 F. Supp. 2d at 1304.

335. Notice, League of Women Voters of Fla. v. Browning, No. 1:08-cv-21243 (S.D. Fla. Apr. 28, 2008), D.E. 6.

to discuss whether the 2008 case needed to be reassigned, but the two judges agreed that it did not.[336]

After her April 29, 2008, hearing, Judge Altonaga ordered the parties to submit a proposed consent order by noon on the following day.[337] The consent order (1) suspended enforcement of Florida's amended voter-registration law until Florida's secretary of state adopted implementation rules and (2) set a preliminary-injunction hearing for June 19.[338] The parties stipulated that the court could rely upon their joint factual statement filed in the 2006 case.[339]

On August 6, 2008, Judge Altonaga denied the plaintiffs a preliminary injunction, finding that Florida's interests in preventing the mishandling of voter-registration applications by third parties were sufficient to justify the burden on the plaintiffs' First Amendment rights.[340] An appeal was voluntarily dismissed on October 23.[341]

On December 15, 2011, the league and other organizations brought a third action, in the Northern District of Florida's Tallahassee courthouse, against Florida's 2011 amended regulation of voter registration.[342] Judge Robert L. Hinkle granted the league a preliminary injunction on May 31.[343]

> The Statute and rule impose a harsh and impractical 48-hour deadline for an organization to deliver applications to a voter-registration office and effectively prohibit an organization from mailing applications in. And the statute and rule impose burdensome record-keeping and report-

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336. Interview with Judge Cecilia M. Altonaga, Oct. 10, 2012.

337. Docket Sheet, *League of Women Voters of Fla. v. Browning*, No. 1:08-cv-21243 (S.D. Fla. Apr. 28, 2008) (minutes, D.E. 8).

338. Consent Order, *id.* (Apr. 30, 2008), D.E. 15; *League of Women Voters of Fla.*, 575 F. Supp. 2d at 1302.

339. *League of Women Voters of Fla.*, 575 F. Supp. 2d at 1301 n.1.

340. *Id.* at 1319–25; *see* Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 Wm. & Mary Bill Rts. J. 453, 488–90 (2008).

341. Order, League of Women Voters of Fla. v. Browning, No. 08-15156 (11th Cir. Oct. 23, 2008), *filed as* Order, *League of Women Voters of Fla. v. Browning*, No. 1:08-cv-21243 (S.D. Fla. Nov. 12, 2008), D.E. 87.

342. Complaint, League of Women Voters of Fla. v. Browning, No. 4:11-cv-628 (N.D. Fla. Dec. 15, 2011), D.E. 1; *see* Amended Complaint, *id.* (Dec. 16, 2011), D.E. 5; *see also* Fla. Stat. § 97.0575; Kathleen Haughney, *Scott Signs Elections Overhaul Into Law*, S. Fla. Sun-Sentinel, May 20, 2011, at 1B.

343. League of Women Voters of Fla. v. Browning, 863 F. Supp. 2d 1155 (N.D. Fla. 2012); *see* Lizette Alvarez, *Judge Blocks Florida's Voter Drive Rules*, N.Y. Times, June 1, 2012, at A15; Steve Bousquet & Marc Caputo, *Federal Judge Strikes Down Part of Law*, Miami Herald, June 1, 2012, at 3B; Jerry Markon, *Federal Judge Blocks Parts of Florida Voting Law*, Wash. Post, June 1, 2012, at A6.

> ing requirements that serve little if any purpose, thus rendering them unconstitutional even to the extent they do not violate the [National Voting Rights Act].[344]

So that an appeal could be heard on a final order, at the request of the parties, Judge Hinkle converted his preliminary injunction into a permanent injunction on August 30, 2012.[345] The appeal was voluntarily dismissed.[346]

Pursuant to section 5 of the Voting Rights Act, Florida pursued both judicial and administrative preclearance of its amendments to regulation of third-party voter registration and early voting.[347]

Preclearance of Landowner Voter-Registration Requirements

Shields v. Engelman Irrigation District (Ricardo H. Hinojosa, S.D. Tex. 7:08-cv-116)

> In response to an April 3, 2008, federal complaint, a district judge and then a three-judge district court enjoined new voter-registration requirements for a May 10 election by landowners to an irrigation-district board of directors for lack of preclearance pursuant to section 5 of the Voting Rights Act.
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> *Topics:* Registration procedures; section 5 preclearance; three-judge court; voter identification; matters for state courts; intervention; pro se party.

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344. *League of Women Voters of Fla.*, 863 F. Supp. 2d at 1158.

345. Permanent Injunction, *League of Women Voters of Fla.*, No. 4:11-cv-628 (N.D. Fla. Dec. 15, 2012), D.E. 83; *see* Lizette Alvarez, *Judge to Toss Out Changes in Florida Voter Registration*, N.Y. Times, Aug. 30, 2012, at A13; Steve Bousquet, *Judge Throws Out Part of Voter Registration Law*, Tampa Bay Times, Aug. 30, 2012, at 3B; Bill Kaczor, *Voter Registration Ruling to Be Finalized*, Miami Herald, Aug. 30, 2012, at 6B.

> Department of State spokesman Chris Cate said the agency agreed to the settlement because Hinkle's order did not cover a provision requiring third-party registration groups to be identified on the registration forms that they collect. Without that provision, no deadline, whether 48 hours or 10 days, could be enforced, he said.

Kaczor, *supra*.

346. Order, League of Women Voters of Fla. v. Secretary, No. 12-13522 (11th Cir. Aug. 4, 2012).

347. Florida v. United States, 885 F. Supp. 2d 299 (D.D.C. 2012); Stipulation, Florida v. United States, No. 1:11-cv-1428 (D.D.C. Oct. 15, 2012), D.E. 163 (resolving action); Status Report, *id.* (Sept. 25, 2012), D.E. 162; *see* Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination).

On June 25, 2013, the Supreme Court declined to hold section 5 unconstitutional, but the Court did hold unconstitutional the criteria for which jurisdictions require section 5 preclearance. Shelby County v. Holder, 570 U.S. 529 (2013).

On April 3, 2008, a member of the board of directors of an irrigation district and a candidate for the board in an upcoming May 10 election filed a federal complaint in the Southern District of Texas's McAllen courthouse objecting to registration requirements for landowners to vote in the election.[348] The complaint sought a temporary restraining order from the judge assigned the case and further declaratory and injunctive relief from a three-judge district court.[349]

The court assigned the case to Judge Ricardo H. Hinojosa,[350] and the chief circuit judge appointed Circuit Judge Emilio M. Garza and Southern District of Texas Judge Randy Crane to join Judge Hinojosa on a three-judge court.[351] Following an April 11 conference in chambers,[352] Judge Hinojosa issued a temporary restraining order on April 18.[353] New registration requirements were enjoined because they had not been precleared pursuant to section 5 of the Voting Rights Act.[354] A state court enjoined the new registration requirements on the same day.[355]

On April 25, the three-judge court issued a preliminary injunction against the new identification requirements for landowner voter registration for lack of preclearance.[356] The court denied a pro se motion to intervene by two plaintiffs seeking to challenge the previous registration re-

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348. Complaint, Shields v. Engelman Irrigation Dist., No. 7:08-cv-116 (S.D. Tex. Apr. 3, 2008), D.E. 1.

349. *Id.*

350. Conference Order, *id.* (Apr. 4, 2008), D.E. 2.

351. Order, *id.* (Apr. 9, 2008), D.E. 3.

Judge Garza retired on January 15, 2015. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

352. Docket Sheet, *Shields*, No. 7:08-cv-116 (S.D. Tex. Apr. 3, 2008).

353. Temporary Restraining Order, *id.* (Apr. 18, 2008), D.E. 12.

354. *Id.*; *see* Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination and requiring that preclearance disputes be heard by a three-judge district court).

On June 25, 2013, the Supreme Court declined to hold section 5 unconstitutional, but the Court did hold unconstitutional the criteria for which jurisdictions require section 5 preclearance. Shelby County v. Holder, 570 U.S. 529 (2013).

355. Order, Shields v. Engelman Irrigation Dist., No. C-356-08-B (Tex. Dist. Ct. 93d Dist. Apr. 18, 2008), *attached as* Ex. 1, Notice, *Shields*, No. 7:08-cv-116 (S.D. Tex. Apr. 18, 2008), D.E. 13; *see* Notice, *Shields*, No. 7:08-cv-116 (S.D. Tex. May 9, 2008), D.E. 25 (noting affirmance by the state court of appeals).

356. Order, *Shields*, No. 7:08-cv-116 (S.D. Tex. Apr. 25, 2008), D.E. 120.

quirements for lack of previous preclearance.[357] On May 9, the court resolved the case with a permanent injunction.[358]

Wrongfully Requiring Photo Identification for Voter Registration

Pakosz v. Orr (John W. Darrah, N.D. Ill. 1:06-cv-5992)

> On the Thursday before the 2006 general election, a pro se plaintiff filed a federal complaint alleging that he was wrongfully prevented from registering to vote. The complaint was docketed on Monday, and the federal judge issued a temporary restraining order that day requiring the defendants to issue the plaintiff a voter-registration card. The defendants had wrongfully required the plaintiff to present photo identification, which was not required by the voter-registration statute.
>
> *Topics:* Voter identification; registration procedures; pro se party.

On the Thursday before the 2006 general election, a pro se plaintiff filed a federal complaint in the Northern District of Illinois alleging that he was wrongfully prevented from registering to vote.[359]

The complaint was docketed on Monday,[360] and Judge John W. Darrah heard the matter at 9:00 a.m. that day.[361] He granted the plaintiff a temporary restraining order: "I take judicial notice of the fact that today is November 6th and that tomorrow is November 7th. I find, therefore, that if a court in equity does not act to protect this right that the right will be lost. Therefore, I'm going to grant the relief sought."[362]

As forms of identification, the plaintiff had provided "two utility bills, a library card, and a letter from U.S. Senator Richard Durbin."[363] He was denied registration because he did not provide state-issued photo identifi-

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357. Order, *id.* (May 9, 2008), D.E. 26; *see* Intervention Motion, *id.* (Apr. 28, 2008), D.E. 21; Order, *id.* (Apr. 25, 2008), D.E. 19 (denying intervention for lack of motion); Intervention Request, *id.* (Apr. 25, 2008), D.E. 18.

358. Order, *id.* (May 9, 2008), D.E. 27.

359. Minutes, Pakosz v. Orr, No. 1:06-cv-5992 (N.D. Ill. Nov. 6, 2006), D.E. 6 [hereinafter May 9, 2008, *Pakosz* Minutes]; Docket Sheet, *id.* (Nov. 2, 2006) [hereinafter *Pakosz* Docket Sheet] (D.E. 1).

360. *Pakosz* Docket Sheet, *supra* note 359.

361. Transcript, *Pakosz*, No. 1:06-cv-5992 (N.D. Ill. Nov. 6, 2006, filed July 13, 2007), D.E. 12 [hereinafter *Pakosz* Transcript]; May 9, 2008, *Pakosz* Minutes, *supra* note 359.

Judge Darrah died on March 23, 2017. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

362. *Pakosz* Transcript, *supra* note 361, at 7.

363. May 9, 2008, *Pakosz* Minutes, *supra* note 359.

cation.[364] Illinois law required "two forms of identification, and except in the case of a homeless individual, one of which must include his or her residence address."[365] The voter-registration statute did not require photo identification.[366] Judge Darrah ruled, "Defendants are ordered to accept Plaintiff's voter registration application and issue a voter's registration card so that Plaintiff may vote on a provisional ballot in the election on November 7, 2006."[367]

At a November 28 status conference, Judge Darrah closed the case as resolved.[368]

Overly Burdensome Voter-Registration Rules

Project Vote v. Blackwell (Kathleen M. O'Malley, N.D. Ohio 1:06-cv-1628)

> In July 2006, public-interest organizations challenged new voter-registration laws as overly burdensome, and the court enjoined the new laws. The court awarded the plaintiffs $321,485.28 in attorney fees and costs.
>
> *Topics:* Registration procedures; attorney fees.

On July 6, 2006, six public-interest organizations and three individuals filed a federal complaint in the Northern District of Ohio, challenging recently enacted voter-registration laws and interpretations of those laws by Ohio's secretary of state.[369] The core allegation was that the new registration rules would "severely impact third-party voter-registration efforts in Ohio and hinder low-income, minority, and disabled citizens from registering to vote."[370] One week later, the plaintiffs filed a motion for a preliminary injunction.[371]

The court assigned the case to Judge Kathleen M. O'Malley.[372] She learned that for injunction cases involving elections, it was usually very

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364. *Id.*

365. 10 Ill. Comp. Stat. 5/4-10; *see Pakosz* Minutes, *supra* note 359.

366. 10 Ill. Comp. Stat. 5/4-10; *see Pakosz* Minutes, *supra* note 359.

367. May 9, 2008, *Pakosz* Minutes, *supra* note 359.

368. Minutes, Pakosz v. Orr, No. 1:06-cv-5992 (N.D. Ill. Nov. 28, 2006), D.E. 11.

369. Complaint, Project Vote v. Blackwell, No. 1:06-cv-1628 (N.D. Ohio July 6, 2006), D.E. 1; Project Vote v. Blackwell, 455 F. Supp. 2d 694, 696–97 (N.D. Ohio 2006).

370. *Project Vote*, 455 F. Supp. 2d at 697.

371. Preliminary-Injunction Motion, *Project Vote*, No. 1:06-cv-1628 (N.D. Ohio July 13, 2006), D.E. 3; *Project Vote*, 455 F. Supp. 2d at 697.

372. Docket Sheet, *Project Vote*, No. 1:06-cv-1628 (N.D. Ohio July 6, 2006).

Tim Reagan interviewed Judge O'Malley for this report by telephone on July 19, 2012. Judge O'Malley was elevated to a seat on the Court of Appeals for the Federal Circuit on December 27, 2010, and she retired on March 11, 2022. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

important for boards of elections to participate.[373] They are the experts on how elections are conducted, and they can provide important feasibility information about possible remedies.[374] The parties agreed that the boards should be included, and Judge O'Malley gave the boards thirty days to prepare for their participation.[375] On August 2, she set a case-management conference for August 17.[376] At the conference, she set a preliminary-injunction hearing for September 1.[377]

After the hearing, Judge O'Malley orally issued a preliminary injunction.[378] When time was of the essence, she would sometimes rule from the bench and later provide a detailed written opinion to facilitate possible appellate review.[379] The written opinion came on September 8.[380] In essence, she found that extra burdens placed on persons who were compensated for registering voters were not sufficiently justified, and a requirement that persons registering another person personally submit the registration card to an election office improperly chilled voter registration.[381] Ohio had backed away from its defense of the most problematic provisions and elected not to appeal the injunction against the others.[382]

On February 11, 2008, after additional briefing, Judge O'Malley converted her preliminary injunction to summary judgment.[383] On March 31, 2009, she awarded the plaintiffs $321,485.28 in attorney fees and costs.[384]

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373. Interview with Judge Kathleen M. O'Malley, July 19, 2012.

374. *Id.*

375. *Id.*

376. Order, *Project Vote*, No. 1:06-cv-1628 (N.D. Ohio Aug. 2, 2006), D.E. 14; *see Project Vote*, 455 F. Supp. 2d at 697.

377. Order, *Project Vote*, No. 1:06-cv-1628 (N.D. Ohio Aug. 17, 2006), D.E. 22; *see Project Vote*, 455 F. Supp. 2d at 697.

378. *Project Vote*, 455 F. Supp. 2d at 697–98.

379. Interview with Judge Kathleen M. O'Malley, July 19, 2012.

380. *Project Vote*, 455 F. Supp. 2d 694; *see* Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 Wm. & Mary Bill Rts. J. 453, 487–88 (2008).

381. *Project Vote*, 455 F. Supp. 2d at 702–07; *see* Tokaji, *supra* note 380, at 487–88.

382. Interview with Judge Kathleen M. O'Malley, July 19, 2012.

383. Opinion, Project Vote v. Blackwell, No. 1:06-cv-1628 (N.D. Ohio Feb. 11, 2008), D.E. 59, 2008 WL 397585 (noting that the parties provided very light additional briefing).

384. Opinion, *id.* (Mar. 31, 2009), D.E. 69, 2009 WL 917737.

Enhanced Requirements for Registering and Voting in Arizona

González v. Arizona (2:06-cv-1268), Inter Tribal Council of Arizona v. Brewer (3:06-cv-1362), and Navajo Nation v. Brewer (3:06-cv-1575) (Roslyn O. Silver, D. Ariz.)

> Four months before Arizona's 2006 primary election, a federal complaint challenged proposition 200, a 2004 initiative that enhanced requirements for proof of citizenship for voter registration and proof of identity and residence for voting. The district court acted quickly on the plaintiffs' motions for a temporary restraining order but denied injunctive relief. In 2012, the court of appeals determined en banc that the proof of citizenship procedure for registration is superseded by the National Voter Registration Act but the identification requirement for voting is not. The Supreme Court agreed that the required federal registration form did not permit additional evidence of citizenship.
>
> *Topics:* Citizenship; voter identification; registration procedures; National Voter Registration Act; interlocutory appeal; recusal; section 5 preclearance; primary election.

On May 9, 2006, four months before Arizona's primary election, five citizens and five organizations filed a federal challenge in the District of Arizona's Phoenix courthouse to Arizona's 2004 revision of its voter-registration-and-identification law resulting from the passage of proposition 200.[385] Proposition 200's revision received preclearance from the Justice Department pursuant to section 5 of the Voting Rights Act on May 6, 2005.[386]

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385. Complaint, González v. Arizona, No. 2:06-cv-1268 (D. Ariz. May 9, 2006), D.E. 1 [hereinafter *González* Complaint]; Purcell v. Gonzalez, 549 U.S. 1, 3 (2006); González v. Arizona, 435 F. Supp. 2d 997, 999 (D. Ariz. 2006); *see Lawsuit Questions Legality of ID Rules*, Ariz. Republic, May 10, 2006, at B1; Daniel P. Tokaji, *Leave It to the Lower Courts: On Judicial Intervention in Election Administration*, 68 Ohio St. L.J. 1065, 1087 (2007) [hereinafter *Judicial Intervention*]; *see also* Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 Wm. & Mary Bill Rts. J. 453, 491 (2008) [hereinafter *Reform*] (describing the proposition as "[p]robably the most onerous recent registration requirement").

386. *Purcell*, 549 U.S. at 3; *see* Pub. L. No. 89-110, § 5 (1965), 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination).

On June 25, 2013, the Supreme Court declined to hold section 5 unconstitutional, but the Court did hold unconstitutional the criteria for which jurisdictions require section 5 preclearance. Shelby County v. Holder, 570 U.S. 529 (2013).

The plaintiffs objected to the procedural specifics of proof of citizenship for registration and proof of identity and residence for voting.[387] With their complaint, the plaintiffs filed an application for a temporary restraining order[388] and a motion for a preliminary injunction.[389]

The court originally assigned the case to Judge Neil V. Wake, but he recused himself, so the case was randomly reassigned to Judge Roslyn O. Silver.[390] At a hearing in court on May 12, Judge Silver declined to issue a temporary restraining order and set another hearing for May 17.[391] On May 16, the plaintiffs filed a second temporary-restraining-order motion.[392] On May 17, Judge Silver set argument on the second motion for June 9.[393] On June 19, she denied immediate injunctive relief, holding that Arizona's new proof of citizenship requirements did not violate the National Voter Registration Act (NVRA):[394] "there is no indication in the language of the NVRA itself that states are prohibited from requiring additional information, such as proof-of-citizenship, when processing voter registration forms."[395]

On May 24, six organizations and a member of Arizona's house of representatives filed a similar complaint in the Prescott courthouse.[396] Granting the plaintiffs' motion,[397] Judge Silver consolidated this action with the

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387. *González* Complaint, *supra* note 385.

388. Temporary-Restraining-Order Application, *González*, No. 2:06-cv-1268 (D. Ariz. May 9, 2006), D.E. 3.

389. Preliminary-Injunction Motion, *id.* (May 9, 2006), D.E. 7.

390. Reassignment Order, *id.* (May 11, 2006), D.E. 10.

For this report, Tim Reagan interviewed Judge Silver and her law clerk Mike Newman by telephone on September 11, 2012.

391. Minutes, *González*, No. 2:06-cv-1268 (D. Ariz. May 12, 2006), D.E. 16.

392. Temporary-Restraining-Order Motion, *id.* (May 16, 2006), D.E. 13.

393. Minutes, *id.* (May 17, 2006), D.E. 26; *see* Minutes, *id.* (June 9, 2006), D.E. 64; *see also Voter Sign-Up Rules Assailed*, Ariz. Republic, June 10, 2006, at B9.

394. Pub. L. No. 103-31, 107 Stat. 77 (1993), *as amended*, 52 U.S.C. §§ 20501–20511; *see* Robert Timothy Reagan, Motor Voter: The National Voter Registration Act (Federal Judicial Center 2014).

395. González v. Arizona, 435 F. Supp. 2d 997, 1001 (D. Ariz. 2006); *see Request to Halt ID Rules Rejected*, Ariz. Republic, June 20, 2006, at B1; Tokaji, *Reform*, *supra* note 385, at 492 (determining that "the district court's analysis is in error").

396. Complaint, Inter Tribal Council of Ariz. v. Brewer, No. 3:06-cv-1362 (D. Ariz. May 24, 2006), D.E. 1; *see Another Group Challenging Prop. 200 Voting Provisions*, Ariz. Republic, May 25, 2006, at B3.

397. Consolidation Motion, *Inter Tribal Council of Ariz.*, No. 3:06-cv-1362 (D. Ariz. May 30, 2006), D.E. 4.

first one on May 31.[398] On June 20, the Navajo Nation and one of its members filed a third similar complaint in Prescott.[399] On August 4, Judge Silver consolidated this case with the other two[400] on Arizona's motion.[401]

On September 11, Judge Silver declined to interfere with the next day's primary election and denied the plaintiffs a preliminary injunction.[402] She issued findings of fact and conclusions of law on October 12.[403] On interlocutory appeal, however, a motions panel of the court of appeals enjoined application of proposition 200 on October 5.[404] The Supreme Court vacated the injunction on October 20.[405] In its per curiam opinion, the Supreme Court scolded the district court for not providing the court of appeals with findings of fact and conclusions of law more promptly: "These findings were important because resolution of legal questions in the Court of Appeals required evaluation of underlying factual issues."[406]

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398. Consolidation Order, *González*, No. 2:06-cv-1268 (D. Ariz. June 1, 2006), D.E. 28; *González*, 435 F. Supp. 2d at 999 n.3.

399. Complaint, Navajo Nation v. Brewer, No. 3:06-cv-1575 (D. Ariz. June 20, 2006), D.E. 1.

400. Consolidation Order, *González*, No. 2:06-cv-1268 (D. Ariz. Aug. 4, 2006), D.E. 142, 2006 WL 2246365.

401. Consolidation Motion, *id.* (June 30, 2006), D.E. 92.

402. Findings of Fact and Conclusions of Law, *id.* (Oct. 12, 2006), D.E. 219, 2006 WL 3627297; Order, *id.* (Sept. 11, 2006), D.E. 183; *see* Tokaji, *Judicial Intervention*, *supra* note 385, at 1087.

403. *González* Findings of Fact and Conclusions of Law, *supra* note 402; *see* Tokaji, *Judicial Intervention*, *supra* note 385, at 1087.

404. Docket Sheet, Nos. 06-16702 and 06-16706 (9th Cir. Oct. 5, 2006); Order, *id.* (Oct. 9, 2006), *filed as* Order, *González*, No. 2:06-cv-1268 (D. Ariz. Oct. 16, 2006), D.E. 221 (denying reconsideration); *see* Tokaji, *Judicial Intervention*, *supra* note 385, at 1087–88.

405. Purcell v. Gonzalez, 549 U.S. 1 (2006); *see* Edward B. Foley, *The Future of* Bush v. Gore*?*, 68 Ohio St. L.J. 925, 995–96 (2007); Daniel P. Tokaji, Election Law in a Nutshell 163–64, 195 (2013); *see also* Richard L. Hasen, The Untimely Death of *Bush v. Gore*, 60 Stan. L. Rev. 1 (2007); Tokaji, *Judicial Intervention*, *supra* note 385, at 1067 ("an opinion that demonstrated a failure to think carefully through the appropriate role of the federal judiciary in election administration and threatens to distort equal protection analysis of claims in the area"); *id.* at 1088–91. *See generally* Stephen Vladeck, The Shadow Docket 204–09 (2023).

406. *Purcell*, 549 U.S. at 3; *see* Richard L. Hasen, Reining in the *Purcell* Principle, 43 Fla. State Univ. L. Rev. 427, 428 (2016) (observing that eight years later the Supreme Court decided emergency election cases without providing reasons); *see also id.* at 461 (extolling the virtues of issuing reasons "weeks or months after the Court issues an emergency order").

Following a tradition in the Ninth Circuit, where district judges were encouraged to bring misunderstandings to the attention of appellate judges, Judge Silver wrote the Chief Justice in an effort to explain the difficulties of striking a balance between quick action and a complete record.[407]

Although rulings by the Supreme Court and Judge Silver resulted in proposition 200's applying to the 2006 election, when Judge Silver offered to present identification at her polling place she was told that the poll workers would not be enforcing proposition 200 at that location.[408]

On April 17, 2012, the court of appeals determined en banc that the proof-of-citizenship procedure for registration was superseded by the NVRA, but the identification requirement for voting was not inconsistent with federal law.[409]

On June 17, 2013, the Supreme Court agreed that "the fairest reading of the statute is that a state-imposed requirement of evidence of citizenship not required by the Federal Form is inconsistent with the NVRA's mandate that States accept and use the Federal Form."[410] Arizona decided, therefore, to apply its enhanced registration requirements only to state and local elections.[411]

Computerized Voter-Registration List

United States v. Alabama (W. Keith Watkins, M.D. Ala. 2:06-cv-392)

The attorney general sued to enforce Alabama's compliance with the Help America Vote Act's requirements for voter-registration

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407. Interview with Judge Roslyn O. Silver and her law clerk Mike Newman, Sept. 11, 2012.

408. *Id.*

409. González v. Arizona, 677 F.3d 383 (9th Cir. 2012); *see Court Strikes Down Part of Voter-ID Law*, Ariz. Republic, Apr. 18, 2012, at B1; *see* Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 Harv. C.R.-C.L. L. Rev. 439, 451–52, 454–55 (2015); Daniel P. Tokaji, *HAVA in Court: A Summary and Analysis of Litigation*, 12 Election L.J. 203, 211 (2013).

410. Ariz. v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 15 (2013) (quotation marks omitted); *see id.* at 19 (noting that "a State may request that the [Election Assistance Commission] alter the Federal Form to include information the State deems necessary to determine eligibility"); *see also* Robert Barnes, *Justices Reject Ariz. Law on Voting*, Wash. Post, June 18, 2013, at A1; Adam Liptak, *State Can't Ask Voters for Proof of Citizenship*, N.Y. Times, June 18, 2013, at A1.

411. *See Re* Voter Registration, Ariz. Att'y Gen. Op. No. I13-011 (Oct. 7, 2013); *Ballots Will Have Two-Track System*, N.Y. Times, Oct. 8, 2013, at A14; Cindy Carcamo, *New Voting Rules Planned*, L.A. Times, Oct. 8, 2013, at 2; Fernanda Santos & John Eligon, *2 States Plan 2-Tier System for Balloting*, N.Y. Times, Oct. 12, 2013, at A1 (reporting that Kansas and Arizona would adopt separate voter registrations for federal and state elections).

databases. The judge appointed the governor as a special master to order compliance.

Topics: Help America Vote Act (HAVA); special master.

Five weeks before Alabama's June 6, 2006, primary election, which included primaries for federal offices, Attorney General Alberto Gonzales filed a federal action seeking enforcement of the Help America Vote Act (HAVA)[412] in the Middle District of Alabama, the district that includes Montgomery, the state's capital.[413] With the complaint, the government filed a motion for a preliminary injunction.[414] On the following day, the court assigned the case to Judge W. Keith Watkins.[415]

Alabama was not in compliance with HAVA's section 303 respecting "computerized statewide voter registration list requirements and requirements for voters who register by mail."[416] On May 3, the lawsuit's third day, Judge Watkins issued an order to show cause on May 30 why he should not issue a preliminary injunction forbidding failure to comply with HAVA and requiring a plan of compliance.[417] He issued the order on papers alone, without a proceeding, as a way to get the case moving.[418]

At the May 30 hearing, Judge Watkins issued preliminary-injunction instructions orally.[419] A written order followed one week later, the day after the primary election.[420]

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412. Pub. L. No. 107-252, 116 Stat. 1666 (2002), *as amended*, 52 U.S.C. §§ 20901–21145. *See generally* Marie Leary & Robert Timothy Reagan, The Help America Vote Act (Federal Judicial Center 2012); Symposium, *HAVA @ 10*, 12 Election L.J. 111 (2013).

413. Complaint, United States v. Alabama, No. 2:06-cv-392 (M.D. Ala. May 1, 2006), D.E. 1; *see* Mary Orndorff, *U.S. Sues State Over Voter Database*, Birmingham News, May 3, 2006, at 6C.

414. Preliminary-Injunction Brief, *United States v. Alabama*, No. 2:06-cv-392 (M.D. Ala. May 1, 2006), D.E. 3; Preliminary-Injunction Motion, *id.* (May 1, 2006), D.E. 2.

415. Docket Sheet, *id.* (May 1, 2006).

Tim Reagan interviewed Judge Watkins for this report by telephone on June 6, 2012.

416. Preliminary Injunction at 2, *United States v. Alabama*, No. 2:06-cv-392 (M.D. Ala. June 7, 2006), D.E. 16 [hereinafter *United States v. Alabama* Preliminary Injunction], 2006 WL 1598839; *see* HAVA § 303, 52 U.S.C. § 21083 (2014); *see also* Transcript at 10, *United States v. Alabama*, No. 2:06-cv-392 (M.D. Ala. May 30, 2006, filed June 30, 2006), D.E. 26 [hereinafter *United States v. Alabama* Transcript] ("The State has admitted to an actual violation . . . .").

417. Order to Show Cause, *United States v. Alabama*, No. 2:06-cv-392 (M.D. Ala. May 3, 2006), D.E. 4.

418. Interview with Judge W. Keith Watkins, June 6, 2012.

419. *United States v. Alabama* Transcript, *supra* note 416, at 36–40; Minute Entry, *United States v. Alabama*, No. 2:06-cv-392 (M.D. Ala. May 30, 2006), D.E. 14.

420. *United States v. Alabama* Preliminary Injunction, *supra* note 416.

The preliminary injunction required Alabama to present a compliance plan by June 29, to be reviewed at a July 20 hearing.[421] At the hearing, Judge Watkins ordered compliance by August 31, 2007, in time for the 2008 primary election.[422]

Because Alabama's secretary of state said that she could not ensure compliance with the court's order, Judge Watkins appointed Alabama's governor as a special master to supervise compliance.[423] Before he appointed the governor, Judge Watkins consulted with a former secretary of state, who told the judge that only the governor had the authority to achieve HAVA compliance.[424] Anyone else would have to seek numerous compliance orders from the judge.[425]

Over the couple of weeks following the July 20 hearing, the chair of Alabama's Democratic Party[426] and the chair of the Alabama Democratic Conference[427] moved to intervene to challenge appointment of the Republican governor as the special master. Judge Watkins held a public hearing on the motions;[428] he thought it was important to hear the concerns in open court.[429] He held, however, that the motions were not timely.[430]

On October 24, 2007, Judge Watkins determined that Alabama was in compliance with HAVA.[431] Governor Bob Riley submitted his twenty-first and final status report on August 22, 2008.[432] The court entered a final order and judgment on September 18.[433] The governor's special-master work was considerably more successful than Judge Watkins even imagined it would be.[434]

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421. *Id.* at 11; *United States v. Alabama* Transcript, *supra* note 416, at 39.

422. Order at 4, *United States v. Alabama*, No. 2:06-cv-392 (M.D. Ala. July 21, 2006), D.E. 38 [hereinafter July 21, 2006, *United States v. Alabama* Order].

423. Special-Master Order, *id.* (Aug. 8, 2006), D.E. 64; July 21, 2006, *United States v. Alabama* Order, *supra* note 422, at 4–5.

424. Interview with Judge W. Keith Watkins, June 6, 2012.

425. *Id.*

426. Motion to Intervene, *United States v. Alabama*, No. 2:06-cv-392 (M.D. Ala. July 27, 2006), D.E. 42.

427. Motion to Intervene, *id.* (Aug. 1, 2006), D.E. 56.

428. Minutes, *id.* (Aug. 2, 2006), D.E. 59.

429. Interview with Judge W. Keith Watkins, June 6, 2012.

430. Opinion at 12–17 & n.14, *United States v. Alabama*, No. 2:06-cv-392 (M.D. Ala. Aug. 8, 2006), D.E. 63, 2006 WL 2290726.

431. Final Order and Judgment at 2, *id.* (Sept. 18, 2008), D.E. 160 [hereinafter *United States v. Alabama* Final Order and Judgment].

432. Final Special-Master Status Report, *id.* (Aug. 22, 2008), D.E. 153.

433. *United States v. Alabama* Final Order and Judgment, *supra* note 431.

434. Interview with Judge W. Keith Watkins, June 6, 2012.

In resolving this case, Judge Watkins was mindful that political considerations should not have anything to do with how a federal judge resolves an election case, and this was much more about technology than it was about policy.[435]

In 2006, Attorney General Gonzales also filed a HAVA action against New York in the Northern District of New York.[436] Three weeks later, Judge Gary L. Sharpe issued a preliminary injunction requiring New York to submit to the court a plan for compliance.[437] Court supervision of New York's compliance efforts continued until December 3, 2014.[438]

Strict Voter-Registration Rules

Citizens Alliance for Secure Elections v. Vu (Paul R. Matia, N.D. Ohio 1:04-cv-2147)

> In a challenge to a county's voter-registration procedures, claiming that they were so strict as to disfranchise voters, the court determined, on the case's third day, that provisional-ballot procedures were sufficient to protect voters from disfranchisement.
>
> *Topics:* Registration procedures; provisional ballots.

On October 25, 2004, citizens' organizations and would-be voters sued Cuyahoga County's board of elections in the Northern District of Ohio's Cleveland courthouse claiming that the county's overly strict enforcement of voter-registration requirements and insufficient efforts to assist would-be voters in correcting registration errors would disfranchise voters, especially minority voters, in the general election eight days later.[439] With the

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435. *Id.*

436. Complaint, United States v. N.Y. State Bd. of Elections, No. 1:06-cv-263 (N.D.N.Y. Mar. 1, 2006), D.E. 1; *see* Michael Cooper, *New York Is Sued by U.S. on Delay of Vote System*, N.Y. Times, Mar. 2, 2006, at A1 ("The first lawsuit the federal government has filed to force a state to comply with the voting guidelines enacted by Congress after the 2000 election debacle."); Michael Cooper, *U.S. Warns Albany of Suit Over Slow Vote Modernization*, N.Y. Times, Jan. 12, 2006, at B1; Orndorff, *supra* note 413.

437. Preliminary Injunction, *N.Y. State Bd. of Elections*, No. 1:06-cv-263 (N.D.N.Y. Mar. 23, 2006), D.E. 38.

438. Docket Sheet, *id.* (Mar. 1, 2006) (D.E. 450); *see* Status Report, *id.* (June 10, 2014), D.E. 444 (183d status report).

439. Complaint, Citizens Alliance for Secure Elections v. Vu, No. 1:04-cv-2147 (N.D. Ohio Oct. 25, 2004), D.E. 1; *see* Amended Complaint, *id.* (Oct. 26, 2010), D.E. 6; *see also* John Caniglia, *Suit Says Cuyahoga County Board Botched Voter Registrations*, Cleveland Plain Dealer, Oct. 26, 2004, at B4; Edward B. Foley, *The Promise and Problems of Provisional Voting*, 73 Geo. Wash. L. Rev. 1193, 1197 (2005); Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 Wm. & Mary Bill Rts. J. 453, 477 (2008).

complaint, the plaintiffs filed a motion for a temporary restraining order.[440]

The court assigned the case to Judge Paul R. Matia,[441] who, on the following day, ordered a hearing at 2:30 p.m.[442] The hearing lasted an hour and a half;[443] on the third day, Judge Matia denied the plaintiffs immediate relief because "the provisional vote mechanism will allow voters whose names do not appear on the final list of registered voters to cast ballots that will be counted if it is later determined that their names should have been listed."[444]

On the day before election day, two voters moved to intervene to defend the county's strict enforcement of registration requirements.[445] On election day, Judge Matia set that day as the due date for opposition papers.[446] Plaintiffs responded by voluntarily dismissing the action.[447]

Although Judge Matia acted quickly in this case, he strove to take enough time to rule correctly.[448]

Identification Numbers and Voter Registration

Lucas County Democratic Party v. Blackwell (James G. Carr, N.D. Ohio 3:04-cv-7646)

> Eighteen days before a general election, a suit alleged that a directive by Ohio's secretary of state not to process voter-registration forms that left blank the box for a driver's license or Social Security number violated the Help America Vote Act and the National Voter Registration Act. The court denied immediate relief, because there was not enough time to develop an evidentiary record.
>
> *Topics:* Registration procedures; Help America Vote Act (HAVA); National Voter Registration Act; laches.

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440. Temporary-Restraining-Order Motion, *Citizens Alliance*, No. 1:04-cv-2147 (N.D. Ohio Oct. 25, 2004), D.E. 4.

441. Tim Reagan interviewed Judge Matia for this report by telephone on May 1, 2012. Judge Matia retired on May 31, 2005. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

442. Order, *Citizens Alliance*, No. 1:04-cv-2147 (N.D. Ohio Oct. 26, 2004), D.E. 8.

443. Minutes, *id.* (Oct. 26, 2004), D.E. 9.

444. Order at 3–4, *id.* (Oct. 27, 2004), D.E. 10.

445. Intervention Motion, *id.* (Nov. 1, 2004), D.E. 11.

446. Order, *id.* (Nov. 2, 2004), D.E. 13 (noting that opposition papers were due at 4:00 p.m.).

447. Order, *id.* (Nov. 2, 2004), D.E. 15; Notice, *id.* (Nov. 2, 2004), D.E. 14.

448. Interview with Paul R. Matia, May 1, 2012.

On October 15, 2004, the Democratic Parties of Ohio and Lucas County, the county that includes Toledo, filed a federal challenge in the Toledo courthouse of the Northern District of Ohio to instructions provided by Ohio's secretary of state to county boards of elections, alleging that they violated the National Voter Registration Act[449] and the Help America Vote Act (HAVA)[450] with respect to a requirement for provision of a driver's license number or the last four digits of a Social Security number when registering to vote at state offices.[451] The plaintiffs filed with their complaint a motion for a preliminary injunction.[452]

The court originally assigned the case to Judge David A. Katz, but Judge Katz and Judge James G. Carr agreed, five days after the action was filed, that it was related to an earlier filed case before Judge Carr concerning application of HAVA to provisional ballots.[453]

On the next day, relying on the filings alone, Judge Carr issued a sua sponte denial of the motion for a preliminary injunction.[454]

> This case involves box 10 on Ohio's voter registration form when a prospective voter registers in person. Box 10 reads "Ohio driver's license No. OR last 4 digits of Social Security No. (required)." . . .
>
> In December, 2003, defendant issued a memorandum to all Ohio County Board of Elections informing them how to process voter registration forms. In his memorandum, defendant informed the Boards that, if

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449. Pub. L. No. 103-31, 107 Stat. 77 (1993), *as amended*, 52 U.S.C. §§ 20501–20511. *See generally* Robert Timothy Reagan, Motor Voter: The National Voter Registration Act (Federal Judicial Center 2014).

450. Pub. L. No. 107-252, 116 Stat. 1666 (2002), *as amended*, 52 U.S.C. §§ 20901–21145. *See generally* Marie Leary & Robert Timothy Reagan, The Help America Vote Act (Federal Judicial Center 2012); Symposium, *HAVA @ 10*, 12 Election L.J. 111 (2013).

451. Complaint, Lucas Cty. Democratic Party v. Blackwell, No. 3:04-cv-7646 (N.D. Ohio Oct. 15, 2004), D.E. 1; *see* Tom Beyerlein, *Ohio Democrats File Federal Lawsuit Against Blackwell*, Dayton Daily News, Oct. 16, 2004, at B3; Edward B. Foley, *The Promise and Problems of Provisional Voting*, 73 Geo. Wash. L. Rev. 1193, 1197 (2005); Sandy Theis, *Democrats' Suit: Blackwell Trying to Stymie New Voters*, Cleveland Plain Dealer, Oct. 16, 2004, at B4.

452. Preliminary-Injunction Motion, *Lucas Cty. Democratic Party*, No. 3:04-cv-7646 (N.D. Ohio Oct. 15, 2004), D.E. 2.

453. Order, *id.* (Oct. 20, 2004), D.E. 4; *see* Sandusky Cty. Democratic Party v. Blackwell, 339 F. Supp. 2d 975 (N.D. Ohio), *aff'd in part and rev'd in part*, 387 F.3d 565 (6th Cir. 2004).

Tim Reagan interviewed Judge Carr for this report by telephone on June 18, 2012. Judge Katz died on July 26, 2016. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

454. Lucas Cty. Democratic Party v. Blackwell, 341 F. Supp. 2d 861 (N.D. Ohio 2004); Interview with Judge James G. Carr, June 18, 2012.

> a person who registered in person left box 10 blank, the Boards were not to process the registration forms. If, however, box 10 was completed with an answer of "none," the Boards were to process the registrations.[455]

The plaintiffs wanted Ohio to process registrations with a blank box 10.[456]

Judge Carr refused the plaintiffs a preliminary injunction because "there is not enough time between now and the election to develop the evidentiary record necessary to determine if the plaintiffs are likely to succeed on the merits of their claim" and the plaintiffs did not explain why they waited until so long after the secretary issued his instructions and so close to the 2004 election to file the suit.[457]

On December 20, Judge Carr held a case-management conference and accepted the plaintiffs' voluntary dismissal of the case.[458]

Correcting Imperfect Voter Registrations

Diaz v. Hood (James Lawrence King, S.D. Fla. 1:04-cv-22572)

> Eight days after voter registration closed for the 2004 general election, three would-be voters and four unions filed a federal complaint alleging that five counties were improperly failing to process and approve voter registrations. At the end of the week, the district court heard a motion to expedite the case; at the end of the following week, the court heard a motion for a preliminary injunction. Four days later, the court dismissed the case for lack of standing, because the plaintiffs either cured or refused to cure their registration defects. In 2005, the court of appeals reversed the dismissal. The district court ruled against the plaintiffs again in 2006, but without prejudice. After a five-day bench trial on a third amended complaint, the court again ruled against the plaintiffs, finding the firm deadline for voter registration to be constitutionally reasonable.
>
> *Topics:* Registration procedures; National Voter Registration Act; intervention; recusal.

On Tuesday afternoon, October 12, 2004, eight days after the close of voter registration, three would-be voters and four unions filed a federal complaint in the Southern District of Florida's Miami courthouse against Florida's secretary of state and the supervisors of elections for five counties—the three southern-most Atlantic counties in the Southern District (Palm

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455. *Lucas Cty. Democratic Party*, 341 F. Supp. 2d at 862–63.

456. *Id.* at 863.

457. *Id.*; *see* Richard L. Hasen, The Voting Wars 122 (2012).

458. Order, *Lucas Cty. Democratic Party*, No. 3:04-cv-7646 (N.D. Ohio Dec. 30, 2004), D.E. 9.

Beach, Broward, and Miami-Dade), another Atlantic county in the Middle District (Duval), and an interior county in the Middle District (Orange)—alleging that the counties were improperly failing to process and approve voter registrations.[459] With their complaint, the plaintiffs filed a motion for expedition and consolidation of a motion for a preliminary injunction with a trial on the merits.[460] On Wednesday, Judge James Lawrence King set a hearing on the expedition motion for Friday morning at the Miami courthouse named after him.[461] Also on Wednesday, the plaintiffs filed their preliminary-injunction motion.[462]

Judge King heard the expedition motion on Friday.[463] He always had hearings in a courtroom, never in chambers.[464] He would have heard the motion on Thursday, but he wanted to accommodate attorneys who had to travel for the hearing.[465] His motto in a time-sensitive case was "jump right on it."[466] Filers should be ready to proceed at the moment of filing; respondents should be ready shortly thereafter.[467]

An attorney for one of the counties had been a law clerk for Judge King a few decades earlier, and he brought this to the attention of the other parties, but there was no suggestion of recusal.[468]

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459. Complaint, Diaz v. Hood, No. 1:04-cv-22572 (S.D. Fla. Oct. 12, 2004), D.E. 1; Diaz v. Cobb, 541 F. Supp. 2d 1319, 1321 (S.D. Fla. 2008); Diaz v. Cobb, 475 F. Supp. 2d 1270, 1273 (S.D. Fla. 2007); Diaz v. Cobb, 435 F. Supp. 2d 1206, 1208 (S.D. Fla. 2006); Diaz v. Hood, 342 F. Supp. 2d 1111, 1112–14 (S.D. Fla. 2004); Transcript at 5–6, *Diaz*, No. 1:04-cv-22572 (S.D. Fla. Oct. 15, 2004, filed Oct. 20, 2004), D.E. 47 [hereinafter *Diaz* Transcript] (noting that the complaint was filed at 4:22 p.m.); *see* Gary Fineout & Jay Weaver, *Florida Sued Over Rejected Voters*, Miami Herald, Oct. 14, 2004, at 1B.

460. Expedition Motion, *Diaz*, No. 1:04-cv-22572 (S.D. Fla. Oct. 12, 2004), D.E. 2; *Diaz*, 342 F. Supp. 2d at 1114.

461. Order, *Diaz*, No. 1:04-cv-22572 (S.D. Fla. Oct. 13, 2004), D.E. 5; *Diaz*, 342 F. Supp. 2d at 1114.

Tim Reagan interviewed Judge King for this report by telephone on October 1, 2012.

462. Preliminary-Injunction Motion, *Diaz*, No. 1:04-cv-22572 (S.D. Fla. Oct. 13, 2004), D.E. 7; *Diaz*, 342 F. Supp. 2d at 1114.

463. *Diaz* Transcript, *supra* note 459; Minutes, *Diaz*, No. 1:04-cv-22572 (S.D. Fla. Oct. 15, 2004), D.E. 25; *see Diaz* Transcript, *supra* note 459, at 6, 11 (noting that expedition was not opposed).

464. Interview with Judge James Lawrence King, Oct. 1, 2012.

465. *Diaz* Transcript, *supra* note 459, at 16.

466. Interview with Judge James Lawrence King, Oct. 1, 2012.

467. *Id.*

468. *Id.*

On Tuesday of the second week, Judge King granted expedition and set a preliminary-injunction hearing for the following Friday.[469] Also on that Tuesday, the Republican Party moved to intervene as a defendant.[470]

> Clearly the old adage, "justice delayed is justice denied," was quickly discerned by all the attorneys and the Court to be particularly true when considering the issues raised by this important litigation. The absolute deadline for a resolution of these issues was literally "set in concrete" by the November 2, 2004 general election. It also became abundantly clear from the statements of the respective attorneys for the Defendants, that if a decision was not rendered within a sufficient number of days prior to the November 2nd election, that any Order regardless of the outcome, would be impossible to perform due to the passage of time.[471]

On the day of the preliminary-injunction hearing, the plaintiffs attempted to file an amended complaint, but the defendants objected.[472] Judge King had not received the amended complaint from the clerk's office in another building by the time of hearing, and the defendants had little opportunity to respond to it; the plaintiffs withdrew the amended complaint.[473]

Four days after the preliminary-injunction hearing, on October 26, Judge King dismissed the case for lack of standing.[474] Two individual plaintiffs declined to cure registration defects upon notice of them, the other individual plaintiff did cure and was registered to vote, and the union plaintiffs had not identified specific members who had been harmed by the defendants.[475]

On September 28, 2005, the court of appeals reversed the dismissal, but the court noted that Florida law had changed in the interim.[476] On May 2,

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469. Order, Diaz v. Hood, No. 1:04-cv-22572 (S.D. Fla. Oct. 19, 2004), D.E. 44; Diaz v. Hood, 342 F. Supp. 2d 1111, 1115 (S.D. Fla. 2004).

470. Intervention Motion, *Diaz*, No. 1:04-cv-22572 (S.D. Fla. Oct. 19, 2004), D.E. 34.

471. *Diaz*, 342 F. Supp. 2d at 1115; *see* Jay Weaver, *Judge Takes Up Voter Applications*, Miami Herald, Oct. 16, 2004, at 6B ("King said he had never experienced such a fast hearing schedule in his more than three decades on the federal bench.").

472. Motion to Strike Amended Complaint, *Diaz*, No. 1:04-cv-22572 (S.D. Fla. Oct. 21, 2004), D.E. 56.

473. *Diaz*, 342 F. Supp. 2d at 1115.

474. *Id.* at 1120; Diaz v. Cobb, 541 F. Supp. 2d 1319, 1322 (S.D. Fla. 2008); Diaz v. Cobb, 475 F. Supp. 2d 1270, 1274 (S.D. Fla. 2007); Diaz v. Cobb, 435 F. Supp. 2d 1206, 1208 (S.D. Fla. 2006); *see* Jay Weaver, *Voting Suit Voided*, Miami Herald, Oct. 27, 2004, at 3B.

475. *Diaz*, 342 F. Supp. 2d at 1117–20.

476. Opinion, Diaz v. Secretary of State of Florida, No. 04-15539 (11th Cir. Sept. 28, 2005), 2005 WL 2402748; *Diaz*, 541 F. Supp. 2d at 1322 & n.3; *Diaz*, 475 F. Supp. 2d at

2006, Judge King denied the Republican Party's motion to intervene.[477] Reviewing a second amended complaint,[478] on June 20, Judge King ruled that Florida's rejection of voter registrations for failure to check certain boxes when the correct boxes to check were implied by other information on the application did not violate the Voting Rights Act or the National Voter Registration Act, but the plaintiffs could attempt to replead constitutional claims.[479]

Reviewing a third amended complaint,[480] on February 27, 2007, Judge King dismissed all claims except for a constitutional challenge to Florida's denial of a grace period to amend incomplete voter-registration applications.[481] After a five-day bench trial in 2008, Judge King denied the plaintiffs relief, finding the firm deadline for voter registration to be constitutionally reasonable.[482]

A Party's Standing to Challenge Voter-Registration Procedures

Florida Democratic Party v. Hood (Stephan P. Mickle, N.D. Fla. 4:04-cv-405)

> A political party filed a federal complaint challenging election officials' not processing voter-registration applications on which applicants did not check a box stating that they were U.S. citizens even if they signed a statement that they were citizens. The district judge ordered a prompt response and then dismissed the case for lack of standing, because the party had not alleged actual denial of registration for one of its members.
>
> *Topics:* Citizenship; registration procedures; National Voter Registration Act.

1274; *Diaz*, 435 F. Supp. 2d at 1208–09; *see Panel Clears Way for Voter Forms Challenge*, Miami Herald, Sept. 29, 2005, at B4.

477. Order, *Diaz*, No. 1:04-cv-22572 (S.D. Fla. May 2, 2006), D.E. 135.

478. Second Amended Complaint, *id.* (May 17, 2006), D.E. 151; *see* Amended Complaint, *id.* (Apr. 7, 2006), D.E. 120.

479. *Diaz*, 435 F. Supp. 2d 1206; *Diaz*, 541 F. Supp. 2d at 1323; *Diaz*, 475 F. Supp. 2d at 1274; *see* Daniel P. Tokaji, *HAVA in Court: A Summary and Analysis of Litigation*, 12 Election L.J. 203, 211 (2013); Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 Wm. & Mary Bill Rts. J. 453, 488–90 (2008).

480. Third Amended Complaint, *Diaz*, No. 1:04-cv-22572 (S.D. Fla. July 10, 2006), D.E. 170.

481. *Diaz*, 475 F. Supp. 2d 1270; *Diaz*, 541 F. Supp. 2d at 1323.

482. *Diaz*, 541 F. Supp. 2d 1319; *see* Jay Weaver, *Judge: Voter Deadline is OK*, Miami Herald, Mar. 26, 2008, at B3.

The Florida Democratic Party filed a federal complaint against Florida's secretary of state on October 7, 2004, alleging that election officials in Florida were not processing voter-registration applications on which the checkbox for U.S. citizen status was not checked "yes" even if the attestation of citizenship was signed.[483] With its complaint, the party filed a motion for a preliminary injunction.[484]

Finding that time was of the essence, Judge Stephan P. Mickle ordered the secretary to respond by October 12.[485] On October 11, the party moved for joinder of the U.S. Department of Justice as a party or participation as an amicus curiae by the department as an alternative.[486]

On October 14, Judge Mickle dismissed the case.[487] "Plaintiff has simply failed to allege that any member or members of the Democratic Party could have sued in his or her own right. In fact, nowhere does Plaintiff's complaint state that any members of the Democratic Party will be injured personally by the challenged state action."[488] Because the complaint did not allege that a Democrat was actually denied registration for failing to check the box, the party lacked standing to pursue the case.[489]

Denial of Voter-Registration Efforts

Goodwin v. Meyer (William F. Downes, D. Wyo. 1:04-cv-256)

> A federal complaint challenged state proscriptions on voter-registration drives. The district judge determined that the plaintiffs had failed to show irreparable injury because voter-registration forms were available on the internet.
>
> *Topic:* Registration procedures.

Three citizens of Wyoming and forty Doe plaintiffs filed a federal complaint in Wyoming's Casper courthouse on September 23, 2004, against Wyoming's secretary of state, three county clerks, and twenty unknown government officials, challenging Wyoming's proscriptions on voter-

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483. Complaint, Fla. Democratic Party v. Hood, No. 4:04-cv-405 (N.D. Fla. Oct. 7, 2004), D.E. 1; *see* Lucy Morgan & Joni James, *New Suit Expands Pre-Election Battles*, St. Petersburg Times, Oct. 8, 2004, at 5B.

484. Preliminary-Injunction Motion, *Fla. Democratic Party*, No. 4:04-cv-405 (N.D. Fla. Oct. 7, 2004), D.E. 3.

485. Order, *id.* (Oct. 7, 2004), D.E. 5.

Judge Mickle died on January 26, 2021. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

486. Motion, *Fla. Democratic Party*, No. 4:04-cv-405 (N.D. Fla. Oct. 11, 2004), D.E. 7.

487. Opinion, *id.* (Oct. 14, 2004), D.E. 10.

488. *Id.* at 3.

489. *Id.* at 4.

registration drives.[490] Each of the named plaintiffs apparently was refused a voter-registration form in one of the named counties.[491] Five days later, the plaintiffs filed a motion for a preliminary injunction and expedited hearing.[492] The court set a hearing for three days after that.[493]

Attorneys for the plaintiffs and the secretary appeared at the hearing in person, and attorneys for the counties appeared by telephone.[494] Three days later, Judge William F. Downes denied the injunction by telephone.[495] Ten days after that, Judge Downes issued a written ruling, concluding that the plaintiffs failed to show irreparable injury because voter-registration forms were available on the internet.[496] On November 12, Judge Downes granted the plaintiffs a voluntary dismissal.[497]

The Right of Felons to Register to Vote After Release

CURE-Ohio v. Blackwell (Sandra S. Beckwith, S.D. Ohio 1:04-cv-543) and Racial Fairness Project v. Summit County Board of Elections (John R. Adams, N.D. Ohio 5:04-cv-1948)

> A federal complaint against the state's secretary of state and twenty-one county boards of elections challenged false representations by election officials that persons convicted of felonies cannot be registered to vote even if they are on parole or have been released from confinement. Following an agreement to provide former prisoners with notices of the right to reregister to vote, the action was dismissed voluntarily. A subsequent action in the state's other district challenged another county's election officials' not including in notices of registration cancelations to felons notices that felons can reregister following confinement. The district judge in the second case held that notices of registration cancelations were not required, but if they are provided they must not be misleading, which they would be if they failed to provide notice of the right to reregister following confinement.

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490. Complaint, Goodwin v. Meyer, No. 1:04-cv-256 (D. Wyo. Sept. 23, 2004), D.E. 1.

491. *Id.* at 3–4.

492. Motion, *id.* (Sept. 28, 2004), D.E. 3.

493. Notice, *id.* (Sept. 30, 2004), D.E. 6.

494. Minutes, *id.* (Oct. 1, 2004), D.E. 18.

495. Minutes, *id.* (Oct. 4, 2004), D.E. 19; *see* Ilene Olson, *Tort Reform in Wyoming Attracts Out-of-Town Attorney*, Wyo. Trib.-Eagle, Oct. 5, 2004.

Judge Downes retired on July 24, 2011. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

496. Order, *Goodwin*, No. 1:04-cv-256 (D. Wyo. Oct. 14, 2004), D.E. 24.

497. Order, *id.* (Nov. 15, 2004), D.E. 31.

Topics: Registration procedures; prisoner voters; class action; case assignment.

Citizens United for the Rehabilitation of Errants (CURE-Ohio) and the Racial Fairness Project (RFP) filed a federal complaint in the Southern District of Ohio on August 17, 2004, against Ohio's secretary of state and twenty-one county boards of elections—nine out of forty in the Northern District and twelve out of forty-eight in the Southern District—challenging false representations by election officials that persons convicted of felonies could not be registered to vote even if they were on parole or had been released from confinement.[498] With their complaint, the plaintiffs filed a motion for a preliminary injunction.[499] The court reassigned the case from Senior Judge Herman J. Weber to Judge Sandra S. Beckwith.[500] On August 25, the plaintiffs filed a motion for a temporary restraining order.[501]

Following a proceeding on August 27, Judge Beckwith denied the plaintiffs a temporary restraining order on August 31 "because the likelihood of success at this point is not strong and the injury to Plaintiffs appears at this time to be speculative."[502] Judge Beckwith and the parties agreed to a trial schedule leading to trial briefs due on September 9.[503]

On September 10, following promises of notices to felons about their rights to reregister to vote, the parties stipulated dismissals.[504] Agreements leading to voluntary dismissals hit a rough patch later in the month when Ohio's attorney general notified the plaintiffs that representations by Ohio's department of rehabilitation about notices that it would provide were unenforceable because the department was not a party to the lawsuit.[505]

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498. Complaint, CURE-Ohio v. Blackwell, No. 1:04-cv-543 (S.D. Ohio Aug. 17, 2004), D.E. 1; *see* 28 U.S.C. § 115; *see also* Scott Hiaasen, *Officials Kept Felons from Voting, Lawsuit Says*, Cleveland Plain Dealer, Aug. 18, 2004, at B1; Dan Horn, *Ex-Cons Misled on Voting, Suit Says*, Cincinnati Enquirer, Aug. 18, 2004, at 1A.

499. Preliminary-Injunction Motion, *CURE-Ohio*, No. 1:04-cv-543 (S.D. Ohio Aug. 17, 2004), D.E. 2.

500. Notice, *id.* (Aug. 18, 2004), D.E. 5; Order, *id.* (Aug. 17, 2004), D.E. 4.

501. Temporary-Restraining-Order Motion, *id.* (Aug. 25, 2004), D.E. 8.

502. Order, *id.* (Aug. 31, 2004), D.E. 19.

503. *Id.* at 1.

504. Stipulated Dismissals with Prejudice, *id.* (Sept. 10, 2004), D.E. 34 to 39; *see* Transcript, *id.* (Sept. 3, 2004, filed Sept. 21, 2004), D.E. 44 [hereinafter *CURE-Ohio* Transcript] (describing initial settlement discussions); *see also* Dan Horn, *Officials Will Tell Felons of Voting Right*, Cincinnati Enquirer, Sept. 14, 2004, at 1C.

505. *See* Scott Hiaasen, *State Broke Deal, Voting Group Says*, Cleveland Plain Dealer, Sept. 24, 2004, at B3; Dan Horn, *Undone Deal Riles Prison Aid Group*, Cincinnati Enquir-

The RFP and a voter who had been convicted of a felony filed a federal class action in the Northern District of Ohio on September 27 against Summit County's board of elections—who was not a defendant in the Southern District action—seeking a remedy for notices of voter-registration cancelations to persons convicted of felonies for failure to state that they could register to vote again once they were released from confinement.[506] With their complaint, the plaintiffs filed a motion for a temporary restraining order.[507]

Judge John R. Adams heard the motion on the day that it was filed[508] and granted it on the following day.[509]

> Although the Board does not have a legal duty to notify persons whose voter registration has been cancelled due to a felony conviction, any such notice voluntarily issued must not mislead by either affirmation or omission. Accordingly, the Court hereby ORDERS that the Board must, no later than 9/29/04, mail to the last [known] address of each individual who received notice in the previous 36 months that his/her voter registration had been cancelled due to a felony conviction, a letter advising that convicted felons who are not currently incarcerated may re-register to vote. The letter shall further advise that the registration deadline for the November 2, 2004 election is October 4, 2004, and shall indicate that registration may be accomplished at the locations listed on the Board's website.[510]

On October 4, "satisfied they have obtained the relief sought," the plaintiffs voluntarily dismissed their case.[511]

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er, Sept. 24, 2004, at 2C; *see also CURE-Ohio* Transcript, *supra* note 504, at 263–64 (discussing getting records from an agency not a party to the suit).

506. Complaint, Racial Fairness Project v. Summit Cty. Bd. of Elections, No. 5:04-cv-1948 (N.D. Ohio Sept. 27, 2004), D.E. 1.

507. Temporary-Restraining-Order Motion, *id.* (Sept. 27, 2004), D.E. 3.

508. Docket Sheet, *id.* (Sept. 27, 2004).

509. Opinion, *id.* (Sept. 28, 2004), D.E. 4 [hereinafter *Racial Fairness Project* Opinion]; *see Felons Briefed on Voting*, Cleveland Plain Dealer, Sept. 29, 2004, at B3; Sherri Williams, *Many Felons Surprised to Learn They Can Vote*, Columbus Dispatch, Oct. 3, 2004, at 1B.

510. *Racial Fairness Project* Opinion, *supra* note 509, at 2–3.

511. Notice, *Racial Fairness Project*, No. 5:04-cv-1948 (N.D. Ohio Oct. 4, 2004), D.E. 4; Order, *id.* (Oct. 8, 2004), D.E. 6.

Bundling Voter Registrations

Nu Mu Lambda Chapter v. Cox (William C. O'Kelley, 1:04-cv-1780) and ACORN v. Cox (Jack T. Camp, 1:06-cv-1891) (N.D. Ga.)

> A 2004 complaint alleged that Georgia improperly required newly registered voters to submit their voter-registration forms directly to the government rather than to coordinators of voter-registration efforts. Thirteen days after the complaint was filed, the court granted the plaintiffs injunctive relief. The court of appeals affirmed the relief in 2005. In 2006, a similar complaint alleged that Georgia was not complying with the earlier precedent. Again, the court granted the plaintiffs preliminary injunctive relief. Two years later, the court vacated the preliminary injunction because the parties had not moved the case forward.
>
> *Topics:* Registration procedures; National Voter Registration Act; enforcing orders; interlocutory appeal.

Two federal Cases challenged Georgia's restrictions on voter registrations collected by private organizations.

First Case

On June 18, 2004, a fraternity alumni chapter filed a federal action in the Northern District of Georgia's Atlanta courthouse complaining that Georgia had wrongfully rejected a package of voter registrations that the fraternity had mailed to Georgia's secretary of state.[512] The forms were rejected because they were mailed in bulk, and the secretary understood Georgia law to proscribe private organizations' collecting voter-registration forms.[513] By amended complaint five days later, an affiliated foundation, four fraternity members, and a would-be voter substituted themselves as plaintiffs.[514] With the amended complaint, the plaintiffs filed a motion for a preliminary injunction.[515]

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512. Complaint, Nu Mu Lambda Chapter v. Cox, No. 1:04-cv-1780 (N.D. Ga. June 18, 2004), D.E. 1; Charles H. Wesley Educ. Found. v. Cox, 408 F.3d 1349, 1351 (11th Cir. 2005); *see* Transcript at 6, Charles H. Wesley Educ. Found. v. Cox, No. 1:04-cv-1780 (N.D. Ga. June 29, 2004, filed Oct. 6, 2004), D.E. 22 [hereinafter *Charles H. Wesley Educ. Found.* Transcript].

513. *Charles H. Wesley Educ. Found.*, 408 F.3d at 1351; Charles H. Wesley Educ. Found. v. Cox, 324 F. Supp. 2d 1358, 1361–62 (N.D. Ga. 2004).

514. Amended Complaint, *Charles H. Wesley Educ. Found.*, No. 1:04-cv-1780 (N.D. Ga. June 23, 2004), D.E. 3; *see Charles H. Wesley Educ. Found.* Transcript, *supra* note 512, at 12–14.

515. Preliminary-Injunction Motion, *Charles H. Wesley Educ. Found.*, No. 1:04-cv-1780 (N.D. Ga. June 23, 2004), D.E. 4.

Judge William C. O'Kelley heard the motion in Gainesville on June 29.[516] He had chambers in both Atlanta and Gainesville.[517] It was his policy to hear Atlanta cases in Atlanta and Gainesville cases in Gainesville if at all possible.[518] He heard the motion on a day he was in Gainesville, which is a bit more than an hour northeast of Atlanta, because of the case's time pressure.[519] Atlanta lawyers frequently practiced in Gainesville as well.[520]

On July 1, Judge O'Kelley determined that Georgia's rejecting voter registrations mailed in bulk violated the National Voter Registration Act.[521]

On Friday, July 16, while the injunction was on appeal,[522] the plaintiffs alleged that Georgia was not complying with the injunction and moved for a finding of contempt and sanctions.[523] Judge O'Kelley held a telephone conference in the motion on Monday[524] and then heard the motion on November 17.[525] At the hearing, he denied the sanctions motion as moot.[526]

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516. *Charles H. Wesley Educ. Found.* Transcript, *supra* note 512; Minutes, *Charles H. Wesley Educ. Found.*, No. 1:04-cv-1780 (N.D. Ga. June 29, 2004), D.E. 8; *Charles H. Wesley Educ. Found.*, 324 F. Supp. 2d at 1360.

Tim Reagan interviewed Judge O'Kelley for this report by telephone on July 20, 2012. Judge O'Kelley died on July 5, 2017. Federal Judicial Center Biographical Directory of Article III Federal Judges [hereinafter FJC Biographical Directory], www.fjc.gov/history/judges.

517. Interview with Judge William C. O'Kelley, July 20, 2012.

518. *Id.*

519. *Charles H. Wesley Educ. Found.* Transcript, *supra* note 512, at 2 ("while I'm going to be in Atlanta tomorrow, I felt I've got a full day there and this was about the only day I could work this matter in and try to meet the schedule that my law clerk tells me the state indicated we needed to address").

520. Interview with Judge William C. O'Kelley, July 20, 2012.

521. *Charles H. Wesley Educ. Found.*, 324 F. Supp. 2d at 1365–68; *see* Pub. L. No. 103-31, 107 Stat. 77 (1993), *as amended*, 52 U.S.C. §§ 20501–20511. *See generally* Robert Timothy Reagan, Motor Voter: The National Voter Registration Act (Federal Judicial Center 2014).

522. Notice of Appeal, Charles H. Wesley Educ. Found. v. Cox, No. 1:04-cv-1780 (N.D. Ga. June 23, 2004), D.E. 11.

523. Sanctions Motion, *id.* (July 16, 2004), D.E. 12.

524. Docket Sheet, *id.* (June 18, 2004) [hereinafter *Charles H. Wesley Educ. Found.* Docket Sheet].

525. Minutes, *id.* (Nov. 17, 2004), D.E. 31.

526. *Charles H. Wesley Educ. Found.* Docket Sheet, *supra* note 524.

On May 12, 2005, the court of appeals affirmed the injunction.[527] The case was finally resolved by a consent decree issued on March 2, 2006,[528] and a stipulated award of $60,000 in attorney fees and costs on April 20.[529]

Second Case

On Monday, August 14, 2006, four organizations and an individual filed a federal complaint in the same district alleging that Georgia was violating the holdings of the earlier case by requiring that voter registrations collected by private parties be individually sealed and forbidding their copying.[530] With their complaint, the plaintiffs filed a motion to expedite[531] consideration of a motion for a preliminary injunction.[532]

The court assigned the case to Judge Jack T. Camp, who, on Wednesday, ordered a status conference for the following Monday.[533] At the conference, he discussed with the parties an outline of merits issues.[534] At the conclusion of the conference, he asked the parties to gear up for a preliminary-injunction hearing in early September.[535]

On September 28, following a September 13 hearing,[536] Judge Camp granted the plaintiffs relief.[537] He determined that the requirement of sealing and the proscription against copying meant that the plaintiffs were "unable to utilize their quality control measures to ensure that the [regis-

527. Charles H. Wesley Educ. Found. v. Cox, 408 F.3d 1349 (11th Cir. 2005).

528. Consent Decree, *Charles H. Wesley Educ. Found.*, No. 1:04-cv-1780 (N.D. Ga. June 18, 2004), D.E. 93.

529. *Charles H. Wesley Educ. Found.* Docket Sheet, *supra* note 524; Proposed Consent Order, *Charles H. Wesley Educ. Found.*, No. 1:04-cv-1780 (N.D. Ga. June 18, 2004), D.E. 95.

530. Complaint, ACORN v. Cox, No. 1:06-cv-1891 (N.D. Ga. Aug. 14, 2006), D.E. 1; *see* Carlos Campos, *Election Board Faces Lawsuit Over Voter Registration Rules*, Atlanta J.-Const., Aug. 17, 2006, at B2; Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 Wm. & Mary Bill Rts. J. 453, 485–86 (2008).

531. Motion to Expedite, *ACORN*, No. 1:06-cv-1891 (N.D. Ga. Aug. 14, 2006), D.E. 3.

532. Preliminary-Injunction Motion, *id.* (Aug. 14, 2006), D.E. 2.

533. Order, *id.* (Aug. 16, 2006), D.E. 5.

Judge Camp retired on November 19, 2010. FJC Biographical Directory, *supra* note 516.

534. Transcript, *ACORN*, No. 1:06-cv-1891 (N.D. Ga. Aug. 21, 2006, filed Oct. 24, 2006), D.E. 42.

535. *Id.* at 37; Minutes, *id.* (Aug. 21, 2006), D.E. 7.

536. Minutes, *id.* (Sept. 13, 2006), D.E. 36.

537. Preliminary Injunction, *id.* (Sept. 28, 2006), D.E. 37 [hereinafter *ACORN* Preliminary Injunction]; *see* Carlos Campos, *Ruling Favors Voters' Groups*, Atlanta J.-Const., Sept. 29, 2006, at D6.

tration] workers are not submitting fraudulent registration applications" in violation of their First Amendment rights.[538]

As the case moved on to trial, Judge Camp issued a discovery order on October 26, 2007, that favored the defendants.[539] In response to a mandamus petition, the court of appeals determined, "We cannot discern from the district court's October 26, 2007, order the extent to which the court considered and rejected Petitioners' assertions of associational privilege protected by the First Amendment."[540] Judge Camp clarified that "the remaining [discovery] dispute primarily involved the production of copies in Plaintiffs' possession of voter registration applications collected by Plaintiffs in Georgia and sign-in sheets used at voter registration drives conducted by the Georgia State Conference of the NAACP Branches and the Georgia Coalition for the People's Agenda, Inc."[541] Judge Camp noted that in addition to ordering discovery he had also invited presentation of a proposed protective order.[542] The court of appeals denied a renewed mandamus petition on September 24, 2008.[543]

On November 7, observing that neither party had sought to move the case forward, Judge Camp vacated the preliminary injunction and dismissed the action without prejudice.[544]

Voter Registration for College Students

Saunders v. Andrews (4:04-cv-20) and Lowe v. Davis (4:04-cv-21) (Raymond A. Jackson, E.D. Va.)

> A college student wishing to run for city council filed a federal complaint challenging the denial of his voter registration. On the following day, three other students filed a similar complaint. The federal judge ruled against the students, but a state judge granted one of the students relief. By the time of the general election, two of the students could register because they obtained driver's licenses at their local address.
>
> *Topic:* Student registration.

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538. *ACORN* Preliminary Injunction, *supra* note 537, at 11–19.

539. Order, *ACORN*, No. 1:06-cv-1891 (N.D. Ga. Oct. 26, 2007), D.E. 92.

540. Opinion, *In re* ACORN, No. 07-15688 (11th Cir. Feb. 27, 2008), *filed as* Notice, *ACORN*, No. 1:06-cv-1891 (N.D. Ga. Feb. 28, 2008), D.E. 104.

541. Order at 6, *ACORN*, No. 1:06-cv-1891 (N.D. Ga. June 20, 2008), D.E. 105.

542. *Id.* at 7.

543. Order, *In re* ACORN, No. 08-14419 (11th Cir. Sept. 24, 2008), *filed as* Notice, *ACORN*, No. 1:06-cv-1891 (N.D. Ga. Sept. 25, 2008), D.E. 109.

544. Order, *ACORN*, No. 1:06-cv-1891 (N.D. Ga. Nov. 10, 2008), D.E. 110.

A sophomore at the College of William and Mary who wished to run for city council filed a federal complaint in the Eastern District of Virginia's Newport News courthouse on Thursday, February 26, 2004, challenging the Williamsburg registrar's denial of the sophomore's voter registration.[545] Because the deadline for filing candidacy papers was the following Tuesday,[546] the plaintiff filed with his complaint a motion for a temporary restraining order.[547]

On February 27, another three students filed a similar federal complaint.[548] They also sought a temporary restraining order.[549] Judge Raymond A. Jackson heard the motions on March 1 and 2; he ruled on March 8 that the students had not made a sufficient showing that they were wrongfully regarded as nonresidents.[550] A state judge, however, ruled that one of the second set of plaintiffs should be registered and another should not be.[551]

By the 2004 general election, the original federal plaintiff and the unsuccessful state-court plaintiff could register, because they obtained driver's licenses at their Williamsburg addresses.[552] The federal cases settled.[553]

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545. Docket Sheet, Saunders v. Andrews, No. 4:04-cv-20 (E.D. Va. Feb. 26, 2004) [hereinafter *Saunders* Docket Sheet] (D.E. 1); *see* Andrew Petkofsky, *W&M Student Files Voting Rights Lawsuit*, Richmond Times-Dispatch, Feb. 27, 2004, at B3; Daphne Sashin, *W&M Student Sues to Vote*, Newport News Daily Press, Feb. 27, 2004, at C1.

546. *See* Sashin, *supra* note 545.

547. *Saunders* Docket Sheet, *supra* note 545 (D.E. 2).

548. Docket Sheet, Lowe v. Davis, No. 4:04-cv-21 (E.D. Va. Feb. 27, 2004) [hereinafter *Lowe* Docket Sheet] (D.E. 1); *see* Andrew Petkofsky, *Three More W&M Students File Voting Suits*, Richmond Times-Dispatch, Feb. 28, 2004, at B3; Daphne Sashin, *W&M Students Wanting to Vote File Second Suit*, Newport News Daily Press, Feb. 28, 2004, at C4.

549. *Lowe* Docket Sheet, *supra* note 548 (D.E. 2).

550. *Id.* (D.E. 5, 7); *Saunders* Docket Sheet, *supra* note 545 (D.E. 4, 5); *see* Andrew Petkofsky, *Williamsburg Registrar Upheld on Voter Status*, Richmond Times-Dispatch, Mar. 3, 2004, at B2.

551. *See* Andrew Petkofsky, *Judge Sides with Student Candidate*, Richmond Times-Dispatch, Mar. 6, 2004, at B1; Patti Rosenberg, *One Wins, One Loses W&M Suit Over Voting*, Newport News Daily Press, Mar. 6, 2004, at C1.

552. *See* Zinie Chen Sampson, *Students Win Right to Vote in Williamsburg*, Virginian-Pilot, Oct. 15, 2004, at B3.

553. *Saunders* Docket Sheet, *supra* note 545 (D.E. 21); *see* Andrew Petkofsky, *Students' Voting Suit Is Dropped but Lawyer Says System Could Still Deny Others Right to Register Locally*, Richmond Times-Dispatch, Oct. 15, 2004, at B7; Daphne Sashin, *2 W&M Students Can Vote*, Newport News Daily Press, Oct. 15, 2004, at C1.

Blaming Candidacy Withdrawal on a Voter-Registration Challenge

Moseley v. Price (T.S. Ellis III, E.D. Va. 1:03-cv-1320)

> A pro se federal complaint alleged that voting-rights violations forced the plaintiff to withdraw from a race that he alleged he was certain to win. According to the complaint, because he registered to vote while he was in the process of moving into a Loudoun County residence, his registration card was returned. A radio journalist made an issue of it, the county's circuit court appointed a special prosecutor, and the state police investigated the matter. The judge dismissed the federal voting-rights claims as without merit and dismissed state-law claims without prejudice.
>
> *Topics:* Registration procedures; pro se party; matters for state courts.

A pro se federal complaint filed in the Eastern District of Virginia's Alexandria courthouse on October 20, 2003, alleged that voting-rights violations forced the plaintiff to withdraw from the race for Loudoun County's commonwealth attorney—a race he alleged that he was certain to win.[554] According to the complaint, because he registered to vote while he was in the process of moving into a Loudoun County residence, his registration card was returned; a radio journalist made an issue of it, the county's circuit court appointed a special prosecutor, and the state police investigated the matter.[555] With his complaint, the plaintiff filed a motion for a temporary restraining order.[556]

Judge T.S. Ellis III heard and denied the plaintiff's motion on October 21.[557] On January 22, 2004, Judge Ellis dismissed the plaintiff's federal voting-rights claims as without merit and dismissed state-law claims without prejudice.[558] The court of appeals affirmed his decisions on August 23.[559]

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554. Docket Sheet, Moseley v. Price, No. 1:03-cv-1320 (E.D. Va. Oct. 20, 2003) [hereinafter *Moseley* Docket Sheet] (D.E. 1); Moseley v. Price, 300 F. Supp. 2d 389, 393–94 (E.D. Va. 2004).

555. *Moseley*, 300 F. Supp. 2d at 393–94.

556. *Moseley* Docket Sheet, *supra* note 554 (D.E. 2).

557. *Id.* (D.E. 3).

558. *Moseley*, 300 F. Supp. 2d at 389.

559. Moseley v. Price, 106 F. App'x 873 (4th Cir. 2004).

Challenge to a Voter-Registration Form Stating That Party Affiliation Is Required for Primary-Election Voting

Fitzgerald v. Berman (Norman A. Mordue, N.D.N.Y. 1:02-cv-926)

> As voters supporting open primary elections began a voter-registration drive as part of their effort to create a new Non-Affiliated Voters Party, they filed a federal complaint challenging voter-registration-form language stating that only registered members of political parties could vote in primary elections. The district judge considered but denied immediate relief fifteen days later. Two years after that, the district judge dismissed the complaint for lack of standing because all established parties wished to retain closed primary elections.
>
> *Topics:* Primary election; registration procedures; pro se party.

Represented by counsel, six voters filed a federal complaint in the Northern District of New York on July 16, 2002, challenging voter-registration-form language that allegedly asserted falsely that party membership was required for primary-election voting.[560] Seeking to establish a new political party called the Non-Affiliated Voters Party, the plaintiffs argued that the First Amendment entitled a party to invite nonmembers to vote in its primary elections.[561] The complaint was filed one week after the plaintiffs began circulating gubernatorial nominating petitions.[562] Six days later, the plaintiffs filed an application for a temporary restraining order.[563]

On July 24, Judge Norman A. Mordue issued an order that defendants show cause at a July 31 telephonic hearing why the plaintiffs should not be granted relief.[564] At the ten-minute hearing, Judge Mordue denied the plaintiffs immediate relief.[565]

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560. Complaint, Fitzgerald v. Berman, No. 1:02-cv-926 (N.D.N.Y. July 16, 2002), D.E. 1 [hereinafter *Fitzgerald* Complaint]; *see* Andrew Tilghman, *Ruling Delayed on Election Law*, Albany Times Union, Aug. 8, 2002, at B4.

561. *Fitzgerald* Complaint, *supra* note 560, at 5–8.

562. *Id.* at 5.

563. Temporary-Restraining-Order Application, *Fitzgerald*, No. 1:02-cv-926 (N.D.N.Y. July 22, 2002), D.E. 2.

564. Order to Show Cause, *id.* (July 24, 2002), D.E. 4, 5.

Judge Mordue died on December 29, 2022. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

565. Minutes, *Fitzgerald*, No. 1:02-cv-926 (N.D.N.Y. July 31, 2002), D.E. 17 (noting that the hearing lasted from 8:30 to 8:40 a.m.).

He denied the plaintiffs a preliminary injunction on September 30, 2003, for lack of standing.[566] Although established political parties in New York held closed primary elections, the plaintiffs could not show that if their planned party became established New York would prevent them from holding open primary elections.[567] Judge Mordue dismissed the complaint on March 22, 2006, with leave to amend it.[568]

On October 31, 2006, Judge Mordue dismissed without prejudice a pro se amended complaint as almost incomprehensible.[569] On December 1, he dismissed as "if anything, more prolix and confusing than the amended complaint" a second amended complaint.[570]

Voter Registration for Disabled Students

National Coalition for Students with Disabilities Education and Legal Defense Fund v. Bush (Robert L. Hinkle, N.D. Fla. 4:00-cv-442)

> A federal complaint alleged that Florida failed to provide voter-registration services to disabled students, as required by the National Voter Registration Act, for the 2000 general election. The district judge concluded that "the time to seek any [registration] redress affecting the 2000 election was prior to that election." Respecting long-term relief, the case settled in May 2001. The judge later learned that a named plaintiff was also a named plaintiff in a similar action in another state; he awarded the plaintiffs zero attorney fees.
>
> *Topics:* National Voter Registration Act; registration procedures; laches; attorney fees.

A November 27, 2000, federal complaint filed in the Northern District of Florida's Tallahassee courthouse alleged that Florida failed to provide voter-registration services to disabled students, as required by the National Voter Registration Act (NVRA),[571] for the 2000 general election.[572] Two

566. Opinion, *id.* (Sept. 30, 2003), D.E. 24, *aff'd*, 112 F. App'x 800 (2d Cir. 2004).

567. *Id.*

568. Opinion, *id.* (Mar. 22, 2006), D.E. 36, 2006 WL 752785.

569. Opinion, *id.* (Oct. 31, 2006), D.E. 54, 2006 WL 6549889; *see* Amended Complaint, *id.* (Apr. 7, 2006), D.E. 37.

570. Opinion, *id.* (Dec. 1, 2006), D.E. 54, 2006 WL 3489051, *appeal dismissed*, Order, No. 07-51 (2d Cir. Apr. 30, 2007) (dismissing the appeal for failure to prosecute it); *see* Second Amended Complaint, *id.* (Nov. 20, 2006), D.E. 55.

571. Pub. L. No. 103-31, 107 Stat. 77 (1993), *as amended*, 52 U.S.C. §§ 20501–20511. *See generally* Robert Timothy Reagan, Motor Voter: The National Voter Registration Act (Federal Judicial Center 2014).

572. Complaint, Nat'l Coal. for Students with Disabilities Educ. & Legal Def. Fund v. Bush, No. 4:00-cv-442 (N.D. Fla. Nov. 27, 2000), D.E. 1; Nat'l Coal. for Students with Dis-

days later, the plaintiffs sought a restraining order against, among other things, certification of Florida's election results until the plaintiffs and persons like them could register and vote in the election.[573]

Judge Robert L. Hinkle denied the immediate relief:

> They apparently have filed their motion ex parte, without notice to any defendant. . . . The assertion that the court should take action affecting the 2000 presidential election (or any other election) without so much as giving notice to any adversary is plainly unfounded.
>
> . . . For purposes of plaintiffs' motion for a temporary restraining order, I conclude that, if plaintiffs failed to register because of violations of the law, the time to seek any redress affecting the 2000 election was prior to that election.[574]

On February 20, 2001, Judge Hinkle held that disabled students who did not register to vote for the 2000 general election and an organization promoting the interests of persons with disabilities had standing to pursue an action against Florida election officials for failure to facilitate voter registration for persons with disabilities, as required by the NVRA.[575]

1. "The National Voter Registration Act plainly authorizes declaratory and injunctive relief in a private enforcement action such as the case at bar."[576]
2. "[Q]ualified immunity would not shield the defendants from liability from damages for violating these clear and express provisions of the Act, assuming a private right of action for damages exists . . . ."[577] In their motion to dismiss the action, the defendants failed to raise the issue of whether section 1983 or some other authority afforded the plaintiffs a damages action to enforce the NVRA.[578]

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abilities Educ. & Legal Def. Fund v. Bush, 173 F. Supp. 2d 1272, 1274 (N.D. Fla. 2001); *see* Amended Complaint, *Nat'l Coal. for Students with Disabilities Educ. & Legal Def. Fund*, No. 4:00-cv-442 (N.D. Fla. Dec. 1, 2000), D.E. 6.

573. Temporary-Restraining-Order Motion, *Nat'l Coal. for Students with Disabilities Educ. & Legal Def. Fund*, No. 4:00-cv-442 (N.D. Fla. Nov. 29, 2000), D.E. 4; *Nat'l Coal. for Students with Disabilities Educ. & Legal Def. Fund*, 173 F. Supp. 2d at 1274.

574. Order at 2–3, *Nat'l Coal. for Students with Disabilities Educ. & Legal Def. Fund*, No. 4:00-cv-442 (N.D. Fla. Nov. 29, 2000), D.E. 5; *see Nat'l Coal. for Students with Disabilities Educ. & Legal Def. Fund*, 173 F. Supp. 2d at 1274.

575. Nat'l Coal. for Students with Disabilities Educ. & Legal Def. Fund v. Bush, 170 F. Supp. 2d 1205 (N.D. Fla. 2001).

576. *Id.* at 1208.

577. *Id.* at 1209.

578. *Id.* at 1208 n.1.

In May 2001, the action settled; Florida officials agreed that they would inform various Florida agencies and contractors about "obligations under Federal and Florida law pertaining to voter registration for persons with disabilities."[579]

While the parties litigated the matter of attorney fees,[580] it came to the court's attention that the plaintiffs' attorney did not know whether either individual plaintiff was a resident of Florida, entitled to vote in Florida, or registered to vote in Florida.[581] Moreover, the plaintiffs' attorney had also named one of the Florida plaintiffs in an action brought in the District of Maryland.[582] Although this called into question the court's jurisdiction to hear the action, Judge Hinkle determined that the organizational plaintiff was able to contract with the defendants for a settlement of the action.[583] Judge Hinkle awarded the plaintiffs zero attorney fees.[584]

Requiring Social Security Numbers for Voter Registration

Schwier v. Cox (Julie E. Carnes, N.D. Ga. 1:00-cv-2820)

> On October 26, 2000, two voters filed a federal complaint challenging a requirement that they provide Social Security numbers as part of their voter registrations. On Friday, November 3, the district judge ruled that to vote the plaintiffs could file their Social Security numbers with election officials and with the court under seal; depending on the resolution of the case, the numbers would be either unsealed or destroyed. In 2002, the district judge ruled that an uncodified provision of the Privacy Act did not provide the plaintiffs with rights of action, but the court of ap-

579. Settlement Order, *Nat'l Coal. for Students with Disabilities Educ. & Legal Def. Fund*, No. 4:00-cv-442 (N.D. Fla. May 30, 2001), D.E. 106; Notice of Settlement, *id.* (May 3, 2001), D.E. 97; *Nat'l Coal. for Students with Disabilities Educ. & Legal Def. Fund*, 173 F. Supp. 2d at 1275.

580. *See Nat'l Coal. for Students with Disabilities Educ. & Legal Def. Fund*, 173 F. Supp. 2d 1272 (deciding that the plaintiffs were entitled to an award of fees).

581. Attorney-Fees Order at 9–11, *Nat'l Coal. for Students with Disabilities Educ. & Legal Def. Fund*, No. 4:00-cv-442 (N.D. Fla. Mar. 31, 2003), D.E. 180 [hereinafter *Nat'l Coal. for Students with Disabilities Educ. & Legal Def. Fund* Attorney-Fees Order].

582. *Id.* at 10; *see* Nat'l Coal. for Students with Disabilities Educ. & Legal Def. Fund v. Scales, 150 F. Supp. 2d 845, 847–48 (D. Md. 2001).

583. *Nat'l Coal. for Students with Disabilities Educ. & Legal Def. Fund* Attorney-Fees Order, *supra* note 581, at 20–23.

584. *Id.* at 16–18 ("Nobody was required to change any practice with respect to registration of voters. . . . Plaintiffs also have been unable to identify any . . . person who has registered to vote as a result of the Settlement Agreement and judgment enforcing it."), *aff'd*, 90 F. App'x 383 (11th Cir. 2003) (table).

peals determined in 2003 that the uncodified provision was nevertheless applicable law that did afford private rights of action.

Topics: Registration procedures; voter identification; 42 U.S.C. § 1983; attorney fees.

On October 26, 2000, two voters filed a federal complaint in the Northern District of Georgia challenging a requirement that they provide Social Security numbers as part of their voter registrations.[585] With their complaint, the plaintiffs filed a motion for a preliminary injunction.[586] On the following day, the court directed the defendant, Georgia's secretary of state, to respond to the motion by the close of business on October 31.[587] On Friday, November 3, Judge Julie E. Carnes granted the plaintiffs immediate relief: in order to vote, they could file their Social Security numbers with election officials and with the court under seal; depending on the ultimate resolution of the case, the numbers would be either unsealed or destroyed.[588]

On May 14, 2002, Judge Carnes granted summary judgment to the secretary, finding that an amended complaint was not supported by private rights of action.[589] The court of appeals reversed her decision on August 11, 2003.[590]

Section 7 of the Privacy Act provides, "It shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number."[591] Some provisions of the Privacy Act were codified at 5 U.S.C. § 552a, but this provision was instead

585. Schwier v. Cox, 439 F.3d 1285, 1285–86 (11th Cir. 2006); Schwier v. Cox, 340 F.3d 1284, 1286 (11th Cir. 2003); Docket Sheet, Schwier v. Cox, No. 1:00-cv-2820 (N.D. Ga. Oct. 26, 2000) [hereinafter *Schwier* Docket Sheet] (D.E. 1).

586. *Schwier* Docket Sheet, *supra* note 585 (D.E. 3); Schwier v. Cox, 412 F. Supp. 2d 1266, 1268 (N.D. Ga. 2005).

587. *Schwier* Docket Sheet, *supra* note 585 (D.E. 4).

588. *Schwier*, 340 F.3d at 1286 & n.2; *Schwier*, 412 F. Supp. 2d at 1268; *Schwier* Docket Sheet, *supra* note 585 (D.E. 8).

Judge Carnes was elevated to the court of appeals on July 31, 2014. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

589. *Schwier*, 439 F.3d at 1286; *Schwier*, 340 F.3d at 1286; *Schwier*, 412 F. Supp. 2d at 1269; *see* Docket Sheet, *supra* note 585 (noting that a February 20, 2001, amended complaint added a third plaintiff, D.E. 14 to 16).

590. *Schwier*, 340 F.3d 1284; *Schwier*, 439 F.3d at 1286; *Schwier*, 412 F. Supp. 2d at 1269; *see* Bill Rankin, *Court Revives Challenge to Voter ID Rules*, Atlanta J.-Const., Aug. 13, 2003, at A1.

591. 5 U.S.C. § 552a note; Pub. L. No. 93-579, § 7(a)(1), 88 Stat. 1896, 1909 (1974).

added as a note to the section.[592] The court of appeals determined that it created a federal right enforceable under 42 U.S.C. § 1983.[593]

The Voting Rights Act proscribes irrelevant voter-registration information:

> No person acting under color of law shall . . . deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election . . . .[594]

The court of appeals determined that this provision also was enforceable through section 1983.[595]

On remand, Judge Carnes granted summary judgment to the plaintiffs on January 31, 2005.[596] The court of appeals affirmed her decision on February 16, 2006.[597] A June 27, 2006, consent decree awarded the plaintiffs $175,000 in attorney fees and costs.[598]

Changing Party Affiliation for a Primary Election

Van Wie v. Pataki (David N. Hurd, 1:00-cv-322), Van Allen v. Cuomo (Gary L. Sharpe, 1:07-cv-722), and Van Allen v. Walsh (Lawrence E. Kahn, 1:08-cv-876) (N.D.N.Y.)

> Two weeks before a presidential primary election, two voters filed a federal complaint challenging a law that allowed new voter registrants to enroll in a political party up to twenty-five days before a primary election but did not allow a change in party enrollment for already registered voters to go into effect until after the next general election. One week later, after oral argument, the district judge dismissed the complaint, finding compelling the incentive to register for new voters. Actions initiated in 2007 and 2008 were similarly unsuccessful.

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592. *Schwier*, 340 F.3d at 1288–89.

593. *Id.* at 1290–92, 1297; *see* ; Daniel P. Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws*, 44 Ind. L. Rev. 113, 140–41 (2010).

594. 52 U.S.C. § 10101(a)(2)(B) (2014).

595. *Schwier*, 340 F.3d at 1294–97.

596. Schwier v. Cox, 412 F. Supp. 2d 1266 (N.D. Ga. 2005); Schwier v. Cox, 439 F.3d 1285, 1286 (11th Cir. 2006); *see* Carlos Campos, *Voters Win Suit Over Registration*, Atlanta J.-Const., Feb. 2, 2005, at B6.

597. *Schwier*, 439 F.3d 1285.

598. Consent Decree, Schwier v. Cox, No. 1:00-cv-2820 (N.D. Ga. June 27, 2006), D.E. 90.

Topics: Registration procedures; primary election; intervention; pro se party.

Despite the Supreme Court's 1973 ruling in *Rosario v. Rockefeller* that New York's lockbox procedure for changing party affiliation is constitutional,[599] New York voters filed unsuccessful emergency complaints in 2000, 2007, and 2008 seeking a different result. The Supreme Court held that New York could delay the effectiveness of a change in party affiliation until after the following general election "to inhibit party 'raiding,' whereby voters in sympathy with one party designate themselves as voters of another party so as to influence or determine the results of the other party's primary."[600]

Two weeks before New York's March 7, 2000, presidential primary election, two voters filed a federal complaint in the Northern District of New York challenging New York's law that allowed new voter registrants to enroll in a political party up to twenty-five days before a primary election but did not allow a change in party enrollment for already-registered voters to go into effect until after the next general election.[601] Two days later, Judge David N. Hurd issued an order to show cause why New York should not give effect to recent party-enrollment changes.[602]

Judge Hurd held oral argument in Utica on February 29, one week before the election.[603] He denied a motion by the Independence Party to intervene as a defendant, but he permitted the party to participate as an amicus curiae.[604] That day, he also dismissed the complaint, finding compelling New York's interest in providing an incentive for new voters to register.[605]

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599. 410 U.S. 752 (1973).

600. *Id.* at 760.

601. Docket Sheet, Van Wie v. Pataki, No. 1:00-cv-322 (N.D.N.Y. Feb. 22, 2000) [hereinafter *Van Wie* Docket Sheet] (D.E. 1); Van Wie v. Pataki, 267 F.3d 109, 112 (2d Cir. 2001); VanWie v. Pataki, 87 F. Supp. 2d 148, 150 (N.D.N.Y. 2000); *see* Tom Precious, *Suit Filed to Open State's Primary to Independents*, Buffalo News, Feb. 25, 2000, at A11 (suggesting that the suit's success would benefit John McCain's candidacy against George W. Bush).

602. *Van Wie* Docket Sheet, *supra* note 601 (D.E. 4); *VanWie*, 87 F. Supp. 2d at 150; *see* Lara Jakes, *Non-Affiliated Voters Take Heart in Court Victory*, Albany Times Union, Feb. 25, 2000, at B2.

603. *Van Wie* Docket Sheet, *supra* note 601 (D.E. 8); *VanWie*, 87 F. Supp. 2d at 150; *Van Wie*, 267 F.3d at 112.

604. *VanWie*, 87 F. Supp. 2d at 150.

605. *Id.* at 152–53; *Van Wie*, 267 F.3d at 112; *see* Lara Jakes, *Independent Voters Lose Fight for Primary Rights*, Albany Times Union, Mar. 1, 2000, at B2; Tom Precious, *Judge*

An appeal was heard on January 23, 2001; on October 4, the court of appeals determined that the case was moot.[606] The appellate court vacated the district court's ruling.[607]

A voter filed a similar complaint in the same district on July 12, 2007, seeking an injunction allowing him to vote in the September primary election.[608] At a hearing one week later, Judge Gary L. Sharpe denied the plaintiff a temporary restraining order and dismissed the complaint.[609] Hearing a pro se appeal, the court of appeals affirmed Judge Sharpe's ruling on September 17, 2010.[610]

While the 2007 plaintiff's case was on appeal, the plaintiff and two other voters filed a similar complaint in the Northern District on August 15, 2008.[611] Judge Lawrence E. Kahn denied the plaintiffs relief on September 8 both on the merits and pursuant to res judicata.[612] A different panel of the court of appeals affirmed the judgment on March 25, 2010.[613]

Rejects Effort to Allow Independents to Vote in New York Primary, Buffalo News, Mar. 1, 2000, at A5.

606. *Van Wie*, 267 F.3d 109.

607. *Id.* at 116.

608. Complaint, Van Allen v. Cuomo, No. 1:07-cv-722 (N.D.N.Y. July 1, 2007), D.E. 1; Van Allen v. Cuomo, 621 F.3d 244, 246 (2d Cir. 2010).

609. Opinion, *Van Allen*, No. 1:07-cv-722 (N.D.N.Y. July 19, 2007), D.E. 24, 2007 WL 2091192; Transcript, *id.* (July 19, 2007, filed Nov. 15, 2007), D.E. 31; Minutes, *id.* (July 19, 2007), D.E. 22; *Van Allen*, 621 F.3d at 246–47.

610. *Van Allen*, 621 F.3d 244.

611. Complaint, Van Allen v. Walsh, No. 1:08-cv-876 (N.D.N.Y. Aug. 15, 2008), D.E. 1.

612. Opinion, *id.* (Sept. 8, 2008), D.E. 17.

613. Van Allen v. Walsh, 370 F. App'x 235 (2d Cir. 2010) (noting that the appeal was pro se).

3. Nullifying Registrations

The National Voter Registration Act (NVRA), also known as Motor Voter, constrains local election authorities' nullification of voter registrations for federal elections.[614] Nullifications shortly before an election are both especially constrained by the NVRA and especially prone to emergency litigation. A federal judge may conclude, however, that the federal court is not the proper forum for resolution of a registration dispute.[615]

Local authorities are required to have a program that nullifies federal voter registrations when voters move or die.[616] However, voter registrations may not be *systematically* nullified because of moves fewer than ninety days before an election.[617]

Systematic purging is statutorily permitted because of voter request, criminal conviction, mental incapacity, or death.[618] A district judge concluded, however, that mental-illness disfranchisement has constitutional limits.[619] The U.S. Court of Appeals for the Eleventh Circuit concluded that systematic purging fewer than ninety days before a federal election is not permitted to weed out noncitizens, because systematic purging close in

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614. *See generally* Robert Timothy Reagan, Motor Voter: The National Voter Registration Act (Federal Judicial Center 2014).

615. *See, e.g.*, Opinion, Democratic Party of Va. v. Va. State Bd. of Elections, No. 1:13-cv-1218 (E.D. Va. Oct. 21, 2013), D.E. 34, 2013 WL 5741486, *as reported in* "Purging Voter Registrations Because of Registration in Other States," *infra* page 108; *see also* "Unsuccessful Effort to Open a Primary Election Because of Allegedly Purged Party Registrations," *infra* page 106.

616. NVRA § 8(a)(4), 52 U.S.C. § 20507(a)(4).

617. *Id.* § 8(c)(2), 52 U.S.C. § 20507(c)(2); *see, e.g.*, "Voter-Registration Purges in North Carolina," *infra* page 102; "Partisan Canceling of Voter Registrations," *infra* page 125.

618. NVRA § 8(a)(3)(A)–(B), (a)(4)(A), (c)(2), 52 U.S.C. § 20507(a)(3)(A)–(B), (a)(4)(A), (c)(2); *see, e.g.*, "The Right to Vote While Under Guardianship," *infra* page 136 (litigation over voting in one state after a finding of incapacity in another state).

In some states, a criminal conviction is only disfranchising while a person is incarcerated. *See, e.g.*, "Restoration of the Elective Franchise for a Voter Whose Criminal Sentence Is Stayed," *infra* page 104.

619. Doe v. Rowe, 156 F. Supp. 2d 35 (D. Me. 2001), *as reported in* "Voting and Mental Illness," *infra* page 147.

time to an election does not allow enough time to correct errors.[620] Insufficient evidence of errors motivated a district judge to deny relief from a registration purge despite the state's concession of error corrections, because corrected errors were evidence of care and not evidence of current errors.[621]

If postal records show that a voter has moved outside a registrar's jurisdiction, the registrar may nullify the registration only after proper notice.[622] Notice from the voter to the registrar would count.[623] Without notice from the voter, the registrar can nullify the registration of a voter who apparently has moved only after (1) notice by forwardable mail with a postage-prepaid, preaddressed return card,[624] (2) no response from the voter,[625] and (3) no voting by the voter in the registrar's jurisdiction for two subsequent general federal elections.[626] The Help America Vote Act (HAVA) also proscribes nullification of a federal voter registration without notice.[627]

The availability of provisional ballots, as established by HAVA,[628] is sometimes a reason judges give for not imposing more invasive remedies for improper nullifications of voter registrations.[629]

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620. Arcia v. Florida Sec'y of State, 772 F.3d 1335 (11th Cir. 2014), *as reported in* "Purging Noncitizen Voter Registrations," *infra* page 112.

621. Ohio Democratic Party v. LaRose, 402 F. Supp. 3d 419, 420, 424–25 (S.D. Ohio 2019), *as reported in* "No Relief from a 2019 Voter-Registration Purge in Ohio," *infra* page 101.

622. NVRA § 8(c)(1)(B)(ii), (d)(2)(A), 52 U.S.C. § 20507(c)(1)(B)(ii), (d)(2)(A).

623. *Id.* § 8(d)(1)(A), 52 U.S.C. § 20507(d)(1)(A); *see id.* § 8(a)(3)(A), 52 U.S.C. § 20507(a)(3)(A) ("the name of a registrant may . . . be removed from the official list of eligible voters . . . at the request of the registrant").

624. *Id.* § 8(d)(2), 52 U.S.C. § 20507(d)(2); *see, e.g.*, "Voter-Registration Purges in North Carolina," *infra* page 102; "Improperly Canceling Voter Registrations for Changes of Address," *infra* page 127.

625. NVRA § 8(d)(1)(B), 52 U.S.C. § 20507(d)(1)(B).

626. *Id.* § 8(b)(2), (d)(2)(A), 52 U.S.C. § 20507(b)(2), (d)(2)(A); *see, e.g.*, "Voter-Registration Purges in North Carolina," *infra* page 102.

627. HAVA § 303(a)(4)(A); 52 U.S.C. § 21083(a)(4)(A); *see, e.g.*, "Cancellation of Voter Registrations for Not Voting in the Last Election," *infra* page 109.

628. HAVA § 302, 52 U.S.C. § 21082.

629. *See, e.g.*, Opinion at 4–5, Democratic Party of Va. v. Va. State Bd. of Elections, No. 1:13-cv-1218 (E.D. Va. Oct. 21, 2013), D.E. 34, 2013 WL 5741486, *as reported in* "Purging Voter Registrations Because of Registration in Other States," *infra* page 108; Common Cause of Colo. v. Buescher, 750 F. Supp. 2d 1259 (D. Colo. 2010), *as reported in* "Voter-Registration Purges in Colorado," *infra* page 120.

Litigation can arise when political actors challenge voter registrations based on change-of-address records[630] or returned mail.[631] Emergency election litigation has also arisen in federal courts over nullification threats;[632] citizenship;[633] residency rules for students,[634] prisoners,[635] RV enthusiasts,[636] and evicted tenants;[637] temporary displacement;[638] minor-party registrations;[639] whether someone can be registered to vote in one location but registered to drive in another;[640] whether spouses can be registered at different addresses;[641] and whether registration forms for college students include dormitory room numbers.[642]

A 2000 suit in the Northern District of Illinois sought reinstatements of voter registrations that were voided because of systematically unreliable records of a deputy registrar; the district judge denied immediate relief following arguments citing efforts by election authorities to contact prospective voters to cure registration defects.[643]

Litigation arose in Georgia when both U.S. Senate seats were up for election in 2020 and no candidate received a majority of the votes in either election.[644] A complaint seeking an injunction against votes in the runoff

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630. *See, e.g.*, "Complaints Against Widespread Voter-Registration Challenges Based on Possibly Inaccurate Change-of-Address Records," *infra* page 92; "No Preliminary Injunction for Erroneous Voter-Registration Cancelations in Georgia in 2020," *infra* page 98.

631. *See, e.g.*, "Widespread Voter-Registration Challenges," *infra* page 134.

632. *See, e.g.*, "Threats to Cancel Voter Registrations," *infra* page 117 ; "Using Foreclosure Notices to Challenge Voters," *infra* page 130; "A List of Inactive Voters in Lawrence, Massachusetts," *infra* page 133.

633. *See, e.g.*, "Citizenship Verification," *infra* page 123.

634. *See, e.g.*, "Nullifying University Students' Voter Registrations," *infra* page 141.

635. *See, e.g.*, "Voter Registrations for Juvenile Offenders," *infra* page 118.

636. *See, e.g.*, "Challenge to Voter Registrations in an RV Park," *infra* page 149.

637. *See, e.g.*, "Denial of the Right to Vote Because of Eviction," *infra* page 145.

638. *See, e.g.*, "Hurricane Displacement and Voter Registration," infra page 131.

639. *See, e.g.*, "Injunction Against Purging Minor-Party Registrations for the Party's Failure to Qualify as an Established Party," *infra* page 138.

640. *See, e.g.*, "Improperly Canceling Voter Registrations for Changes of Address," *infra* page 127.

641. *See, e.g.*, "Spouses Registered in Different Precincts," *infra* page 143.

642. *See, e.g.*, "George Mason University Student Voter-Registration Addresses," *infra* page 100.

643. *See* "Voter Registrations Voided Because a Deputy Registrar Was Dismissed," *infra* page 146.

644. *See, e.g.*, "Complaints Against Widespread Voter-Registration Challenges Based on Possibly Inaccurate Change-of-Address Records," *infra* page 92; "An Unsuccessful Attempt to Disqualify Runoff-Election Voters Who Voted in Other States in the Previous

elections by voters who voted in other states in the general election was unsuccessful; the judge observed that there was no way to determine whether voters in the runoff election had voted in a senatorial election.[645]

Complaints Against Widespread Voter-Registration Challenges Based on Possibly Inaccurate Change-of-Address Records

Majority Forward v. Ben Hill County Board of Elections (Leslie A. Gardner, M.D. Ga. 1:20-cv-266) and Fair Fight v. True the Vote (Steve C. Jones, N.D. Ga. 2:20-cv-302)

> Two federal complaints filed less than two weeks before a senatorial runoff election in Georgia alleged that an organization was improperly challenging voter registrations based on unreliable change-of-address records. One week after the complaints were filed, a district judge in the Middle District of Georgia curtailed one county's canceling voter registrations based on the change-of-address records alone. On the following day, a district judge in the Northern District of Georgia declined to impose immediate relief on the organization, but the case remains pending.
>
> *Topics:* Registration challenges; National Voter Registration Act; recusal; provisional ballots; Covid-19; case assignment.

Two federal complaints filed in Georgia on December 23, 2020—thirteen days before a senatorial runoff election—alleged that widespread efforts by a Texas-based organization to challenge voter registrations were based on unreliable change-of-address records.

The Middle District of Georgia

A complaint filed in the Middle District of Georgia alleged that election officials for Ben Hill County and Muscogee County were cooperating with the organization by accepting voter-registration challenges based on "notoriously unreliable" records.[646] The plaintiffs were an "organization creat-

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General Election," *infra* page 96; "No Preliminary Injunction for Erroneous Voter-Registration Cancelations in Georgia in 2020," *infra* page 98.

645. Transcript, Ga. Republican Party v. Raffensperger, No. 2:20-cv-135 (S.D. Ga. Dec. 18, 2020, filed Dec. 28, 2020), D.E. 32, *as reported in* "An Unsuccessful Attempt to Disqualify Runoff-Election Voters Who Voted in Other States in the Previous General Election," *infra* page 96.

646. Complaint, Majority Forward v. Ben Hill Cty. Bd. of Elections, No. 1:20-cv-266 (M.D. Ga. Dec. 23, 2020), D.E. 1 [hereinafter *Majority Forward* Complaint]; Majority Forward v. Ben Hill Cty. Bd. of Elections, 509 F. Supp. 3d 1348, 1352, 1354 (M.D. Ga. 2020).

"In-person early voting in the Runoff Elections began on December 14, 2020." *Majori-*

ed to support voter registration and voter turnout efforts" and a voter who had moved temporarily to California for contract work.[647] On the following day, Judge Leslie A. Gardner set the case for hearing on December 30.[648] On December 27, the plaintiffs filed a motion for a temporary restraining order requiring election officials to accept regular ballots from challenged voters.[649] On December 28, Judge Gardner granted the plaintiffs the requested temporary restraining order, to remain in effect for eight days (through election day).[650]

Also on December 28, Muscogee County election officials moved to sever claims against them from the rest of the case.[651] On December 29, the plaintiffs filed an amended complaint,[652] and the Muscogee County defendants filed a motion to stay the temporary restraining order.[653]

On the day of the all-day December 30 evidentiary hearing,[654] Judge Gardner issued a preliminary injunction against Muscogee County election officials—finding insufficient evidence justifying relief against Ben Hill County election officials—on finding a violation of section 8 of the National Voter Registration Act.[655] A published opinion followed on January 4, 2021.[656]

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ty Forward, 509 F. Supp. 3d at 1353.

647. *Majority Forward* Complaint, *supra* note 646; *Majority Forward*, 509 F. Supp. 3d at 1352.

648. Order, *Majority Forward*, No. 1:20-cv-266 (M.D. Ga. Dec. 24, 2020), D.E. 2; *Majority Forward*, 509 F. Supp. 3d at 1354.

649. Temporary-Restraining-Order Motion, *Majority Forward*, No. 1:20-cv-266 (M.D. Ga. Dec. 27, 2020), D.E. 5; *Majority Forward*, 509 F. Supp. 3d at 1352–53.

650. *Majority Forward*, 509 F. Supp. 3d at 1348.

651. Severance Motion, *Majority Forward*, No. 1:20-cv-266 (M.D. Ga. Dec. 28, 2020), D.E. 8, 11.

652. Amended Complaint, *id.* (Dec. 29, 2020), D.E. 20.

653. Stay Motion, *id.* (Dec. 29, 2020), D.E. 24.

654. Transcript, *id.* (Dec. 30, 2020, filed Jan. 27, 2021), D.E. 40; Minutes, *id.* (Dec. 30, 2020), D.E. 31.

"Defendant Muscogee County called one witness." Majority Forward v. Ben Hill Cty. Bd. of Elections, 512 F. Supp. 3d 1354, 1357–58 (M.D. Ga. 2020).

655. Preliminary Injunction, *Majority Forward*, No. 1:20-cv-266 (M.D. Ga. Dec. 30, 2020), D.E. 27 [hereinafter *Majority Forward* Preliminary Injunction], 2020 WL 9074825; *see* 52 U.S.C. § 20507; *see also* Susan McCord, *Federal Judge Rejects Georgia Voter Challenges*, Augusta Chron., Dec. 30, 2020, at A4; Mark Niesse, *Judge Rejects Challenges to 4,000 Voters*, Atlanta J.-Const., Dec. 30, 2020, at 5B; David Wickert, *Judge Is Skeptical of Challenges to Ga. Voters' Eligibility*, Atlanta J.-Const., Jan. 3, 2021, at 15A. *See generally* Robert Timothy Reagan, Motor Voter: The National Voter Registration Act (Federal Judicial Center 2014).

656. *Majority Forward*, 512 F. Supp. 3d 1354.

Section 8(d) specifies information requirements for the cancelation of a voter's registration for change of residence.[657] In addition, section 8(c) prohibits the systematic cancelation of voter registrations fewer than ninety days before an election.[658]

The plaintiffs had moved on December 28, 2020, for the recusal of Judge Gardner, "the sister of Stacey Abrams, a Georgia politician and voting rights activist who was the Democratic candidate in the 2018 Georgia gubernatorial election."[659] On December 31, Judge Gardner ruled that her oath of office required her to accept assignment of the case and decide it impartially.[660]

Twenty days after the election, the parties stipulated dismissal of the action.[661]

The Northern District of Georgia

A political action committee and two anonymous voters filed a complaint in the Northern District of Georgia against the Texas-based organization at issue in the Middle District case, an "organization whose stated purpose is to combat voter fraud," and four persons affiliated with the organization, claiming that the organization "has spearheaded a coordinated attack on Georgia's electoral system threatening voters with entirely frivolous claims of fraudulent and illegal voting that have reached feverish heights in the weeks leading up to the January 5, 2021 [senatorial] runoff."[662] The complaint further alleged that the organization "in partnership with electors in each Georgia county, intended to preemptively challenge the eligibility of more than 364,000 Georgians to vote on the grounds that these voters no longer reside in the State of Georgia."[663] The individual plaintiffs sought permission to proceed anonymously, alleging that they feared "retaliation from Defendants and their supporters for having filed the lawsuit."[664]

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657. 52 U.S.C. § 20507(d); *see Majority Forward* Preliminary Injunction, *supra* note 655, at 1–2.

658. 52 U.S.C. § 20507(c)(2)(A); *see Majority Forward* Preliminary Injunction, *supra* note 655, at 2.

659. Recusal-Motion Brief at 4, *Majority Forward*, No. 1:20-cv-266 (M.D. Ga. Dec. 28, 2020), D.E. 7-1.

660. Opinion, *id.* (Dec. 31, 2020), D.E. 28.

661. Stipulation, *id.* (Jan. 25, 2021), D.E. 39.

662. Complaint, Fair Fight, Inc. v. True the Vote, No. 2:20-cv-302 (N.D. Ga. Dec. 23, 2020), D.E. 1 [hereinafter *Fair Fight, Inc.* Complaint]; *see* Order, *id.* (Jan. 1, 2021), D.E. 28 (changing the name of a defendant in the case from True the Vote to True the Vote, Inc.).

663. *Fair Fight, Inc.* Complaint at 2, *supra* note 662.

664. Motion to Proceed Anonymously, *Fair Fight, Inc.*, No. 2:20-cv-302 (N.D. Ga.

Senior Judge Richard W. Story exercised his prerogative as a senior judge on December 29 and declined assignment of the case.[665] That day, Judge Steve C. Jones set the case for a videoconference hearing on December 31.[666] Judge Jones noted that the complaint sought immediate injunctive relief and ordered the plaintiffs to file a motion to that effect.[667] On December 29, the plaintiffs filed a motion for a temporary restraining order or a preliminary injunction.[668]

At his hearing, Judge Jones and the parties acknowledged Judge Gardner's injunction.[669]

Judge Jones informed the plaintiffs' attorney that he would need to know additional information about the individual plaintiffs to establish standing for them to bring their claims, and Judge Jones said that if the individual plaintiffs were concerned about their safety, then the information should be physically brought to him that day, but it should not be emailed.[670] The hearing ended at 1:15 p.m.[671] After the hearing, the plaintiffs filed declarations that had been executed on December 24 by the two anonymous plaintiffs, and Judge Jones filed copies of the declarations in the public record, redacting identifying information.[672] Following the defendants' response,[673] Judge Jones decided late on January 1, 2021, that the individual plaintiffs could proceed anonymously.[674]

> This Court finds, in light of the current climate surrounding this runoff election, their fears to be reasonable. Since the general election, Georgia election workers and officials have reported receiving threats predicated on unfounded claims of voter fraud. The atmosphere has been serious enough for state officials to make a public plea for the accusations to stop before people are seriously harmed or killed.[675]

Dec. 23, 2020), D.E. 2.

665. Order, *id.* (Dec. 29, 2020), D.E. 5.

666. Order, *id.* (Dec. 29, 2020), D.E. 6.

667. *Id.*

668. Motion, *id.* (Dec. 29, 2020), D.E. 11.

669. Transcript at 19–22, 38–41, 71–82, 103, *id.* (Dec. 31, 2020, filed Jan. 26, 2021), D.E. 46.

670. *Id.* at 12–14.

671. Minutes, *id.* (Dec. 31, 2020), D.E. 25.

672. Declarations, *id.* (Jan. 1, 2021), D.E. 26.

673. Letter, *id.* (Jan. 1, 2021), D.E. 27.

674. Opinion at 18–19, *id.* (Jan. 1, 2021), D.E. 29 [hereinafter Jan. 1, 2021, *Fair Fight, Inc.* Opinion]; *see* Wickert, *supra* note 655.

675. Jan. 1, 2021, *Fair Fight, Inc.* Opinion, *supra* note 674, at 18–19.

But Judge Jones denied the plaintiffs immediate relief.[676] Although Judge Jones expressed "grave concerns regarding Defendants' coordinated, broad-strokes challenge to more than 360,000 Georgia voters on the eve of an unprecedented two-seat Senate runoff,"[677] "the evidence provided to date does not show that Defendants have harassed or intimidated voters."[678]

An amended complaint filed on March 22 included three individual plaintiffs, one of them anonymous.[679] The complaint offered an explanation for each individual plaintiff's recently relocating to where the plaintiff intended to vote.[680] Judge Jones determined on March 9, 2023, that only some of the case's issues could be resolved by summary judgment.[681]

On September 13, Judge Jones denied an August 14 defense motion for a jury trial: relief at issue was only equitable, the request was "extremely delayed," and the requested change in procedure would be disruptive to the court and parties and prejudicial to the plaintiffs.[682] Trial began on October 26.[683]

An Unsuccessful Attempt to Disqualify Runoff-Election Voters Who Voted in Other States in the Previous General Election

Georgia Republican Party v. Raffensperger (Lisa Godbey Wood, S.D. Ga. 2:20-cv-135)

> After early voting had started in a January 5, 2021, senatorial runoff election, a federal complaint challenged the validity of votes by persons who voted in other states in the general election the previous November. The district judge denied the plaintiffs immediate relief, because, among other things, it could not be determined whether voters who were in other states the previous November voted in those states' senatorial elections.
>
> *Topics:* Registration challenges; Covid-19; early voting.

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676. *Id.* at 21–28 (citations omitted).

677. *Id.* at 11; *see id.* at 15 (noting that many Georgia voters might have been "temporarily out of state for various COVID-19 related reasons").

678. *Id.* at 26.

679. Amended Complaint, *Fair Fight, Inc.*, No. 2:20-cv-302 (N.D. Ga. Mar. 22, 2021), D.E. 73 [hereinafter *Fair Fight, Inc.* Amended Complaint]; *see also* Opinion, *id.* (Aug. 17, 2021), D.E. 111 (dismissing earlier counterclaims).

680. *Fair Fight, Inc.* Amended Complaint, *supra* note 679, at 7–8.

681. Opinion, *Fair Fight, Inc.*, No. 2:20-cv-302 (N.D. Ga. Mar. 9, 2023), D.E. 222, *modified by* Order, *id.* (May 3, 2023), D.E. 235.

682. Opinion, *id.* (Sept. 13, 2023), D.E. 244; *see* Motion, *id.* (Aug. 14, 2023), D.E. 237.

683. Docket Sheet, *id.* (Dec. 23, 2020).

A federal complaint filed in the Southern District of Georgia on Thursday night, December 17, 2020, sought injunctive relief against Georgia's allowing persons who voted in other states during the November 2020 general election to vote in Georgia in the January 5, 2021, senatorial runoff election.[684] Plaintiffs were the campaigns for two incumbent senators, the political party supporting them, and three voters.[685] The complaint named state election officials and county election officials for Glynn County and Chatham County.[686] The complaint acknowledged that early voting began three days previously.[687] With their complaint, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction.[688]

Judge Lisa Godbey Wood set the case for a videoconference hearing on the following afternoon, posting audio contact information for the hearing in the docket sheet.[689] At the hearing, she acknowledged procedural accommodations of the global infectious Covid-19 pandemic:

> Of course, if there weren't COVID, we would all be here together. But because of the challenges of the current epidemic, it's hard for people that are located outside of this area to get here in a hurry, and it's also not safe for us to all be packed into one courtroom at this time, so I did allow the hearing to proceed by way of video conference so we could get to it in a timely fashion.
>
> . . .
>
> By way of further preliminaries, we have some attorneys who are local who are here in the courtroom. We have some members of the public, citizens, who, of course, are entitled to listen and observe. We also, because of COVID, have a public line open so that anybody from anywhere can dial in to the public line and listen to the proceedings.
>
> For the benefit of those of you who are participating remotely either by audio or by video, whether you're a member of the bar or not, I need to remind everybody who is participating that it is improper to make any kind of video or audio recording of this event.[690]

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684. Complaint, Ga. Republican Party v. Raffensperger, No. 2:20-cv-135 (S.D. Ga. Dec. 17, 2020), D.E. 1 [hereinafter *Ga. Republican Party* Complaint]; Transcript at 6, *id.* (Dec. 18, 2020, filed Dec. 28, 2020), D.E. 32 [hereinafter *Ga. Republican Party* Transcript].

685. *Ga. Republican Party* Complaint, *supra* note 684.

686. *Id.*

687. *Id.* at 3.

688. Motion, *Ga. Republican Party*, No. 2:20-cv-135 (S.D. Ga. Dec. 17, 2020), D.E. 3.

689. Docket Sheet, *id.* (Dec. 17, 2020).

690. *Ga. Republican Party* Transcript, *supra* note 684, at 6–7.

Judge Wood determined that the plaintiffs did not have standing to obtain the relief requested, so she dismissed the case.[691] Among other things, there was no way to properly discover whether persons who voted in other states in the general election voted for the office of U.S. Senate.[692]

No Preliminary Injunction for Erroneous Voter-Registration Cancelations in Georgia in 2020

Black Voters Matter Fund v. Raffensperger (Steve C. Jones, N.D. Ga. 1:20-cv-4869)

> A preliminary-injunction motion sought remedies for voter-registration cancelations based on erroneous change-of-address data. On the one hand, the plaintiffs did not give the state's secretary of state adequate notice of the alleged errors before filing suit. On the other hand, they had not shown that the errors discriminated against any group.
>
> *Topics:* Registration procedures; National Voter Registration Act; equal protection; intervention; laches.

A December 2, 2020, federal complaint filed in the Northern District of Georgia by three organizations against Georgia's secretary of state alleged improper cancelations of voter registrations based on erroneous change-of-address information.[693] "Plaintiffs seek declaratory and injunctive relief to allow those persons whose registrations were wrongfully cancelled to be placed on the voter rolls in time to vote in the January 5, [2021] Senate runoff races."[694] On the day that the complaint was filed, Judge Steve C. Jones set the case for a videoconference evidentiary hearing on December 10.[695] The plaintiffs filed a motion for a preliminary injunction on December 3.[696]

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691. Order, *Ga. Republican Party*, No. 2:20-cv-135 (S.D. Ga. Dec. 18, 2020), D.E. 31; Minutes, *id.* (Dec. 18, 2020), D.E. 30; *Ga. Republican Party* Transcript, *supra* note 684.

692. *Ga. Republican Party* Transcript, *supra* note 684.

693. Complaint, Black Voters Matter Fund v. Raffensperger, No. 1:20-cv-4869 (N.D. Ga. Dec. 2, 2020), D.E. 1 [hereinafter *Black Voters Matter Fund* Complaint]; Black Voters Matter Fund v. Raffensperger, 508 F. Supp. 3d 1283, 1289 (N.D. Ga. 2020); *see* Amended Complaint, *Black Voters Matter Fund*, No. 1:20-cv-4869 (N.D. Ga. Dec. 8, 2020), D.E. 27 (adding a fourth plaintiff organization); *see also* David Wickert, *Groups Sue Georgia Over Voter Purges*, Atlanta J.-Const., Dec. 3, 2020, at 9A.

694. *Black Voters Matter Fund* Complaint, *supra* note 693, at 5.

695. Order, *Black Voters Matter Fund*, No. 1:20-cv-4869 (N.D. Ga. Dec. 2, 2020), D.E. 4; *see* Order, *id.* (Dec. 9, 2020), D.E. 41 (allocating one hour for each side); *Black Voters Matter Fund*, 508 F. Supp. 3d at 1288; Minutes, *Black Voters Matter Fund*, No. 1:20-cv-4869 (N.D. Ga. Dec. 10, 2020), D.E. 51; Transcript, *id.* (Dec. 10, 2020, filed Dec. 18, 2020), D.E. 65; *see also* Maya T. Prabhu, *Federal Judge Will Rule Soon on Voter Purge*, Atlanta J.-

On Saturday, December 5, a political party filed an intervention motion.[697] On Sunday, Judge Jones ordered a response by Tuesday afternoon.[698] After receiving the response,[699] he ordered a reply filed by Wednesday afternoon.[700] On the day that the reply was filed,[701] he granted intervention[702] and ordered a response to the preliminary-injunction motion by 5:00 p.m. that day.[703]

He denied immediate relief on December 16.[704] The plaintiffs could not obtain relief pursuant to the National Voter Registration Act[705] because they did not give the secretary notice of his alleged violation of the act ninety days before filing the complaint.[706] Also, as a constitutional matter, "Plaintiffs have shown that Georgia's list maintenance process may not be accurate in identifying voters who have actually moved. But they have not shown, or even alleged, that the process is applied differently to any class of voters."[707] Although the equities did not support a preliminary injunction, Judge Jones's opinion "strongly encourage[d] the Parties to meet and determine the explanation, if any, for the alleged [cancelation] inaccuracies."[708]

An April 1, 2021, stipulated dismissal brought the case to a close.[709]

Const., Dec. 11, 2020, at 1B.

696. Preliminary-Injunction Motion, *Black Voters Matter Fund*, No. 1:20-cv-4869 (N.D. Ga. Dec. 3, 2020), D.E. 6; *Black Voters Matter Fund*, 508 F. Supp. 3d at 1288.

697. Intervention Motion, *Black Voters Matter Fund*, No. 1:20-cv-4869 (N.D. Ga. Dec. 5, 2020), D.E. 13.

698. Order, *id.* (Dec. 6, 2020), D.E. 18.

699. Intervention-Motion Response, *id.* (Dec. 8, 2020), D.E. 30.

700. Order, *id.* (Dec. 9, 2020), D.E. 32.

701. Intervention-Motion Reply, *id.* (Dec. 9, 2020), D.E. 33.

702. Opinion, *id.* (Dec. 9, 2020), D.E. 42; Order, *id.* (Dec. 9, 2020), D.E. 36.

703. Order, *id.* (Dec. 9, 2020), D.E. 37.

704. Black Voters Matter Fund v. Raffensperger, 508 F. Supp. 3d 1283 (N.D. Ga. 2021); *see* Order, *Black Voters Matter Fund*, No. 1:20-cv-4869 (N.D. Ga. Dec. 29, 2020), D.E. 69 (denying emergency reconsideration); *see also* Maya T. Prabhu, *Ga. Needn't Immediately Restore Purged Voters*, Atlanta J.-Const., Dec. 17, 2020, at 8B.

705. Pub. L. No. 103-31, 107 Stat. 77 (1993), *as amended*, 52 U.S.C. §§ 20501–20511. *See generally* Robert Timothy Reagan, Motor Voter: The National Voter Registration Act (Federal Judicial Center 2014).

706. *Black Voters Matter Fund*, 508 F. Supp. 3d at 1292–96; *see* 52 U.S.C. § 20510(b)(2).

707. *Black Voters Matter Fund*, 508 F. Supp. 3d at 1299.

708. *Id.* at 1303.

709. Stipulation, *Black Voters Matter Fund*, No. 1:20-cv-4869 (N.D. Ga. Apr. 1, 2021), D.E. 78; *see Voting Groups End Legal Challenge to Purges*, Atlanta J.-Const., Apr. 11, 2021, at 7A; David Wickert, *Groups Drop Federal Lawsuit Over Georgia Voter Purges*, Atlanta J.-

George Mason University Student Voter-Registration Addresses

New Virginia Majority Education Fund v. Fairfax County Board of Elections (Rossie D. Alston, Jr., E.D. Va. 1:19-cv-1379)

> A district judge ordered relief for university students whose voter-registration applications were rejected because they did not include dormitory and room numbers.
>
> *Topics:* Student registration; registration procedures; provisional ballots; case assignment.

A Wednesday, October 30, 2019, federal complaint filed in the Eastern District of Virginia sought remedies for a county's denying voter registration to George Mason University students who did not specify their dormitory and room numbers on their applications, alleging that this was contrary to prior practice, and alleging that the county's offered remedies were inadequate.[710] On the next day, the plaintiffs filed a motion for a preliminary injunction completing approximately 170 voter registrations in time for the November 5 election.[711]

The court initially assigned the case to Judge T.S. Ellis III, then to Judge Leonie M. Brinkema, and then to Judge Rossie D. Alston, Jr., who heard the case from 10:26 to 11:00 a.m. on November 1 and promised a decision by 12:30.[712]

Judge Alston granted relief.[713] His order specified conditions for curing some incomplete registration applications for George Mason students in time for the election.[714]

On July 20, 2020, Judge Alston approved a voluntary dismissal of the case.[715]

Const., Apr. 6, 2021, at 7B.

710. Complaint, New Va. Majority Educ. Fund v. Fairfax Cty. Bd. of Elections, No. 1:19-cv-1379 (E.D. Va. Oct. 30, 2019), D.E. 1; *see* Amy Gardner, *Voting at GMU Made Difficult*, Wash. Post, Oct. 25, 2019, at B4.

711. Preliminary-Injunction Motion, *New Va. Majority Educ. Fund*, No. 1:19-cv-1379 (E.D. Va. Oct. 31, 2019), D.E. 9.

712. Minutes, *id.* (Nov. 1, 2019), D.E. 16; Docket Sheet, *id.* (Oct. 30, 2019).

713. Order, *id.* (Nov. 1, 2019), D.E. 17.

714. *Id.*; *see* Antonio Olivo, *Judge Orders Fairfax to Let GMU Students Vote*, Wash. Post, Nov. 2, 2019, at B4.

715. Order, *New Va. Majority Educ. Fund*, No. 1:19-cv-1379 (E.D. Va. July 20, 2020), D.E. 19.

No Relief from a 2019 Voter-Registration Purge in Ohio

Ohio Democratic Party v. LaRose (James L. Graham, S.D. Ohio 2:19-cv-3774)

> A district judge denied relief from imminent purging of voter-registration records, because the plaintiff political party had not presented sufficient evidence of widespread errors in the purging process that would not be corrected.
>
> *Topics:* Registration procedures; Help America Vote Act (HAVA).

A political party filed a federal complaint in the Southern District of Ohio on Friday, August 30, 2019, eleven days before some Ohio municipalities would hold primary elections, alleging that a process underway to purge voter registrations would purge valid registrations.[716] Attached to its complaint, the party filed a motion for a temporary restraining order and a preliminary injunction.[717]

Judge James L. Graham held telephone conferences at 3:00 p.m. on the day that the case was filed and at 1:00 p.m. four days later.[718] Judge Graham set the case for a preliminary-injunction hearing on September 9[719] and denied the party a temporary restraining order on September 3.[720]

The party cited news and other reports of errors, but it did not provide any evidence of errors.[721] Public concessions by Ohio's secretary of state of corrected errors were not evidence of current errors, and they were evidence of care in finding and correcting errors.[722]

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716. Complaint, Ohio Democratic Party v. LaRose, No. 2:19-cv-3774 (S.D. Ohio Aug. 30, 2019), D.E. 1 [hereinafter *Ohio Democratic Party* Complaint]; Ohio Democratic Party v. LaRose, 402 F. Supp. 3d 419, 420, 422 (S.D. Ohio 2019).

717. *Ohio Democratic Party* Complaint, *supra* note 716, D.E. 1-1; Motion, *Ohio Democratic Party*, No. 2:19-cv-3774 (S.D. Ohio Aug. 30, 2019), D.E. 2; *Ohio Democratic Party*, 402 F. Supp. 3d at 420, 422.

718. Minutes, *Ohio Democratic Party*, No. 2:19-cv-3774 (S.D. Ohio Aug. Sept. 3, 2019), D.E. 12; Docket Sheet, *id.* (Aug. 30, 2019) (D.E. 6); *Ohio Democratic Party*, 402 F. Supp. 3d at 422.

719. Notice, *Ohio Democratic Party*, No. 2:19-cv-3774 (S.D. Ohio Sept. 3, 2019), D.E. 13; *Ohio Democratic Party*, 402 F. Supp. 3d at 422.

720. *Ohio Democratic Party*, 402 F. Supp. 3d 419; *see* Jim Provance, *Judge: Ohio Voter Purge May Go On*, Cincinnati Enquirer, Sept. 5, 2019; Andrew J. Tobias, *Voter Purge to Proceed After Block Request Denied by Judge*, Cleveland Plain Dealer, Sept. 4, 2019, at A1; *see also* Monroe Trombly, *LaRose Defends Voter Roll Removals*, Mansfield News J., Sept. 11, 2019, at A2.

721. *Ohio Democratic Party*, 402 F. Supp. 3d at 423–24.

722. *Id.* at 424–25.

On the day of Judge Graham's ruling, the plaintiff party voluntarily dismissed its case.[723]

Voter-Registration Purges in North Carolina

North Carolina State Conference of the NAACP v. North Carolina State Board of Elections (Loretta C. Biggs, M.D.N.C. 1:16-cv-1274)

> Eight days before a presidential election, a federal complaint challenged widespread cancelation of voter registrations based on single instances of undeliverable mail. Finding that the National Voter Registration Act proscribed systematic voter-registration cancelations less than ninety days before a federal election and proscribed cancelations based on evidence of residence changes before two federal elections had occurred, a district judge enjoined the voter-registration cancelation program at issue in an opinion issued four days before the election. The judge issued a permanent injunction about two years later.
>
> *Topics:* Registration challenges; National Voter Registration Act.

A state unit and a county unit of the NAACP and four voters whose voter registrations were challenged as part of what the plaintiffs called en masse challenges filed a federal complaint in the Middle District of North Carolina against election officials of North Carolina and three of its counties on October 31, 2016, eight days before a general election, claiming that the late and widespread challenges violated the National Voter Registration Act (NVRA).[724] With their complaint, the plaintiffs filed a motion for a temporary restraining order.[725]

On the day that the case was filed, Judge Loretta C. Biggs set it for hearing two days later.[726] Judge Biggs issued a twenty-eight-page opinion

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723. Notice, *Ohio Democratic Party*, No. 2:19-cv-3774 (S.D. Ohio Sept. 3, 2019), D.E. 15.

724. Complaint, N.C. State Conference of the NAACP v. N.C. State Bd. of Elections, No. 1:16-cv-1274 (M.D.N.C. Oct. 31, 2016), D.E. 1; N.C. State Conference of the NAACP v. N.C. State Bd. of Elections, 283 F. Supp. 3d 393, 397 (M.D.N.C. 2017); *see* Pub. L. No. 103-31, 107 Stat. 77 (1993), *as amended*, 52 U.S.C. §§ 20501–20511. *See generally* Robert Timothy Reagan, Motor Voter: The National Voter Registration Act (Federal Judicial Center 2014).

725. Amended Temporary Restraining Order, *N.C. State Conference of the NAACP*, No. 1:16-cv-1274 (M.D.N.C. Oct. 31, 2016), D.E. 21; Temporary Restraining Order, *id.* (Oct. 31, 2016), D.E. 3; *N.C. State Conference of the NAACP*, 283 F. Supp. 3d at 397.

726. Order, *N.C. State Conference of the NAACP*, No. 1:16-cv-1274 (M.D.N.C. Oct. 31, 2016), D.E. 24; *see* Transcript, *id.* (Nov. 2, 2016, filed Oct. 23, 2017), D.E. 79; Minutes, *id.* (Nov. 2, 2016), D.E. 40; *N.C. State Conference of the NAACP*, 283 F. Supp. 3d at 397; *see*

on November 4 explaining her reasons for granting the plaintiffs a preliminary injunction.[727]

"[T]here is little question that the County Boards' process of allowing third parties to challenge hundreds and, in Cumberland County, thousands of voters within 90 days before the 2016 General Election constitutes the type of 'systematic' removal prohibited by the NVRA."[728]

"[T]he only evidence presented [to the county boards] was . . . one mailing returned and marked undeliverable."[729] "The mailing was marked 'DO NOT FORWARD'; however, the NVRA expressly states that the notice must be sent by forwardable mail."[730]

> (1) A State shall not remove the name of a registrant from the official list of eligible voters in elections for Federal office on the ground that the registrant has changed residence unless the registrant—
>
> . . .
>
> (B) (i) has failed to respond to a notice . . .
>
> (2) [that] is a postage prepaid and pre-addressed return card, sent by forwardable mail, on which the registrant may state his or her current address . . . .[731]

Moreover, the NVRA forbids cancelation of the voter registration until after two general federal elections.[732] The counties' violation of this provi-

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also Martha Waggoner & Jonathan Drew, *Judge Says Voter-Challenge Process Seems "Insane" in Swing State of N.C.*, Miami Herald, Nov. 3, 2016, at 16A.

727. Opinion, *N.C. State Conference of the NAACP*, No. 1:16-cv-1274 (M.D.N.C. Nov. 4, 2016), D.E. 42 [hereinafter *N.C. State Conference of the NAACP* Opinion], 2016 WL 6581284; *N.C. State Conference of the NAACP*, 283 F. Supp. 3d at 397–98; *see* Preliminary Injunction, *N.C. State Conference of the NAACP*, No. 1:16-cv-1274 (M.D.N.C. Nov. 4, 2016), D.E. 43; *see also* Anne Blythe, *Judge: N.C. Counties Must Restore Voters*, Winston-Salem J., Nov. 5, 2016, at A7; Jonathan Drew & Gary D. Robertson, *Judge Says N.C. Counties Must Restore Voters Removed from Rolls*, Miami Herald, Nov. 5, 2016, at 16A; Allan J. Lichtman, The Embattled Vote in America 207 (2018); Michael Wines, *Judge's Ruling Preserves Voting Rights for Thousands in North Carolina*, N.Y. Times, Nov. 5, 2016, at A13.

728. *N.C. State Conference of the NAACP* Opinion, *supra* note 727, at 12–13.

> [T]he Court concludes that the County Boards' reliance on a single mailing that was returned undeliverable as the basis for sustaining a challenge, resulting in the County Boards systematically purging between 3,500 and 4,000 voters from registration rolls within 90 days of the General Election, was a likely violation of the NVRA.

Id. at 18.

729. *Id.* at 14.

730. *Id.*at 19 (citation omitted).

731. 52 U.S.C. § 20507(d).

732. *Id.* § 20507(d)(1)(B)(ii).

sion created a second reason for the plaintiffs' likelihood of success on the merits.[733]

On August 7, 2018, Judge Biggs permanently enjoined "Defendants from canceling the registration of voters in violation of the NVRA's prior notice and waiting period requirement and 90-day prohibition on systematic removals, as well as order[ed] the Executive Director of the State Board to ensure statewide compliance with the NVRA."[734]

Restoration of the Elective Franchise for a Voter Whose Criminal Sentence Is Stayed

Hunter v. Hamilton County Board of Elections (1:16-cv-962) and Hunter v. Hamilton County Board of Elections (1:16-cv-996) (Michael R. Barrett, S.D. Ohio)

> A plaintiff convicted in state court of a felony filed a federal complaint on September 27, 2016, seeking an order requiring the county board of elections to accept her voter registration because her criminal sentence had been stayed by the district court in a habeas corpus action, so she was not incarcerated. A district judge granted the plaintiff relief on October 6. A second federal complaint filed pro se on October 11 seeking the plaintiff's certification as a candidate for juvenile court was not successful, because the plaintiff had been disbarred as a result of her conviction.
>
> *Topics:* Registration challenges; getting on the ballot; case assignment; pro se party; attorney fees.

A federal complaint filed in the Southern District of Ohio on September 27, 2016, alleged that a county board of elections wrongfully rejected the plaintiff's voter-registration application because although the plaintiff had been convicted of a crime she was not incarcerated.[735] The plaintiff's sentence was stayed on May 19 by Judge Timothy S. Black while he considered her habeas corpus petition.[736] With her complaint, the plaintiff filed a

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733. *N.C. State Conference of the NAACP* Opinion, *supra* note 727, at 21.

734. Opinion at 24, N.C. State Conference of the NAACP v. N.C. State Bd. of Elections, No. 1:16-cv-1274 (M.D.N.C. Aug. 7, 2018), D.E. 114, 2018 WL 3748172; *see* N.C. State Conference of the NAACP v. N.C. State Bd. of Elections, 283 F. Supp. 3d 393 (M.D.N.C. 2017) (denying motions to dismiss the complaint).

735. Complaint, Hunter v. Hamilton Cty. Bd. of Elections, No. 1:16-cv-962 (S.D. Ohio Sept. 27, 2016), D.E. 2 [hereinafter *Hunter* Voter-Registration Complaint].

736. Order, Hunter v. Hamilton Cty. Ct. of Common Pleas, No. 1:16-cv-561 (May 19, 2016), D.E. 4; *see* Petition, *id.* (May 19, 2016), D.E. 1; *see also Hunter* Voter-Registration Complaint, *supra* note 735, at 2; Opinion, Hunter v. Hamilton County, No. 1:15-cv-540

motion for a temporary restraining order or a preliminary injunction.[737] On the following day, Judge Susan J. Dlott transferred the case from her docket to the docket of Judge Michael R. Barrett.[738]

Judge Barrett held a status conference on September 30 and set the case for a second conference on October 4 following additional briefing.[739] On October 4, Judge Barrett set the case for hearing on October 6.[740] In a seventeen-page opinion issued on the day of the hearing, Judge Barrett concluded that the plaintiff was entitled to register to vote.[741] "The parties disagree as to whether a convicted felon, who is not currently incarcerated, albeit sentenced to a jail term, is competent to be an elector."[742] Judge Barrett determined that the board was obliged to adhere to the secretary of state's interpretation of Ohio law: convicted felons were not disqualified from voting when they were not incarcerated.[743]

> In accordance with the Court's Opinion and Order, the Board met on October 11, 2016. During the course of that meeting, the Board went into executive session to discuss this litigation and, upon returning from executive session, unanimously voted to direct the Board's staff to take all steps necessary to restore Plaintiff's registration, rather than to seek a stay or appeal of the Opinion and Order.[744]

At the parties' request, Judge Barrett vacated his order and dismissed the case as settled, approving an attorney-fee payment of $30,000, on January 19, 2017.[745]

On October 11, 2016, the plaintiff filed a second federal complaint seeking certification as a candidate for reelection to the county's juvenile court.[746] This pro se case was transferred from Judge Dlott's docket to Judge Barrett as related to the plaintiff's voter-registration case.[747]

(S.D. Ohio Sept. 15, 2016), D.E. 96, 2016 WL 4836810 (opinion by Judge Michael R. Barrett dismissing an August 18, 2015, pro se civil action by the voter-registration plaintiff against county officials involved with the prosecution of the plaintiff).

737. Motion, *Hunter*, No. 1:16-cv-962 (S.D. Ohio Sept. 27, 2016), D.E. 3.

738. Order, *id.* (Sept. 28, 2016), D.E. 6.

739. Docket Sheet, *id.* (Sept. 27, 2016) (minutes).

740. *Id.* (minutes); *see* Minutes, *id.* (Oct. 6, 2016), D.E. 18.

741. Opinion, *id.* (Oct. 6, 2016), D.E. 19.

742. *Id.* at 7; *see id.* at 1–2 (reciting state-court stays of the plaintiff's sentence while she pursued ultimately unsuccessful state-court appeals).

743. *Id.* at 7–14.

744. Notice of Compliance, *id.* (Oct. 12, 2016), D.E. 23.

745. Agreed Order, *id.* (Jan. 19, 2017), D.E. 24.

746. Complaint, Hunter v. Hamilton Cty. Bd. of Elections, No. 1:16-cv-996 (S.D. Ohio Oct. 11, 2016), D.E. 1.

747. Order, *id.* (Oct. 12, 2016), D.E. 4.

At an October 14 status conference, Judge Barrett observed that the complaint sought immediate injunctive relief, but the plaintiff had not filed an injunction motion.[748] In light of the board's preference that an immediate injunction be litigated by separate motion, Judge Barrett set the case for hearing one week later.[749]

In a fifteen-page opinion issued on the day of the hearing, Judge Barrett denied the plaintiff immediate relief.[750] "On October 21, 2014, as a result of her conviction, the Ohio Supreme Court suspended Plaintiff from the practice of law and consequently, judicial office, for an interim period. . . . Plaintiff's sentence remains stayed, but her suspension from the practice of law and judicial office remains intact."[751] Judge Barrett concluded that the plaintiff's claim that she would be eligible for office upon the beginning of her term, if elected, was pure conjecture.[752]

Following the plaintiff's failure to respond to scheduling orders, Judge Barrett sanctioned the plaintiff on August 21, 2017, $1,975 to compensate defense attorneys for their participation at a May 5 proceeding that the plaintiff skipped.[753]

Judge Black denied the 2016 federal-court habeas corpus petition on May 29, 2019.[754] The court of appeals affirmed his decision on January 18, 2022.[755]

Unsuccessful Effort to Open a Primary Election Because of Allegedly Purged Party Registrations

Campanello v. New York State Board of Elections (Joanna Seybert and Sandra J. Feuerstein, E.D.N.Y. 2:16-cv-1892)

> Filed on the day before a presidential primary election, a federal complaint sought to open the parties' primary elections to voters of all parties as a remedy for allegedly improper purging of party registrations. The district judge on miscellaneous duty denied immediate relief. Following their filing of an amended complaint

748. Transcript at 2, *id.* (Oct. 14, 2016, filed Oct. 22, 2016), D.E. 16.

749. *Id.* at 6; Docket Sheet, *id.* (Oct. 11, 2016) (minutes); *see* Transcript, *id.* (Oct. 21, 2016, filed Oct. 22, 2016), D.E. 17; Minutes, *id.* (Oct. 21, 2016), D.E. 14.

750. Opinion, *id.* (Oct. 21, 2016), D.E. 15.

751. *Id.* at 1–2.

752. *Id.* at 10.

753. Order, *id.* (Aug. 21, 2017), D.E. 30.

754. Opinion, Hunter v. Hamilton Cty. Ct. of Common Pleas, No. 1:16-cv-561 (May 29, 2019), D.E. 58, 2019 WL 2281542.

755. Opinion, Hunter v. Office of the Ohio Att'y Gen., No. 19-3515 (6th Cir. Jan. 18, 2022), 2022 WL 154341.

> after the election, the plaintiffs declined to respond to a motion to dismiss the case, and so the assigned judge dismissed the case.
>
> *Topics:* Registration procedures; matters for state courts; primary election; National Voter Registration Act; case assignment; class action; ballot segregation; provisional ballots.

Fourteen voters filed a federal class-action complaint in the Eastern District of New York's Long Island courthouse on April 18, 2016, against the state board of elections and its officers, alleging that an improper voter registration purge would wrongfully disfranchise voters in the presidential primary election scheduled for the following day.[756] With their complaint, at approximately five minutes before 5:00 p.m., the plaintiffs filed a proposed order to show cause why relief should not be granted, including an injunction opening the primary elections to voters of all parties.[757]

The court assigned the case to Judge Sandra J. Feuerstein, who was unavailable to hear it immediately.[758] Judge Joanna Seybert was on miscellaneous duty, and she conducted a hearing on the following afternoon.[759] She denied the plaintiffs immediate relief,[760] observing that the state courts had procedures for restoring voter registrations.[761] "I mean there is a process. There are judges that sit in New York Supreme to issue these orders and people are advised to go to the judges . . . ."[762] Judge Seybert also observed that relief could not be directed against local election officials because they were neither named nor served.[763]

An April 27 amended complaint included local election officials as defendants.[764] The plaintiffs did not respond, however, to a motion to dismiss

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756. Complaint, Campanello v. N.Y. State Bd. of Elections, No. 2:16-cv-1892 (E.D.N.Y. Apr. 18, 2016), D.E. 1.

757. Proposed Order to Show Cause, *id.* (Apr. 18, 2016), D.E. 2; Transcript at 2, *id.* (Apr. 19, 2016, filed June 7, 2016), D.E. 17-3 [hereinafter *Campanello* Transcript].

758. *Campanello* Transcript, *supra* note 757, at 2.

Judge Feuerstein died on April 9, 2021. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

759. *Campanello* Transcript, *supra* note 757, at 2; Minutes, *Campanello*, No. 2:16-cv-1892 (E.D.N.Y. Apr. 19, 2016), D.E. 7 [hereinafter *Campanello* Minutes]; *see Campanello* Transcript, *supra* note 757, at 2–3 (noting the court's efforts to contact the plaintiffs for an earlier hearing).

760. *Campanello* Minutes, *supra* note 759; *Campanello* Transcript, *supra* note 757, at 14.

761. *Campanello* Transcript, *supra* note 757, at 4.

762. *Id.* at 15.

763. *Id.*

764. Amended Complaint, *Campanello*, No. 2:16-cv-1892 (E.D.N.Y. Apr. 27, 2016), D.E. 11.

the case,[765] and Judge Feuerstein dismissed the action at a June 21 conference with both sides represented.[766]

Purging Voter Registrations Because of Registration in Other States

Democratic Party of Virginia v. Virginia State Board of Elections (Claude M. Hilton, E.D. Va. 1:13-cv-1218)

> A federal complaint challenged the purging of voter registrations for persons that appeared to have registered in other states since the last time they voted in Virginia, alleging an excess of errors. The district judge denied the plaintiffs relief, finding several mechanisms in place to correct errors.
>
> *Topic:* Registration challenges.

Five weeks before the 2013 gubernatorial election in Virginia, the commonwealth's Democratic Party filed a federal complaint in the Eastern District of Virginia's Alexandria courthouse seeking an immediate halt to a program of purging voter registrations for persons who appeared to have registered in other states since the last time they voted in Virginia, alleging an excess of errors.[767] Two days later, the party filed a motion for a preliminary injunction.[768] Five days after that, the plaintiffs notified the defendants of a hearing on the matter in ten days.[769]

On October 21, three days after the hearing, Judge Claude M. Hilton denied the party immediate relief.[770] "If a voter is removed from the voter rolls in error, there are several mechanisms in place to protect that voter's rights, including provisional ballots and registration reinstatement."[771] On election day, Judge Hilton granted the parties a stipulated dismissal.[772]

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765. Letter, *id.* (June 7, 2016), D.E. 17.

766. Minutes, *id.* (June 21, 2016), D.E. 18.

767. Complaint, Democratic Party of Va. v. Va. State Bd. of Elections, No. 1:13-cv-1218 (E.D. Va. Oct. 1, 2013), D.E. 1; *see* Antonio Olivo, *Democrats File Lawsuit to Stop Use of Voter "Purge List,"* Wash. Post, Oct. 3, 2013, at B5.

768. Preliminary-Injunction Motion, *Democratic Party of Va.*, No. 1:13-cv-1218 (E.D. Va. Oct. 3, 2013), D.E. 6.

769. Notice, *id.* (Oct. 8, 2013), D.E. 12.

770. Opinion, *id.* (Oct. 21, 2013), D.E. 34 [hereinafter *Democratic Party of Va.* Opinion], 2013 WL 5741486; *see* Matt Zapotosky, *Democrats Lose Suit Over Voter Rolls*, Wash. Post, Oct. 19, 2013, at B3.

Judge Hilton granted leave for two interest groups to file amicus curiae briefs. Order, *Democratic Party of Va.*, No. 1:13-cv-1218 (E.D. Va. Oct. 18, 2013), D.E. 33.

771. *Democratic Party of Va.* Opinion, *supra* note 770, at 4–5.

772. Order, *Democratic Party of Va.*, No. 1:13-cv-1218 (E.D. Va. Nov. 5, 2013), D.E. 41.

Cancellation of Voter Registrations for Not Voting in the Last Election

Colón Marrero v. Conty Pérez (Carmen Consuelo Cerezo, D.P.R. 3:12-cv-1749)

> Five days before a September 17, 2012, voter-registration deadline in Puerto Rico, a voter filed a federal complaint challenging the cancellation of her registration because she had not voted in the 2008 general election. The district judge denied the voter immediate relief because (1) the National Voter Registration Act does not apply to Puerto Rico as it does to the states, (2) the Help America Vote Act (HAVA) does not afford a private right of action, and (3) the plaintiff had not justified bringing the case so late. The court of appeals, on the other hand, found probable success on the merits and remanded the case for an evidentiary hearing. On October 18, the court of appeals determined that relief for the plaintiff had become infeasible. In November, the court of appeals vacated an order issued in the plaintiff's favor by the district-court judge under the All Writs Act. After further litigation, the district judge issued a declaratory judgment in favor of plaintiffs, which was affirmed on appeal. The courts ruled that canceling a federal voter registration after missing only one general election violates HAVA. In 2017, the court awarded the plaintiffs $135,931 in attorney fees.
>
> *Topics:* Registration challenges; National Voter Registration Act; Help America Vote Act (HAVA); laches; enforcing orders; attorney fees.

Five days before the September 17, 2012, voter-registration deadline in Puerto Rico for the 2012 general election, a voter filed a federal complaint in the District of Puerto Rico challenging the cancellation of her registration because she had not voted in the 2008 general election.[773] On the following day, she filed a motion for a preliminary injunction.[774]

Judge Carmen Consuelo Cerezo denied the injunction on September 18.[775] On the one hand, Judge Cerezo determined that the plaintiff's statu-

773. Complaint, Colón Marrero v. Conty Pérez, No. 3:12-cv-1749 (D.P.R. Sept. 12, 2012), D.E. 1; Colón-Marrero v. Conty-Pérez, 703 F.3d 134, 135–36 (1st Cir. 2012); *see* Amended Complaint, *Colón Marrero*, No. 3:12-cv-1749 (D.P.R. Sept. 21, 2012), D.E. 19 (adding a second plaintiff).

774. Preliminary-Injunction Motion, *Colón Marrero*, No. 3:12-cv-1749 (D.P.R. Sept. 13, 2012), D.E. 6.

775. Order, *id.* (Sept. 18, 2012), D.E. 11 [hereinafter Sept. 18, 2012, D.P.R. *Colón Marrero* Order].

tory grounds for requested relief did not support such relief:[776] the National Voter Registration Act (NVRA)[777] did not apply to Puerto Rico as it does to the states, and the Help America Vote Act (HAVA)[778] did not afford the plaintiff a right of action. On the other hand, "No justification has been advanced . . . as to why [the plaintiff waited] until four (4) days before expiration of the voter registration deadline in Puerto Rico to seek a preliminary injunction . . . ."[779]

An appeal was heard on October 11, and the court of appeals determined that the plaintiff had demonstrated a likelihood of success on the merits.[780] Because, however, "the parties have made widely differing claims with respect to the feasibility of granting the request for preliminary relief," the court of appeals returned the case to the district court for an evidentiary hearing.[781]

From 9:15 in the morning until 9:00 at night on October 15,[782] and then again on October 16,[783] Judge Cerezo held an evidentiary hearing.[784] On October 17, she certified findings of fact to the court of appeals.[785] A key finding was, "The total number of voters who remain inactive at this time for not having participated in the 2008 general elections is 330,902."[786]

Judge Cerezo retired on February 28, 2021. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

776. Sept. 18, 2012, D.P.R. *Colón Marrero* Order, *supra* note 775, at 2–3.

777. Pub. L. No. 103-31, 107 Stat. 77 (1993), *as amended*, 52 U.S.C. §§ 20501–20511. *See generally* Robert Timothy Reagan, Motor Voter: The National Voter Registration Act (Federal Judicial Center 2014).

778. Pub. L. No. 107-252, 116 Stat. 1666 (2002), *as amended*, 52 U.S.C. §§ 20901–21145. *See generally* Marie Leary & Robert Timothy Reagan, The Help America Vote Act (Federal Judicial Center 2012); Symposium, *HAVA @ 10*, 12 Election L.J. 111 (2013).

779. Sept. 18, 2012, D.P.R. *Colón Marrero* Order, *supra* note 775, at 3.

780. Order, Colón-Marrero v. Conty-Pérez, No. 12-2145 (1st Cir. Oct. 11, 2012) [hereinafter Oct. 11, 2012, 1st Cir. *Colón-Marrero* Order]; Colón-Marrero v. Conty-Pérez, 703 F.3d 134, 136 (1st Cir. 2012).

781. Oct. 11, 2012, 1st Cir. *Colón-Marrero* Order, *supra* note 780; *see Colón-Marrero*, 703 F.3d at 136.

782. Minutes, Colón Marrero v. Conty Pérez, No. 3:12-cv-1749 (D.P.R. Oct. 15, 2012), D.E. 44; Transcript, *id.* (Oct. 15, 2012, filed Oct. 16, 2012), D.E. 53 (transcribing proceedings from 4:45 to 8:56 p.m.).

783. Minutes, *id.* (Oct. 16, 2012), D.E. 51; Transcript, *id.* (Oct. 16, 2012, filed Oct. 16, 2012), D.E. 54 (transcribing proceedings from 9:15 a.m. to 4:35 p.m.).

784. *Colón-Marrero*, 703 F.3d at 136 ("nearly sixteen hours of testimony").

785. Findings, *Colón Marrero*, No. 3:12-cv-1749 (D.P.R. Oct. 17, 2012), D.E. 60 [hereinafter *Colón Marrero* Findings], 2012 WL 5185997; *Colón-Marrero*, 703 F.3d at 136.

786. *Colón Marrero* Findings, *supra* note 785, at 2 (citation omitted).

On October 18, by a vote of two to one, the court of appeals "concluded that serious feasibility issues preclude the entry of the relief sought by plaintiff-appellant. Hence, the decision of the district court denying the request for a preliminary injunction is affirmed."[787]

The court of appeals issued its opinion on November 2.[788] It agreed that the NVRA does not apply to Puerto Rico.[789] Although the court determined that HAVA protected the plaintiff's right to vote for Puerto Rico's representative in Congress, its resident commissioner, "it would be improvident to grant plaintiff's requested relief with only eighteen days remaining before the general election."[790]

On Saturday, November 3, three days before the election, Judge Cerezo issued an order under the All Writs Act[791] that voters whose registrations had been canceled for not voting be permitted to cast provisional ballots.[792] On Monday, the court of appeals, again on a two-to-one vote, "vacated forthwith" Judge Cerezo's order as again improvident.[793]

After additional litigation, Judge Cerezo ruled on January 30, 2015, that Puerto Rico's provision for canceling a voter registration for failure to vote in a general election violated HAVA's registration protection absent notice and a failure to vote in two consecutive general elections.[794] On February 1, 2016, the court of appeals affirmed Judge Cerezo's ruling, again agreeing that Puerto Rico is bound by HAVA but not by the NVRA.[795] Judge Cerezo awarded plaintiffs $135,931 in attorney fees on March 22, 2017.[796]

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787. Order, Colón-Marrero v. Conty-Pérez, No. 12-2145 (1st Cir. Oct. 18, 2012); *Colón-Marrero*, 703 F.3d at 136.

788. *Colón-Marrero*, 703 F.3d 134.

789. *Id.* at 137–38.

790. *Id.* at 138–39; *see* Daniel P. Tokaji, *HAVA in Court: A Summary and Analysis of Litigation*, 12 Election L.J. 203, 210 (2013).

791. 28 U.S.C. § 1651(a).

792. Order, Colón Marrero v. Conty Pérez, No. 3:12-cv-1749 (D.P.R. Nov. 3, 2012), D.E. 79.

793. Judgment, Colón-Marrero v. Conty-Pérez, Nos. 12-2328 and 12-2329 (1st Cir. Nov. 5, 2012).

794. Declaratory Judgment, *Colón Marrero*, No. 3:12-cv-1749 (D.P.R. Jan. 30, 2015), D.E. 152; Opinion, *id.* (June 4, 2015), D.E. 160, 2015 WL 3508142; *see also* 52 U.S.C. § 21083(a)(4)(A).

795. Colón-Marrero v. Garcia Velez, 813 F.3d 1 (1st Cir. 2016).

796. Opinion, *Colón Marrero*, No. 3:12-cv-1749 (D.P.R. Mar. 22, 2017), D.E. 194.

Purging Noncitizen Voter Registrations

United States v. Florida (Robert L. Hinkle, N.D. Fla. 4:12-cv-285)

> The U.S. Court of Appeals for the Eleventh Circuit determined that a systematic purge of noncitizens' voter registrations violated the National Voter Registration Act. During the 2012 election cycle, the Justice Department brought a federal action against Florida in the Northern District of Florida claiming that Florida was violating the Act. Fifteen days later, the district court ruled against preliminary injunctive relief, because Florida had ceased the purge that prompted the suit. In addition, the district judge ruled that the ninety-day proscription against systematic purges did not apply to noncitizens. In another case, a judge in the Southern District came to the same conclusion. Florida resumed its purge upon access to more reliable citizenship data from the Department of Homeland Security. In 2014, the court of appeals held a systematic purge even of noncitizens illegal shortly before an election, when there is little time to correct errors.
>
> *Topics:* Citizenship; registration challenges; National Voter Registration Act; intervention; recusal; case assignment.

The Justice Department brought a civil action in the Northern District of Florida against the State of Florida on June 12, 2012, charging the state with violating the National Voter Registration Act by undertaking a systematic purge of its voter registrations within ninety days of a federal election, Florida's August 14 primary election.[797] The suit followed Florida's refusal to comply with a May 31 letter request by the department that Florida halt the purge.[798] Three days after it filed its complaint, the department moved for a temporary restraining order.[799] The court originally assigned the case to Judge William Stafford, but he recused himself, so the court reassigned the case to Judge Robert L. Hinkle.[800]

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797. Complaint, United States v. Florida, No. 4:12-cv-285 (N.D. Fla. June 12, 2012), D.E. 2; United States v. Florida, 870 F. Supp. 2d 1346, 1347, 1349 (N.D. Fla. 2012); *see* 52 U.S.C. § 20507(c)(2)(A); *see also* Robbie Brown, *Florida's Approach to Purging Voter Rolls of Noncitizens Prompts Federal Lawsuit*, N.Y. Times, June 13, 2012, at A17; Marc Caputo, *Move to Purge Rolls Started with a Chat*, Miami Herald, June 13, 2012, at 1A.

798. *See* Lizette Alvarez, *Florida Defends Search for Ineligible Voters*, N.Y. Times, June 7, 2012, at A17; Lizette Alvarez, *Search for Illegal Voters May Violate Federal Safeguards, U.S. Tells Florida*, N.Y. Times, June 2, 2012, at A13; Marc Caputo, *Florida Ordered to Halt Purge of Voters*, Miami Herald, June 2, 2012, at 1A; Marc Caputo & Steve Bousquet, *Scott: Feds Are Breaking Law on Voter Purge*, Miami Herald, June 7, 2012, at 6B.

799. Temporary-Restraining-Order Motion, *United States v. Florida*, No. 4:12-cv-285 (N.D. Fla. June 15, 2012), D.E. 7; *United States v. Florida*, 870 F. Supp. 2d at 1347.

800. Recusal Order, *United States v. Florida*, No. 4:12-cv-285 (N.D. Fla. June 13,

On May 10, the *Miami Herald* reported that a study found nearly 2,700 noncitizens in Florida who were registered to vote.[801] The method of identifying noncitizens included matching voter registrations to driver-license data, but driver-license data are not always updated to show naturalization.[802]

On June 8, two voters and Mi Familia Vota Education Fund filed a federal complaint in the Middle District of Florida claiming that the registration purge violated the Voting Rights Act because it had not received preclearance pursuant to section 5 of the Voting Rights Act.[803]

On June 11, Florida filed a civil action in the U.S. District Court for the District of Columbia against the department of homeland security, seeking a court order that the Department provide Florida with citizenship records.[804]

On June 19, two voters and five organizations filed a civil action in the Southern District of Florida alleging that not only was the purge improperly close to an election but it violated both the Voting Rights Act and the National Voter Registration Act as discriminatory against Black and Hispanic voters.[805]

2012), D.E. 6; Docket Sheet, *id.* (June 12, 2012).

Tim Reagan interviewed Judge Hinkle for this report by telephone on October 10, 2012.

801. Marc Caputo & Steve Bousquet, *State Finds Nearly 2,700 Noncitizens on Voting Rolls*, Miami Herald, May 10, 2012, at 1A.

802. *United States v. Florida*, 870 F. Supp. 2d at 1347–48; *see* Amy Sherman, *Democrats Rip Effort to Purge Voter Rolls*, Miami Herald, May 30, 2012, at 1A.

803. Complaint, Mi Familia Vota Educ. Fund v. Detzner, No. 8:12-cv-1294 (M.D. Fla. June 8, 2012), D.E. 1; Mi Familia Vota Educ. Fund v. Detzner, 891 F. Supp. 2d 1326, 1329 (M.D. Fla. 2012); *see* 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination and requiring that preclearance disputes be heard by a three-judge district court); Amended Complaint, *Mi Familia Vota Educ. Fund*, No. 8:12-cv-1294 (M.D. Fla. July 27, 2012), D.E. 20; *see also* Robbie Brown, *Florida Halts Its Search for Violations of Voter Law*, N.Y. Times, June 9, 2012, at A13; Brown, *supra* note 797; Marc Caputo, *ACLU Sues Florida Over Purge of Noncitizen Voters*, Miami Herald, June 9, 2012, at 1B.

"Five Florida counties—Hillsborough, Monroe, Collier, Hendry, and Hardee—are covered jurisdictions under Section 5 of the Voting Rights Act." *Mi Familia Vota Educ. Fund*, 891 F. Supp. 2d at 1331.

804. Complaint, Fla. Dep't of State v. U.S. Dep't of Homeland Sec., No. 1:12-cv-960 (D.D.C. June 11, 2012), D.E. 1; *see* Brown, *supra* note 797; Marc Caputo, *Florida, Feds in Brawl Over Purge*, Miami Herald, June 12, 2012, at 1A.

805. Complaint, Arcia v. Detzner, No. 1:12-cv-22282 (S.D. Fla. June 19, 2012), D.E. 1; Arcia v. Detzner, 908 F. Supp. 2d 1276, 1277–78 (S.D. Fla. 2012); *see* Amended Complaint, *Arcia*, No. 1:12-cv-22282 (S.D. Fla. Sept. 12, 2012), D.E. 57.

In the Justice Department's case, Judge Hinkle set a telephone conference for the afternoon of June 18.[806] After the conference,[807] Judge Hinkle ordered argument on the temporary-restraining-order motion for the morning of June 27.[808]

On June 20, four voters moved to intervene in defense of the purge.[809] Neither party opposed the motion; Judge Hinkle allowed the voters to participate in oral argument during time yielded by Florida.[810] On June 26, Judicial Watch and True the Vote also moved to intervene in defense of Florida.[811] On November 6, Judge Hinkle denied the intervention motions because the would-be intervenors' interests related to the litigation were the same as all registered voters and therefore adequately represented by the state defendants.[812]

At the June 27 hearing,[813] Judge Hinkle denied the Justice Department immediate relief on a finding that Florida had abandoned the purge.[814] He issued a written opinion on the following day.[815] So that the parties had a prompt outcome, including allowance for a prompt appeal, Judge Hinkle often ruled from the bench with written orders to follow.[816]

The federal government agreed to provide Florida with access to federal citizenship records,[817] so Florida dismissed its action in the District of

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806. Order, United States v. Florida, No. 4:12-cv-285 (N.D. Fla. June 18, 2012), D.E. 8.

807. Minutes, *id.* (June 18, 2012), D.E. 17.

808. Order, *id.* (June 18, 2012), D.E. 13.

809. Intervention Motion, *id.* (June 20, 2012), D.E. 18.

810. Order, *id.* (June 21, 2012), D.E. 22; Order, *id.* (Nov. 6, 2012), D.E. 49 [hereinafter Nov. 6, 2012, *United States v. Florida* Order].

811. Intervention Motion, *id.* (June 26, 2012), D.E. 28.

812. Nov. 6, 2012, *United States v. Florida* Order.

813. Minutes, *United States v. Florida*, No. 4:12-cv-285 (N.D. Fla. June 27, 2012), D.E. 35.

814. United States v. Florida, 870 F. Supp. 2d 1346, 1347, 1350–51 (N.D. Fla. 2012); Transcript at 54–66, *United States v. Florida*, No. 4:12-cv-285 (N.D. Fla. June 27, 2012, filed June 27, 2012), D.E. 33 [hereinafter *United States v. Florida* Transcript]; *see* Lizette Alvarez, *Judge Sides with Florida on Purging Voter Rolls*, N.Y. Times, June 28, 2012, at A14; Steve Bousquet, *Judge Halts Federal Attempt to Block Purge*, Miami Herald, June 28, 2012, at 1A; *see also* Arcia v. Florida Sec'y of State, 772 F.3d 1335, 1339 (11th Cir. 2014). *But see Arcia*, 772 F.3d at 1339 ("Records indicate, however, that suspected non-citizens continued to be removed from the voter rolls during May and June, which was less than 90 days before the Florida primary election.").

815. *United States v. Florida*, 870 F. Supp. 2d 1346 (also ruling that the ninety-day proscription on registration purges did not apply to purges of noncitizens).

816. Interview with Judge Robert L. Hinkle, Oct. 10, 2012.

817. *See United States v. Florida* Transcript, *supra* note 814, at 14–28 (discussion of the Department of Homeland Security's citizenship data at the Northern District of Flor-

Columbia on August 31, 2012.[818] Using federal citizenship information, Florida resumed its noncitizen voter-registration purge on September 26, identifying 198 potentially ineligible voters, of which thirty-six may have voted illegally.[819]

On October 4, 2012, Judge William J. Zloch determined in the Southern District action, as Judge Hinkle did in the Northern District,[820] that the ninety-day proscription on registration purges did not apply to purges of noncitizens.[821] At the plaintiffs' request, and after a hearing, Judge Zloch entered a final judgment on October 29 in favor of the secretary of state from which the plaintiffs could appeal.[822]

The parties stipulated dismissal of the action before Judge Hinkle on January 10, 2013.[823]

On September 17, 2012, a three-judge district court denied Florida's motion to dismiss the Mia Familia Vota section 5 action.[824] On June 25, 2013, the Supreme Court declined to hold section 5 unconstitutional, but the Court did hold unconstitutional the criteria for which jurisdictions re-

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ida hearing); *see also* Steve Bousquet, *A GOP Win in Voter-List Fight*, Miami Herald, July 15, 2012, at 1B.

818. Voluntary Dismissal, Fla. Dep't of State v. U.S. Dep't of Homeland Sec., No. 1:12-cv-960 (D.D.C. Aug. 31, 2012), D.E. 12.

819. *Arcia*, 772 F.3d at 1339–40; *see* Marc Caputo, Patricia Mazzi & Anna Edgerton, *Voter Purge Begins Anew*, Miami Herald, Sept. 27, 2012, at 1A.

In 2014, the *Miami Herald* reported that because of changes to the federal database that would not be complete until 2015, Florida would suspend the 2014 effort to purge noncitizens from voter registrations. Steve Bousquet & Amy Sherman, *Fla. Postpones Voter Purge of Noncitizens*, Miami Herald, Mar. 28, 2014, at 1A.

820. *United States v. Florida*, 870 F. Supp. 2d at 1348–50; *see* Patricia Mazzei, *Timing at Center of Voter-Purge Lawsuit*, Miami Herald, Oct. 2, 2012, at 3B.

821. Opinion, Arcia v. Detzner, No. 1:12-cv-22282 (S.D. Fla. Oct. 4, 2012), D.E. 111; Arcia v. Detzner, 908 F. Supp. 2d 1276, 1279 (S.D. Fla. 2012), *rev'd*, 772 F.3d 1335; *see* Patricia Mazzei, *Judge Rules Voter Purge Can Proceed*, Miami Herald, Oct. 5, 2012, at 1B.

An appeal of the October 4 ruling was dismissed voluntarily. Order, Arcia v. Detzner, No. 12-15220 (11th Cir. Dec. 3, 2012).

822. *Arcia*, 908 F. Supp. 2d 1276, *rev'd*, 772 F.3d 1335; *see* Notice of Appeal, *Arcia*, No. 1:12-cv-22282 (S.D. Fla. Nov. 1, 2012), D.E. 126; Transcript at 3–4, *id.* (Oct. 22, 2012, filed Oct. 29, 2012), D.E. 123.

823. Stipulation, United States v. Florida, No. 4:12-cv-285 (N.D. Fla. Jan. 10, 2013), D.E. 54.

824. Mi Familia Vota Educ. Fund v. Detzner, 891 F. Supp. 2d 1326 (M.D. Fla. 2012) (opinion by Circuit Judge Charles R. Wilson and District Judges James D. Whittemore and James S. Moody).

quire section 5 preclearance.[825] The three-judge court therefore dismissed the action before it on July 24.[826]

On April 1, 2014, a divided panel of the court of appeals reversed Judge Zloch's ruling, concluding "that Florida's program was an attempt to systematically remove names from the voter rolls in violation of the 90 Day Provision."[827]

> First, the purpose of Secretary Detzner's program was clearly to remove the names of "ineligible voters" from the Florida voter rolls. . . .
>
> Second, . . . Secretary Detzner's program was a "systematic" program under any meaning of the word. . . .
>
> . . .
>
> . . . At most times during the election cycle, the benefits of systematic programs outweigh the costs because eligible voters who are incorrectly removed have enough time to rectify any errors. In the final days before an election, however, the calculus changes. Eligible voters removed days or weeks before Election Day will likely not be able to correct the State's errors in time to vote.
>
> . . .
>
> In closing, we emphasize that our interpretation of the 90 Day Provision does not in any way handcuff a state from using its resources to ensure that non-citizens are not listed in the voter rolls. The 90 Day Provision by its terms only applies to programs which "systematically" remove the names of ineligible voters. As a result, the 90 Day Provision would not bar a state from investigating potential non-citizens and removing them on the basis of individualized information, even within the 90-day window.[828]

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825. Shelby County v. Holder, 570 U.S. 529 (2013); *see* Robert Barnes, *Court Blocks Key Part of Voting Rights Act*, Wash. Post, June 26, 2013, at A1; Steve Bousquet, *Court Deals Voting Rights Act a Blow*, Miami Herald, June 26, 2013, at 1A; Adam Liptak, *Justices Void Oversight of States, Issue at Heart of Voting Rights Act*, N.Y. Times, June 26, 2013, at A1.

826. Order, Mi Familia Vota Educ. Fund v. Detzner, No. 8:12-cv-1294 (M.D. Fla. July 24, 2013), D.E. 60.

827. *Arcia*, 772 F.3d at 1339 (opinion by Circuit Judge Beverly B. Martin, joined by Circuit Judge Adalberto Jordan), *superseding* 746 F.3d 1273, 1276 (11th Cir. 2014) (withdrawing a concurring opinion by Judge Jordan); *see id.* at 1348–49 (dissenting opinion by Sixth Circuit Judge Richard Suhrheinrich, sitting by designation, for the reasons set out by Judges Zloch and Hinkle); *see also* Steve Bousquet, *Appeals Court: Voter Purge Violated Federal Law*, Miami Herald, Apr. 2, 2014, at 1A.

828. *Arcia*, 772 F.3d at 1344, 1356, 1348.

Judge Zloch reluctantly followed the appellate mandate and ruled in favor of the plaintiffs.[829]

Threats to Cancel Voter Registrations

Chatman v. Delaney (Clifford J. Proud, S.D. Ill. 3:09-cv-259)

> Voters filed a federal complaint because of notices they received that their voter registrations might be canceled before an April 7, 2009, election and absentee ballots they might have cast might not be counted. The county had identified the voters' village as one with a high rate of voter fraud, so it sent registration-challenge letters to 558 of its residents. The parties consented to a decision by a magistrate judge who was available and local; the assigned district judge was 110 miles away. The case was resolved by a consent order issued after a conference with the judge.
>
> *Topics:* Registration challenges; case assignment.

On April 3, 2009, four voters in Alorton, Illinois, filed a federal complaint against St. Clair County—the county across the river from St. Louis, Missouri—and its clerk because of notices they received that their voter registrations might be canceled before an April 7 election, and absentee ballots they might have cast might not be counted.[830] With their complaint, the plaintiffs filed a motion for a temporary restraining order.[831]

The county identified Alorton as a village with a high rate of voter fraud, so it sent registration challenge letters to 558 of its residents.[832]

The case was randomly assigned to a judge whose chambers were 110 miles away.[833] One of the district's only judges in the district that Friday was Magistrate Judge Clifford J. Proud, whose chambers were in East St. Louis, which is located in St. Clair County.[834] Judge Proud was familiar with the plaintiffs' attorney, and he also knew the state attorneys who

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829. Opinion, Arcia v. Detzner, No. 1:12-cv-22282 (S.D. Fla. Feb. 12, 2015), D.E. 149; *id.* at 3 ("In the meantime, non-citizens, who were never eligible to vote in the first instance, will remain on the voting rolls within 90 days of a Federal election, and there is nothing practical the State of Florida can do about it.").

830. Complaint, Chatman v. Delaney, No. 3:09-cv-259 (S.D. Ill. Apr. 3, 2009), D.E. 2.

831. Motion, *id.* (Apr. 3, 2009), D.E. 3.

832. *See* George Pawlaczyk, *Alorton Protests County's Plan Requiring Voters to Prove Their Legal Address*, Belleville News-Democrat, Mar. 31, 2009; George Pawlaczyk, *"Return to Sender"; St. Clair County Leaders Sort for Voter Fraud in Unopened Letters*, Belleville News-Democrat, Apr. 2, 2009.

833. Interview with Judge Clifford J. Proud, Mar. 12, 2013.

Tim Reagan interviewed Judge Proud for this report by telephone.

834. *Id.*

would be representing the defendants.[835] He told the parties that if they consented to his presiding over the case he could hear it that afternoon.[836] Both sides consented to a magistrate judge's hearing the case.[837]

The parties met with Judge Proud in his conference room at approximately 2:00 p.m.,[838] and within approximately one hour they had agreed to a consent order.[839] According to the order, the clerk would notify voters who received the earlier letter that they had the right to vote on April 7 if they were qualified to do so.[840] The order did not prevent the county from challenging voters whose letters were returned as undeliverable.[841]

Judge Proud dismissed the action on the day after the election.[842]

Voter Registrations for Juvenile Offenders

Hamilton v. Ashland County Board of Education (Donald C. Nugent, N.D. Ohio 1:08-cv-2546)

> Adult inmates of a juvenile correctional facility sued to enjoin cancelation of their voter registrations for not being permanent residents. The district court denied the plaintiffs relief. The court of appeals vacated the portion of the district court's decision pertaining to state law as a matter for state courts to decide.
>
> *Topics:* Prisoner voters; registration challenges; matters for state courts.

On Monday, October 27, 2008, a week before the 2008 presidential election, inmates of the Mohican Juvenile Correctional Facility in Ashland County, Ohio, filed an action in Cleveland's federal courthouse to enjoin cancelation of their voter registrations.[843] On October 15, an Ashland Uni-

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835. *Id.*

836. *Id.*

837. Consent, Chatman v. Delaney, No. 3:09-cv-259 (S.D. Ill. Apr. 3, 2009), D.E. 5; *see* Notice, *id.* (Apr. 3, 2009), D.E. 1 (form notice informing the parties, "In all likelihood, a consent will mean that this civil case will be resolved sooner and at less expense to the parties.").

838. Docket Sheet, *id.* (Apr. 3, 2009); Interview with Judge Clifford J. Proud, Mar. 12, 2013.

839. Consent Order, *Chatman*, No. 3:09-cv-259 (S.D. Ill. Apr. 3, 2009), D.E. 10 [hereinafter *Chatman* Consent Order]; Interview with Judge Clifford J. Proud, Mar. 12, 2013.

840. *Chatman* Consent Order, *supra* note 839.

841. *See* George Pawlaczyk, *Judge Allows Alorton Residents to Cast Votes*, Belleville News-Democrat, Apr. 4, 2009, at A1.

842. Order, *Chatman*, No. 3:09-cv-259 (S.D. Ill. Apr. 8, 2009), D.E. 11.

843. Complaint, Hamilton v. Ashland Cty. Bd. of Educ., No. 1:08-cv-2546 (N.D. Ohio Oct. 27, 2008), D.E. 1 [hereinafter *Hamilton* Complaint]; *see* Rachel Dissell, *Ashland Elections Board Sued*, Cleveland Plain Dealer, Oct. 29, 2008, at B3.

versity professor of criminal justice and local resident challenged the registrations because the inmates were only in the county temporarily.[844] The board of elections heard and sustained the challenge on October 24.[845] The inmates were unable to attend because of their confinement.[846]

On Tuesday, the plaintiffs filed a motion for a temporary restraining order,[847] and the court assigned the case to Judge Donald C. Nugent.[848] As soon as an application for a temporary restraining order was filed, the clerk's office notified the assigned judge's chambers.[849] If the assigned judge was unavailable, the matter could be decided by the judge on duty for miscellaneous matters, but this court developed an ethic against referring election cases to the miscellaneous judge.[850]

On Wednesday, the plaintiffs filed an amended complaint[851] and the defendants filed a motion for a court order requiring the plaintiffs' release for participation in an evidentiary hearing on the temporary restraining order, scheduled for Friday.[852] Judge Nugent informally suggested that live testimony from the would-be voters might not be necessary.[853] He issued an opinion on Friday denying the temporary restraining order and dismissing the complaint on a finding that the plaintiffs did not meet voter

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844. Opinion at 2, *Hamilton*, No. 1:08-cv-2546 (N.D. Ohio Oct. 31, 2008), D.E. 15 [hereinafter *Hamilton* Opinion]; *see Hamilton* Complaint, *supra* note 843, at 4; *see also Ashland Man Challenges Voter Registrations at Mohican Juvenile Correctional Facility*, Mansfield News J., Oct. 24, 2008, at A8.

845. *Hamilton* Opinion, *supra* note 844, at 2–3; *see Hamilton* Complaint, *supra* note 843, at 4; *see also BOE Upholds Voter Registration Challenge*, Mansfield News J., Oct. 25, 2008, at A1.

846. *Hamilton* Opinion, *supra* note 844, at 2–3; *see Hamilton* Complaint, *supra* note 843, at 4.

847. Temporary-Restraining-Order Motion, *Hamilton*, No. 1:08-cv-2546 (N.D. Ohio Oct. 28, 2008), D.E. 2.

848. Docket Sheet, *id.* (Oct. 27, 2008).

Tim Reagan interviewed Judge Nugent for this report by telephone on February 6, 2012.

849. Interview with Judge Donald C. Nugent, Feb. 6, 2012.

850. *Id.*

851. Amended Complaint, *Hamilton*, No. 1:08-cv-2546 (N.D. Ohio Oct. 29, 2008), D.E. 7.

852. *Hamilton* Opinion, *supra* note 844, at 1; Motion to Convey, *Hamilton*, No. 1:08-cv-2546 (N.D. Ohio Oct. 29, 2008), D.E. 6.

853. Interview with Judge Donald C. Nugent, Feb. 6, 2012.

The docket sheet does not show a resolution of the defendants' motion.

residency requirements for Ashland County under Ohio law.[854] He found no federal constitutional violation.[855]

On Monday, November 3, the day before the election, the plaintiffs filed a notice of appeal,[856] and the court of appeals resolved the case that day.[857] The court of appeals affirmed the denial of federal claims and vacated the state-law ruling, dismissing the claim without prejudice so that it could be pursued in state court.[858] The state court ruled as Judge Nugent did.[859]

Voter-Registration Purges in Colorado

Common Cause of Colorado v. Coffman (John L. Kane, D. Colo. 1:08-cv-2321)

> A federal complaint alleged that Colorado was engaging in improper systematic purging of voter-registration rolls within ninety days of a general election in violation of the National Voter Registration Act. Among the issues in the case was Colorado's practice of canceling new registrations if registration notices came back undeliverable within twenty days of their being mailed. After an evidentiary hearing, the parties stipulated a temporary restraining order. The state's secretary of state adopted an aggressive interpretation of his attorney's stipulation, but the district judge further restrained the secretary's actions. The litigation proceeded at a normal pace after the election, and the district judge eventually ruled that Colorado's twenty-day rule did not violate the National Voter Registration Act because voters affected by it could cast provisional ballots.
>
> *Topics:* Registration challenges; registration procedures; National Voter Registration Act; enforcing orders; case assignment.

On Saturday, October 25, 2008, ten days before a general election, three organizations filed a federal action against Colorado's secretary of state to halt and reverse cancelations of voter registrations.[860] One key allegation

854. *Hamilton* Opinion, *supra* note 844, at 8–13; *see* Transcript, *Hamilton*, No. 1:08-cv-2546 (N.D. Ohio Oct. 31, 2008, filed Nov. 3, 2008), D.E. 20.

855. *Hamilton* Opinion, *supra* note 844, at 3–8.

856. Notice of Appeal, *Hamilton*, No. 1:08-cv-2546 (N.D. Ohio Nov. 3, 2008), D.E. 23.

857. Hamilton v. Ashland Bd. of Educ., 320 F. App'x 307 (6th Cir. 2008).

858. *Id.*

859. Interview with Judge Donald C. Nugent, Feb. 6, 2012.

860. Complaint, Common Cause of Colo. v. Coffman, No. 1:08-cv-2321 (D. Colo. Oct. 25, 2008), D.E. 1 [hereinafter *Common Cause of Colo.* Complaint]; Common Cause of Colo. v. Buescher, 750 F. Supp. 2d 1259, 1266 (D. Colo. 2010); *see* Amended Complaint,

was that Colorado had systematically purged registration rolls within ninety days of a general election in violation of the National Voter Registration Act.[861] The plaintiffs also challenged Colorado's registration procedures in which new registrations were canceled if registration notices came back undeliverable within twenty days of their being mailed.[862] With the complaint, the plaintiffs filed a motion for a temporary restraining order.[863]

The court assigned the case to Chief Judge Wiley Y. Daniel, but Senior Judge John L. Kane took responsibility for the emergency matter instead, because of his greater availability.[864]

Judge Kane met with the parties in court on Monday afternoon, required briefing on immediate injunctive relief by 4:00 p.m. that day, and set an injunction hearing for Wednesday afternoon.[865]

The case was politically charged, and one of Judge Kane's primary objectives was to cut through political posturing and understand the key elements of the case.[866] Testimony was required to understand how state policies were being implemented in Colorado's sixty-four counties.[867] After evidence and arguments at the hearing, Judge Kane stepped away from the bench, and the parties worked out a stipulated preliminary injunction.[868]

Common Cause of Colo., No. 1:08-cv-2321 (D. Colo. Apr. 16, 2009), D.E. 46; *see also* Myung Oak Kim, *Latest Developments in Colorado Voting Issues*, Rocky Mountain News, Oct. 29, 2008, at 5.

861. *Common Cause of Colo.* Complaint, *supra* note 860; *see* Pub. L. No. 103-31, 107 Stat. 77 (1993), *as amended*, 52 U.S.C. §§ 20501–20511. *See generally* Robert Timothy Reagan, Motor Voter: The National Voter Registration Act (Federal Judicial Center 2014).

862. *Common Cause of Colo.* Complaint, *supra* note 860.

863. Temporary-Restraining-Order Motion, *Common Cause of Colo.*, No. 1:08-cv-2321 (D. Colo. Oct. 25, 2008), D.E. 2.

864. Reassignment Letter, *id.* (Oct. 30, 2008), D.E. 17; Interview with Judge John L. Kane and his law clerk Karen Robertson, Aug. 2 and 3, 2012 (noting that as a senior judge with more time flexibility, Judge Kane often handled emergency matters for the other judges).

Tim Reagan interviewed Judge Kane and his law clerk Karen Robertson for this report by telephone. Judge Daniel died on May 10, 2019. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

865. Minutes, *Common Cause of Colo.*, No. 1:08-cv-2321 (D. Colo. Oct. 27, 2008), D.E. 6.

866. Interview with Judge John L. Kane and his law clerk Karen Robertson, Aug. 2 and 3, 2012.

867. *Id.*

868. Minutes, *Common Cause of Colo.*, No. 1:08-cv-2321 (D. Colo. Oct. 29, 2008), D.E. 15 [hereinafter Oct. 29, 2008, *Common Cause of Colo.* Minutes]; Interview with Judge John L. Kane and his law clerk Karen Robertson, Aug. 2 and 3, 2012.

The stipulation stated that voters whose registrations were canceled pursuant to the twenty-day rule could cast provisional ballots.[869] The day's proceedings came to a close at 9:06 p.m.[870]

The parties disagreed on how the stipulated injunction applied to registration cancelations not resulting from the twenty-day rule.[871] The secretary's interpretation of the agreement negotiated by his attorney conflicted with the understanding of the agreement by the negotiating attorneys.[872] On Friday, the court met with the parties by telephone and ordered the state to immediately cease canceling registrations.[873]

In June 2009, Judge Kane ruled that Colorado had improperly refused to count three provisional ballots.[874] In January 2010, the parties stipulated dismissal of some of the plaintiffs' claims in light of intervening changes in Colorado's election law.[875] On November 3, 2010, Judge Kane ruled that Colorado's twenty-day rule did not violate the Voter Registration Act, because voters subject to the rule could still cast provisional ballots.[876] The parties stipulated dismissal of an appeal.[877]

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869. Order, *Common Cause of Colo.*, No. 1:08-cv-2321 (D. Colo. Oct. 29, 2008), D.E. 14; Common Cause of Colo. v. Buescher, 750 F. Supp. 2d 1259, 1266–67 (D. Colo. 2010); *see* Felisa Cardona, *A Win for Purged Voters Groups*, Denver Post, Oct. 30, 2008, at A1; Todd Hartman, *Deal Ensures 20,000 Taken off Rolls Can Vote*, Rocky Mountain News, Oct. 30, 2008, at 7.

870. Oct. 29, 2008, *Common Cause of Colo.* Minutes, *supra* note 868.

871. *See* Todd Hartman, *Voter Purge Continues*, Rocky Mountain News, Oct. 31, 2008, at 6.

872. Interview with Judge John L. Kane and his law clerk Karen Robertson, Aug. 2 and 3, 2012 (noting that state officials are sometimes accustomed to pushing limits with state judges who do not have life appointments).

873. Minutes, *Common Cause of Colo.*, No. 1:08-cv-2321 (D. Colo. Oct. 31, 2008), D.E. 18; Interview with Judge John L. Kane and his law clerk Karen Robertson, Aug. 2 and 3, 2012 (noting that the court reminded the parties of the power of detention for contempt); *see* Todd Hartman, *Judge Halts Purging of Voters*, Rocky Mountain News, Nov. 1, 2008, at 18; John Ingold, *Halt Is Ordered to Voter Purge*, Denver Post, Nov. 2, 2008, at B1.

874. Order, *Common Cause of Colo.*, No. 1:08-cv-2321 (D. Colo. June 26, 2009), D.E. 84, 2009 WL 1847353; *Common Cause of Colo.*, 750 F. Supp. 2d at 1267.

875. Order, *Common Cause of Colo.*, No. 1:08-cv-2321 (D. Colo. Jan. 22, 2010), D.E. 140; *Common Cause of Colo.*, 750 F. Supp. 2d at 1262 n.1.

876. *Common Cause of Colo.*, 750 F. Supp. 2d 1259; *see* Order, *Common Cause of Colo.*, No. 1:08-cv-2321 (D. Colo. Oct. 18, 2010), D.E. 186, 2010 WL 4156486 (denying interim relief in advance of the 2010 general election); *see* Daniel P. Tokaji, *HAVA in Court: A Summary and Analysis of Litigation*, 12 Election L.J. 203, 211 (2013).

877. Stipulation, Common Cause of Colo. v. Buescher, No. 10-1546 (Jan. 24, 2011).

Citizenship Verification

Morales v. Handel (Jack T. Camp, N.D. Ga. 1:08-cv-3172)

> A naturalized citizen sued Georgia for its efforts to purge noncitizens from voter-registration rolls. A three-judge district court determined that section 5 preclearance was required for the efforts and granted interim relief. Georgia eventually was able to establish procedures that earned preclearance.
>
> *Topics:* Citizenship; registration challenges; Help America Vote Act (HAVA); section 5 preclearance; three-judge court.

On October 9, 2008, a naturalized U.S. citizen filed a federal class action in the Northern District of Georgia's Atlanta courthouse complaining that Georgia's secretary of state was improperly challenging citizens who registered to vote as possibly not being citizens.[878] With his complaint, he filed a motion for a temporary restraining order, for a preliminary injunction, and to convene a three-judge district court to hear his claim that Georgia had failed to preclear changes to its registration procedures as required by section 5 of the Voting Rights Act.[879]

In September, the plaintiff completed a voter-registration application on campus; he was a student at Kennesaw State University.[880] He received a notice from the county registrar that there was a question about his citizenship.[881] On September 26, the plaintiff proved his citizenship by presenting his passport at the registrar's office.[882] On October 10, the day after he filed his complaint, he was notified that his status as a registered voter was confirmed.[883]

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878. Complaint, Morales v. Handel, No. 1:08-cv-3172 (N.D. Ga. Oct. 9, 2008), D.E. 1.

879. Motion, *id.* (Oct. 9, 2008), D.E. 2; *see* Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (2014) (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination and requiring that preclearance disputes be heard by a three-judge district court).

On June 25, 2013, the Supreme Court declined to hold section 5 unconstitutional, but the Court did hold unconstitutional the criteria for which jurisdictions require section 5 preclearance. Shelby County v. Holder, 570 U.S. 529 (2013).

880. Order at 2–3, *Morales*, No. 1:08-cv-3172 (N.D. Ga. Oct. 27, 2008), D.E. 36 [hereinafter Oct. 27, 2008, *Morales* Order]; Order at 2, *id.* (Oct. 16, 2008), D.E. 19 [hereinafter Oct. 16, 2008, *Morales* Order].

881. Oct. 27, 2008, *Morales* Order, *supra* note 880, at 3; Oct. 16, 2008, *Morales* Order, *supra* note 880, at 3.

882. Oct. 27, 2008, *Morales* Order, *supra* note 880, at 3; Oct. 16, 2008, *Morales* Order, *supra* note 880, at 3.

883. Oct. 27, 2008, *Morales* Order, *supra* note 880, at 3.

The court assigned the case to Judge Jack T. Camp, who ordered the parties to appear in his Newnan courtroom on the morning of October 10.[884] After that proceeding, he approved the request for a three-judge court,[885] which the circuit's chief judge empaneled four days later.[886]

On October 16, Judge Camp determined that a central question was whether Georgia's application of the Help America Vote Act[887] database requirements in checking registered voters for evidence of citizenship required section 5 preclearance.[888] Judge Camp decided that immediate injunctive relief was not necessary in advance of a determination by the three-judge court on that issue.[889]

The three-judge court conducted an evidentiary hearing on October 22 in Atlanta.[890] It suggested that the parties reach a compromise agreement over the lunch break, but that was not to be.[891] After the hearing, the court determined that preclearance was required and noted that although the secretary did not believe preclearance was required she had responded to this action by seeking it.[892] If preclearance would remain unresolved during the upcoming November 4 election, Georgia was ordered to allow voters whose citizenship was in doubt to cast provisional ballots.[893]

On December 15, the Justice Department asked Georgia for additional information.[894] On March 10, 2009, the plaintiff filed an amended complaint adding three civil rights organizations as plaintiffs.[895]

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884. Order, *Morales*, No. 1:08-cv-3172 (N.D. Ga. Oct. 9, 2008), D.E. 5.

Judge Camp retired on November 19, 2010. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

885. Order, *Morales*, No. 1:08-cv-3172 (N.D. Ga. Oct. 10, 2008), D.E. 7; Minutes, *id.* (Oct. 10, 2008), D.E. 10.

886. Order, *id.* (Oct. 14, 2008), D.E. 18.

887. Pub. L. No. 107-252, 116 Stat. 1666 (2002), *as amended*, 52 U.S.C. §§ 20901–21145. *See generally* Marie Leary & Robert Timothy Reagan, The Help America Vote Act (Federal Judicial Center 2012); Symposium, *HAVA @ 10*, 12 Election L.J. 111 (2013).

888. Oct. 16, 2008, *Morales* Order, *supra* note 880, at 5–6.

889. *Id.* at 11.

890. Minutes, *Morales*, No. 1:08-cv-3172 (N.D. Ga. Oct. 22, 2008), D.E. 29; *see* Order, *id.* (Oct. 16, 2008), D.E. 20; Oct. 16, 2008, Morales Order, *supra* note 880, at 11–12.

891. *See* Bill Rankin, *Countdown 2008: Road to the White House*, Atlanta J.-Const., Oct. 23, 2008, at A18.

892. Oct. 27, 2008, Morales Order, *supra* note 880, at 21–22; *see* Aaron Gould Sheinin & Julia Malone, *State Responds to Voter ID Challenge*, Atlanta J.-Const., Oct. 15, 2008, at C7; Aaron Gould Sheinin & Bill Rankin, *Flagged Voters Can Cast Ballots*, Atlanta J.-Const., Oct. 28, 2008, at A1.

893. Oct. 27, 2008, Morales Order, *supra* note 880, at 23–27.

894. Justice Department Letter (May 29, 2009) [hereinafter May 29, 2009, Justice De-

On May 29, 2009, the Justice Department informed Georgia that "the state's proposed procedures for verifying voter registration information are seriously flawed. This flawed system frequently subjects a disproportionate number of African-American, Asian, and/or Hispanic voters to additional and, more importantly, erroneous burdens on the right to register to vote."[896] On June 22, 2010, Georgia sought judicial preclearance by filing an action in the U.S. District Court for the District of Columbia.[897] In response to an August 17, 2010, submission to the Justice Department, Georgia's procedures were precleared by the department on the following day.[898] On November 2, the district court in the District of Columbia granted a voluntary dismissal of the action for judicial preclearance.[899]

Partisan Canceling of Voter Registrations

Montana Democratic Party v. Eaton (Donald W. Molloy, D. Mont. 9:08-cv-141)

> One political party filed a federal action against the other political party for launching an effort to nullify several thousand voter registrations based on postal changes of address. Because the state did not fully effectuate the plan, in part because of the filing of the case, the court did not need to grant the plaintiffs relief.
>
> *Topics:* Registration challenges; National Voter Registration Act.

One month before the 2008 general election, and on the last day for voter registration, Montana's Democratic Party and two voters living in Missoula County filed a federal complaint in the District of Montana's Missoula Division claiming that the state's Republican Party was improperly challenging the eligibility of Democrats' voter registrations.[900] Based on postal-

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partment Letter], *attached as* Ex. 2, Complaint, Georgia v. Holder, No. 1:10-cv-1062 (D.D.C. June 22, 2010), D.E. 1 [hereinafter *Georgia* Complaint].

895. Amended Complaint, *Morales*, No. 1:08-cv-3172 (N.D. Ga. Mar. 10, 2009), D.E. 55 (adding as plaintiffs the NAACP, the Georgia Association of Latino Elected Officials, and the Center for Pan Asian Community Services).

896. May 29, 2009, Justice Department Letter, *supra* note 894.

897. *Georgia* Complaint, *supra* note 894.

898. Justice Department Letter (Aug. 18, 2010), *attached as* Ex. 2, Motion to Dismiss, *Georgia*, No. 1:10-cv-1062 (D.D.C. Aug. 20, 2010), D.E. 46; Georgia v. Holder, 748 F. Supp. 2d 16, 18 (D.D.C. 2010); *see* Aaron Gould Sheinin, *State Wins Voter ID Case*, Atlanta J.-Const., Aug. 24, 2010, at A1.

899. *Georgia*, 748 F. Supp. 2d 16.

900. Complaint, Mont. Democratic Party v. Eaton, No. 9:08-cv-141 (D. Mont. Oct. 6, 2008), D.E. 2 [hereinafter *Mont. Democratic Party* Complaint] ("The challenges were filed in traditionally Democratically leaning areas, including Missoula, Lewis & Clark, [Deer]

service changes of address, the Republican Party challenged the eligibility of approximately six thousand voters.[901] With their complaint, the plaintiffs filed a motion for a temporary restraining order.[902]

Montana's attorney general observed that the mass voter-registration challenges were unprecedented.[903]

Montana law specified that upon submission of a voter-registration challenge, "the election administrator shall question the challenger and the challenged elector and may question other persons to determine whether the challenge is sufficient or insufficient to cancel the elector's registration."[904] The complaint alleged that county officials were in the process of sending notices to challenged voters.[905] "Apparently in response to the filing of Plaintiffs' complaint, the Secretary of State has astutely directed the involved counties to refrain from sending the letters of challenge."[906]

The National Voter Registration Act[907] allows for a program of registration cancelation in which "change-of-address information supplied by the Postal Service through its licensees is used to identify registrants whose addresses may have changed,"[908] but a state may not systematically cancel voter registrations fewer than ninety days before a federal election.[909]

Two days after the action was filed, Judge Donald W. Molloy denied the plaintiffs a temporary restraining order:[910] the Republican Party was

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Lodge, Silver Bow, Glacier, Hill, and Roosevelt counties."); Mont. Democratic Party v. Eaton, 581 F. Supp. 2d 1077, 1078 (D. Mont. 2008); *see* Matthew Brown, *GOP Backs Off Voter Registration Challenges*, Great Falls Trib., Oct. 8, 2008, at M1.

901. *Mont. Democratic Party*, 581 F. Supp. 2d at 1078–79 ("these challenges do not appear directed at the statewide voting population, but rather at select counties that likely contain concentrations of Democratic voters"); *see Cascade County Not Affected by GOP Voter Challenge*, Great Falls Trib., Oct. 3, 2008 (reporting Republican Party challenges to "the eligibility of 6,000 registered voters in six counties that historically are Democratic strongholds").

902. Temporary-Restraining-Order Motion, *Mont. Democratic Party*, No. 9:08-cv-141 (D. Mont. Oct. 6, 2008), D.E. 1.

903. Prehearing Brief at 2, *id.* (Oct. 10, 2008), D.E. 13.

904. Mont. Code § 13-13-301(3)(a).

905. *Mont. Democratic Party* Complaint, *supra* note 900, at 6–7.

906. *Mont. Democratic Party*, 581 F. Supp. 2d at 1080.

907. Pub. L. No. 103-31, 107 Stat. 77 (1993), *as amended*, 52 U.S.C. §§ 20501–20511. *See generally* Robert Timothy Reagan, Motor Voter: The National Voter Registration Act (Federal Judicial Center 2014).

908. § 20507(c)(1)(A); *Mont. Democratic Party*, 581 F. Supp. 2d at 1081.

909. § 20507(c)(2)(A); *Mont. Democratic Party*, 581 F. Supp. 2d at 1081.

910. Judge Molloy ruled on October 8, 2008. Opinion, Mont. Democratic Party v. Eaton, No. 9:08-cv-141 (D. Mont. Oct. 8, 2008), D.E. 10. Two days later, Judge Molloy

not a state actor governed by the federal statute,[911] and the state's decision not to effectuate the Republican Party's scheme mitigated the immediacy of the alleged injury.[912] Judge Molloy set a merits hearing on the plaintiffs' pleas for declaratory and injunctive relief for October 14, the action's ninth day.[913]

Four days before the hearing, however, the plaintiffs voluntarily dismissed their action on assurances that Montana would not act on the Republican Party's challenges.[914]

Judge Molloy was able to resolve this case without proceedings.[915] His chambers were notified of the ex parte application for a temporary restraining order immediately upon its filing, and Judge Molloy gave the case his immediate attention.[916]

Improperly Canceling Voter Registrations for Changes of Address

United States Student Association Foundation v. Land (Stephen J. Murphy III, E.D. Mich. 2:08-cv-14019)

> Three organizations filed a federal complaint charging the state with improperly canceling voter registrations based on insufficient indications of residence changes. The district judge determined that the state's practice of rejecting voter registrations if registration identification cards came back from the post office as undeliverable failed to follow the notice and waiting-period requirements of the National Voter Registration Act. The state's practice of canceling registrations upon learning that the voter became registered to drive in another state also relied on flawed

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amended the opinion nunc pro tunc to add a footnote concerning who should attend a subsequent hearing, Opinion, *id.* (Oct. 10, 2008), D.E. 11, and the amended opinion was published in the Federal Supplement. *Mont. Democratic Party*, 581 F. Supp. 2d 1077.

Tim Reagan interviewed Judge Molloy for this report by telephone on May 16, 2012.

911. *Mont. Democratic Party*, 581 F. Supp. 2d at 1081 ("If the State of Montana, instead of the Montana Republican Party, engaged in the conduct that has created this controversy, its actions would violate the Federal Voter Registration Act.").

912. *Id.* at 1080 ("the allegedly immediate and irreparable injury Plaintiffs' motion addresses is not as immediate as it first appeared").

913. *Id.* at 1085.

914. Notice, *Mont. Democratic Party*, No. 9:08-cv-141 (D. Mont. Oct. 10, 2008), D.E. 15; *see* Docket Sheet, *id.* (Oct. 6, 2008) (noting dismissal on Oct. 10, 2008); *see also* Brown, *supra* note 900 ("Montana Republican Party executive director Jacob Eaton said he was withdrawing the challenges and would be issuing no more.").

915. Interview with Judge Donald W. Molloy, May 16, 2012.

916. *Id.*

> logic and violated the act. The case was finally resolved by settlement with a payment of $150,000 in attorney fees and costs to the plaintiffs.
>
> *Topics:* Registration challenges; National Voter Registration Act; attorney fees; intervention.

On September 17, 2008, three organizations filed a federal complaint in the Eastern District of Michigan, charging the state with improperly canceling voter registrations based on insufficient indications of residence changes.[917] With their complaint, the plaintiffs filed a motion for a preliminary injunction and expedited consideration.[918]

Judge Stephen J. Murphy III heard the motion on September 30.[919] On October 13, he issued a preliminary injunction.[920]

Section 8(d) of the National Voter Registration Act restricts how a state may cancel a voter registration for federal elections because of a change in address:

> (1) A State shall not remove the name of a registrant from the official list of eligible voters in elections for Federal Office on the ground that the registrant has changed residence unless the registrant—
>
> (A) confirms in writing that the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered; or
>
> (B) (i) has failed to respond to a notice described in paragraph (2); and
>
> (ii) has not voted or appeared to vote (and, if necessary, correct the registrar's record of the registrant's address) in an election during the period beginning on the date of the notice and ending on the day after the date of the second general

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917. Complaint, U.S. Student Ass'n Found. v. Land, No. 2:08-cv-14019 (E.D. Mich. Sept. 17, 2008), D.E. 1; U.S. Student Ass'n Found. v. Land, 546 F.3d 373, 378 (6th Cir. 2008); U.S. Student Ass'n Found. v. Land, 585 F. Supp. 2d 925, 929 (E.D. Mich. 2008); *see* Amended Complaint, *U.S. Student Ass'n Found.*, No. 2:08-cv-14019 (E.D. Mich. Oct. 7, 2008), D.E. 25; *see also ACLU Files Suit to Guard Mich. Voters*, Detroit Free Press, Sept. 19, 2008, at B2; Khalil E. Hachem, *Lawsuit Surprises Clerk: Ypsilanti Official Named as Defendant in Voter Registration Case*, Ann Arbor News, Sept. 19, 2008, at A3.

918. Preliminary-Injunction Motion, *U.S. Student Ass'n Found.*, No. 2:08-cv-14019 (E.D. Mich. Sept. 17, 2008), D.E. 2; *U.S. Student Ass'n Found.*, 546 F.3d at 378; *U.S. Student Ass'n Found.*, 585 F. Supp. 2d at 929.

919. Transcript, *U.S. Student Ass'n Found.*, No. 2:08-cv-14019 (E.D. Mich. Sept. 30, 2008, filed Oct. 17, 2008), D.E. 28; *U.S. Student Ass'n Found.*, 585 F. Supp. 2d at 929.

920. *U.S. Student Ass'n Found.*, 585 F. Supp. 2d 925; *U.S. Student Ass'n Found.*, 546 F.3d at 376, 379–80; *see Voter Rolls Judgment Muddles Process*, Detroit Free Press, Oct. 19, 2008, at A15.

> election for Federal office that occurs after the date of the notice.[921]

Judge Murphy determined that the state's practice of rejecting voter registrations if registration identification cards came back from the post office as undeliverable failed to follow the notice and waiting-period requirements of the statute.[922] Judge Murphy also determined that the state's practice of canceling registrations upon learning that the voter became registered to drive in another state failed to comply with section 8(d) and failed to accommodate persons who might be residents of one state for voting purposes and residents of another state for driving purposes.[923]

On October 29, the court of appeals denied Michigan's motion for a stay of Judge Murphy's injunction.[924]

On January 29, 2009, a voter moved to intervene as a plaintiff, alleging that she was denied a ballot in the 2008 general election because she had obtained a driver's license in Georgia.[925] Following a February 19 hearing on her motion,[926] the proposed intervenor withdrew her motion for "personal and family considerations."[927]

On May 26, 2010, Judge Murphy dismissed the action as settled.[928] At Judge Murphy's request, Judge Bernard A. Friedman conducted a settlement conference on May 25 from 10:00 a.m. until 7:00 p.m.[929] Among the settlement's provisions were the following:

> 4. Defendants covenant and agree not to reject or cancel an individual's voter registration solely on the ground that the individual's original disposition notice or voter identification card is returned by the Postal Service as undeliverable.
>
> 5. Defendants further covenant and agree not to cancel an individual's voter registration on the ground that the individual surrendered his or her Michigan driver's license or state identification card and obtained a driver's license or state identification card in another state—without

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921. Pub. L. No. 103-31, § 8(d), 107 Stat. 77, 84 (1993), 52 U.S.C. § 20507(d); *see U.S. Student Ass'n Found.*, 546 F.3d at 376–77 (quoting statute).

922. *U.S. Student Ass'n Found.*, 585 F. Supp. 2d at 937–39.

923. *Id.* at 939–41.

924. *U.S. Student Ass'n Found.*, 546 F.3d at 389.

925. Intervention Motion, U.S. Student Ass'n Found. v. Land, No. 2:08-cv-14019 (E.D. Mich. Jan. 29, 2009), D.E. 46.

926. Docket Sheet, *id.* (Sept. 17, 2008).

927. Notice, *id.* (Mar. 11, 2009), D.E. 53.

928. Dismissal, *id.* (May 26, 2010), D.E. 96.

929. Transcript at 3, *id.* (May 25, 2010, filed June 10, 2010), D.E. 98 [hereinafter May 25, 2010, *U.S. Student Ass'n Found.* Transcript].

specific written confirmation that the individual has changed his residence for voting purposes.[930]

The parties agreed that the defendants would pay the plaintiffs $150,000 in attorney fees and costs.[931]

Using Foreclosure Notices to Challenge Voters

Maletski v. Macomb County Republican Party (David M. Lawson, E.D. Mich. 2:08-cv-13982)

> Based on a news website's report that one party was planning to use foreclosure notices to challenge voter registrations during the 2008 general election, the other party filed a federal complaint to enjoin the plan. In preparation for a hearing, the parties learned that the news report was not accurate, so the parties stipulated dismissal on the day of the hearing.
>
> *Topic:* Registration challenges.

The Democratic Party filed a federal complaint against the Republican Party in the Eastern District of Michigan on September 16, 2008, accusing the Republican Party of a plan to use foreclosure notices to challenge voter eligibility in the 2008 general election.[932] On September 25, the plaintiffs sought a preliminary injunction.[933] On September 29, Judge David M. Lawson set hearing on the injunction motion for October 20.[934]

The controversy apparently arose from a September 10 report posted on a *Michigan Messenger* website quoting the Macomb County Republican Party chair as "planning to use a list of foreclosed homes to block people from voting in the upcoming election."[935] The chair promptly denied the accuracy of the report.[936] After the Democratic Party's federal complaint

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930. Settlement Agreement at 3, *id.* (June 24, 2010), D.E. 100.

931. *Id.* at 5; May 25, 2010, *U.S. Student Ass'n Found.* Transcript, *supra* note 929, at 6.

932. Complaint, Maletski v. Macomb Cty. Republican Party, No. 2:08-cv-13982 (E.D. Mich. Sept. 16, 2008), D.E. 1 [hereinafter *Maletski* Complaint]; *see* Gordon Trowbridge, *Dems File Lawsuit to Block Use of Foreclosure Lists to Bar Voters*, Detroit News, Sept. 17, 2008, at B1.

933. Preliminary-Injunction Motion, *Maletski*, No. 2:08-cv-13982 (E.D. Mich. Sept. 25, 2008), D.E. 12.

934. Order, *id.* (Sept. 29, 2008), D.E. 15.

Tim Reagan interviewed Judge Lawson for this report by telephone on October 3, 2012.

935. Ex. 5, *Maletski* Complaint, *supra* note 932.

936. *See* Kathleen Gray, *GOP Won't Use Foreclosure List to Block Voters*, Detroit Free Press, Sept. 12, 2008, at B2; *Macomb County GOP Leader Denies Plan to Block Votes*, Lansing State J., Sept. 12, 2008, at A1.

was filed, the *Michigan Messenger* retracted its story.[937] The chair then filed a defamation action in state court.[938]

On the day of the hearing, the parties stipulated dismissal.[939] Sometimes a case can be resolved by merely scheduling a hearing, which prompts communication among the parties.[940]

Hurricane Displacement and Voter Registration

Segue v. Louisiana (Kurt D. Engelhardt, E.D. La. 2:07-cv-5221)

> A federal complaint alleged that Louisiana's notification procedures for challenges to voter registrations based on evidence that the voters had registered elsewhere had not been precleared pursuant to section 5 of the Voting Rights Act. The district judge determined that preclearance was not necessary because Louisiana was giving more notice than it was precleared to.
>
> *Topics:* Registration challenges; section 5 preclearance; three-judge court.

On August 29, 2007, the NAACP filed a federal action in the Eastern District of Louisiana on behalf of a named voter and a hypothetical voter alleging that Louisiana was improperly purging its voter registration rolls of persons temporarily displaced by Hurricanes Katrina and Rita.[941] The complaint claimed that some of Louisiana's procedures for ensuring that its registered voters remained eligible to vote in Louisiana had not been precleared pursuant to section 5 of the Voting Rights Act, and so the plaintiff asked the court to convene a three-judge panel.[942]

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937. *See* Kathy Barks Hoffman, *Web Site Admits Error Over One Republican's Comments on Voting*, Flint J., Sept. 21, 2008, at 5.

938. *See Macomb GOP Official Files Suit*, Grand Rapids Press, Oct. 2, 2008, at B4.

939. Order, *Maletski*, No. 2:08-cv-13982 (E.D. Mich. Oct. 20, 2008), D.E. 40; Stipulation, *id.* (Oct. 20, 2008), D.E. 39; *see* Kathleen Gray, *GOP Vows Not to Use Foreclosure Lists at Polls*, Detroit Free Press, Oct. 21, 2008, at A13; Kathy Barks Hoffman, *GOP, Dems Settle Foreclosure Flap*, Grand Rapids Press, Oct. 21, 2008, at B6; Jim Lynch, *Voter Suit Settlement Reached*, Detroit News, Oct. 21, 2008, at B3.

940. Interview with Judge David M. Lawson, Oct. 3, 2012.

941. Complaint, Segue v. Louisiana, No. 2:07-cv-5221 (E.D. La. Aug. 29, 2007), D.E. 1 [hereinafter *Segue* Complaint]; *see* Robert Travis Scott, *Officials Sued Over Voter Purge*, New Orleans Times-Picayune, Aug. 31, 2007, National, at 2.

942. Brief, *Segue*, No. 2:07-cv-5221 (E.D. La. Sept. 21, 2007), D.E. 11; Notice, *id.* (Sept. 13, 2007), D.E. 9; *see* Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (2014) (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination and requiring that preclearance disputes be heard by a three-judge district court).

On June 25, 2013, the Supreme Court declined to hold section 5 unconstitutional, but

The court originally assigned the case to Judge Stanwood R. Duval, Jr., but approximately two weeks after the case was filed the court reassigned the case to Judge Kurt D. Engelhardt because of the number of Katrina cases Judge Duval had received.[943]

On September 24, the plaintiff moved to expedite the case because a gubernatorial primary was to be held on October 20.[944] Cognizant of the upcoming primary,[945] Judge Engelhardt granted the defendants summary judgment on October 3.[946]

As the plaintiffs acknowledged, Louisiana had a precleared procedure in which it could, if it discovered that the voter was also registered in another state, provide a registered voter with a twenty-one-day notice that the voter's registration would be canceled unless the voter could show cancelation of registration in the other state.[947] Louisiana had not yet precleared an additional procedure that it had already implemented in which Louisiana provided registered voters with an earlier thirty-day notice that their registration could be canceled because they registered in another state.[948] The plaintiff had received the thirty-day notice, but her registration in Louisiana had not been canceled, so Judge Engelhardt determined that she lacked standing for want of injury.[949] Moreover, because Louisiana

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the Court did hold unconstitutional the criteria for which jurisdictions require section 5 preclearance. Shelby County v. Holder, 570 U.S. 529 (2013).

943. Order, *Segue*, No. 2:07-cv-5221 (E.D. La. Sept. 11, 2007), D.E. 8; Docket Sheet, *id.* (Aug. 29, 2007).

Tim Reagan interviewed Judge Engelhardt for this report by telephone on May 4, 2012. He was elevated to the court of appeals on May 10, 2018. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges. Judge Duval retired on January 31, 2017. *Id.*

944. Motion, *Segue*, No. 2:07-cv-5221 (E.D. La. Sept. 24, 2007), D.E. 12.

945. Interview with Judge Kurt D. Engelhardt, May 4, 2012.

946. Order and Reasons, *Segue*, No. 2:07-cv-5221 (E.D. La. Oct. 3, 2007), D.E. 24 [hereinafter *Segue* Order and Reasons], 2007 WL 2900207; *see* Robert Travis Scott, *Registrar Helps Thousands Remain Orleans Voters*, New Orleans Times-Picayune, Oct. 11, 2007, National, at 3.

947. *Segue* Order and Reasons, *supra* note 946, at 2–3; *Segue* Complaint, *supra* note 941, at 8.

948. *Segue* Order and Reasons, *supra* note 946, at 2–3.

949. *Id.* at 4–7.

> Were other courts to apply similarly stringent standing rules in challenges to registration practices, it could prevent many cases from getting into court, since it will often be difficult for plaintiffs to show that they were affected—and, even if plaintiffs' names are wrongly stricken, defendants may reinstate them once a complaint is brought, thus potentially mooting the case.

Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 Wm. & Mary Bill Rts. J. 453,

was providing its voters with the additional protection of a thirty-day notice beyond what it had precleared, the plaintiff alleged no valid claim under section 5, so the complaint was without merit and a three-judge panel need not be appointed.[950]

Judge Engelhardt was able to resolve this case on paper, without any oral proceeding.[951] During the first few elections after the hurricanes, there were many efforts undertaken in Louisiana to address voter displacement, and several actions were resolved by the state courts.[952]

A List of Inactive Voters in Lawrence, Massachusetts

¿OÍSTE? v. City of Lawrence (Nathaniel M. Gorton, D. Mass. 1:05-cv-12218)

> On the Friday before a local election, two voters and a political organization filed a federal complaint seeking relief from a recent notification to a large number of potential voters that they had been placed on an inactive list. On Monday afternoon, the judge recessed proceedings for twenty-three minutes for the parties to agree on a statement to voters in both English and Spanish to be broadcast and printed in the media. Several months later, after three filings stating that the parties were working to resolve matters without litigation, the judge dismissed the case without prejudice.
>
> *Topics:* Registration procedures; case assignment.

At 5:01 p.m. on the Friday before the November 8, 2005, election in Lawrence, Massachusetts, two voters and a political organization filed a federal complaint in the District of Massachusetts seeking relief from a recent notification to a large number of potential voters that they had been placed on an inactive list.[953] With their complaint, the plaintiffs filed a motion for a temporary restraining order.[954] The case was docketed on Monday morning.[955]

482–83 n.256 (2008).

950. *Segue* Order and Reasons, *supra* note 946, at 7–11.

951. Interview with Judge Kurt D. Engelhardt, May 4, 2012.

952. *Id. See generally* William P. Quigley, *Katrina Voting Wrongs: Aftermath of Hurricane and Weak Enforcement Dilute African American Voting Rights in New Orleans*, 14 Wash. & Lee J. Civil Rts. & Soc. Just. 49 (2007); Damian Williams, Note, *Reconstructing Section 5: A Post-Katrina Proposal for Voting Rights Act Reform*, 116 Yale L.J. 1116 (2007).

953. Complaint, ¿OÍSTE? v. City of Lawrence, No. 1:05-cv-12218 (D. Mass. Nov. 7, 2005), D.E. 1; Transcript at 19, *id.* (Nov. 7, 2005, filed Dec. 14, 2005), D.E. 11 [hereinafter *¿OÍSTE?* Transcript].

954. Temporary-Restraining-Order Motion, *id.* (Nov. 7, 2005), D.E. 5.

955. Docket Sheet, *id.* (Nov. 7, 2005) [hereinafter *¿OÍSTE?* Docket Sheet]; *¿OÍSTE?*

Because of the unavailability of Judge William G. Young, who signed a 1999 consent decree concerning the rights of Latino voters in Lawrence,[956] Judge Nathaniel M. Gorton presided over a hearing at 4:20 p.m. on the day before the election.[957] At 5:10, Judge Gorton recessed proceedings for twenty-three minutes for the parties to agree on a statement to voters in both English and Spanish to be broadcast and printed in the media.[958]

On July 12, 2006, after three filings stating that the parties were working to resolve matters without litigation,[959] Judge Young dismissed the action without prejudice.[960]

Widespread Voter-Registration Challenges

Miller v. Blackwell (Susan J. Dlott, S.D. Ohio 1:04-cv-735)

> One week before the 2004 general election, the Democratic Party filed a federal complaint challenging widespread voter-registration challenges—approximately 22,000—by the Republican Party based on returned mail. The court enjoined administrative hearings on the challenges through the election. After the election, the plaintiffs dropped the case.
>
> *Topics:* Registration challenges; intervention; class action; enforcing orders.

One week before the 2004 general election, the Ohio Democratic Party and two voters filed a federal class action in the Southern District of Ohio's Cincinnati courthouse against Ohio's secretary of state and the election officials of six counties—three in the Southern District and three in the Northern District—challenging extensive challenges by the Republican Party to voter eligibility based on returned mail.[961] With the complaint, the

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Transcript, *supra* note 953, at 4–5 (noting that the judge received the matter at 8:49 a.m.).

956. *See* Docket Sheet, United States v. City of Lawrence, No. 1:98-cv-12256 (D. Mass. Nov. 5, 1998).

957. *¿OÍSTE?* Transcript, *supra* note 953.

958. *Id.* at 38–42; *¿OÍSTE?* Docket Sheet, *supra* note 955.

959. Stipulation, *¿OÍSTE?*, No. 1:05-cv-12218 (D. Mass. June 5, 2006), D.E. 17; Stipulation, *id.* (Apr. 14, 2006), D.E. 16; Stipulation, *id.* (Mar. 23, 2006), D.E. 15.

960. Order, *id.* (July 12, 2006), D.E. 19.

961. Complaint, Miller v. Blackwell, No. 1:04-cv-735 (S.D. Ohio Oct. 26, 2004), D.E. 1 (Franklin, Lawrence, and Scioto are in the Southern District; Cuyahoga, Medina, and Trumbull are in the Northern District); *see* Edward B. Foley, *The Promise and Problems of Provisional Voting*, 73 Geo. Wash. L. Rev. 1193, 1199 (2005); Scott Hiaasen, *Ohio GOP Challenges 35,000 on Voter Rolls*, Cleveland Plain Dealer, Oct. 23, 2004, at A1; Mark Niquette, *GOP Challenges Voters*, Columbus Dispatch, Oct. 23, 2004, at 1A. *See generally* Ari Berman, Give Us the Ballot 218–20 (2015).

plaintiffs filed a motion for a temporary restraining order.[962]

On the case's second day, two persons who signed challenges moved to intervene.[963] At 12:31 p.m., Judge Susan J. Dlott held a proceeding in chambers with counsel for the plaintiffs present and counsel for the defendants appearing by telephone.[964] The defendants confirmed that they had received a total of over 22,000 challenges—from forty-three to over 17,000 per county—and that they had challenge hearings scheduled from that day to the following Saturday, depending upon county.[965] After a recess of a bit over two hours, Judge Dlott reconvened the parties at 3:45 and announced that she would grant the temporary restraining order against acting on the challenges and hold an evidentiary hearing Friday morning on whether to follow up with a preliminary injunction.[966] A written order followed later that day.[967] The court of appeals declined to stay the order.[968]

Judge Dlott certified the individual plaintiffs as representatives of a class of

> all persons who have registered to vote in the State of Ohio whose eligibility to vote was challenged by the Ohio Republican Party's voter challenges submitted on October 22, 2004 and whose eligibility their County Board of Elections intended to challenge before the General Election to be held on November 2, 2004.[969]

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962. Temporary-Restraining-Order Motion, *Miller*, No. 1:04-cv-735 (S.D. Ohio Oct. 26, 2004), D.E. 2.

963. Challengers Motion to Intervene, *id.* (Oct. 27, 2004), D.E. 5; Transcript at 4, *id.* (Oct. 27, 2004, filed Oct. 29, 2004), D.E. 18 [hereinafter Oct. 27, 2004, *Miller* Transcript].

964. Oct. 27, 2004, *Miller* Transcript, *supra* note 963, at 1–2; *see* Ann Gerhart, *Up to the Challenge*, Wash. Post, Oct. 29, 2004, at C1.

965. Oct. 27, 2004, *Miller* Transcript, *supra* note 963, at 6–9.

966. *Id.* at 41–63; *see* Jo Becker, *Judge Rebuffs GOP Effort to Contest Voters in Ohio*, Wash. Post, Oct. 28, 2004, at A1; James Dao, *G.O.P. Bid to Contest Registrations Is Blocked*, N.Y. Times, Oct. 28, 2004, at A25; Kevin Eigelbach, *Voter Hearings Halted by Ruling*, Cincinnati Post, Oct. 28, 2004, at A1; Edward B. Foley, *The Future of* Bush v. Gore*?*, 68 Ohio St. L.J. 925, 991 (2007); Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 Geo. Wash. L. Rev. 1206, 1235–36, 1243–44 (2005).

967. Miller v. Blackwell, 348 F. Supp. 2d 916 (S.D. Ohio 2004); Temporary Restraining Order, *Miller*, No. 1:04-cv-735 (S.D. Ohio Oct. 27, 2004), D.E. 11; *see* Mark Niquette, *Voter Challenges Halted*, Columbus Dispatch, Oct. 28, 2004, at 1A; Bill Sloat, *Judge Blocks Voter Eligibility Hearings*, Cleveland Plain Dealer, Oct. 28, 2004, at A1.

968. Miller v. Blackwell, 388 F.3d 546 (6th Cir. 2004); *see* Jo Becker, *Ruling on Ohio Voter Challenges Is Upheld*, Wash. Post, Oct. 30, 2004, at A9; Andrew Welsh-Huggins, *Restart of Voter Hearings Rejected*, Cincinnati Post, Oct. 29, 2004, at A11.

969. *Miller*, 348 F. Supp. 2d at 918 n.1.

Judge Dlott determined that the method of challenge combined with the methods of resolution of so many voter registration challenges so close to the election created "grave due process concerns" with respect to the fundamental right to vote.[970] She also granted the challengers' motion to intervene.[971] On Thursday, she granted the State of Ohio's motion to intervene.[972]

On Friday, she allowed the plaintiffs to amend their complaint to include all of Ohio's eighty-eight counties, and she extended the temporary restraining order to all of the counties.[973] There was evidence that one county ignored the temporary restraining order after receiving actual, but not official, notice of it, but the evidence was insufficient to support a finding of contempt.[974]

Judge Dlott conducted the preliminary-injunction hearing on Friday[975] and Monday.[976] The temporary restraining order remained in effect through the election.[977] On April 28, 2005, Judge Dlott granted the plaintiffs' motion to dismiss the action on the grounds that their concerns were moot now that the election was over.[978] Ohio's appeal was settled after briefing.[979]

The Right to Vote While Under Guardianship

Prye v. Blunt (Ortrie D. Smith, W.D. Mo. 2:04-cv-4248)

> A prospective voter filed a federal complaint one month before a general election challenging a state's disqualification of voters under guardianship. The district judge denied the plaintiff immediate relief because of state-court opportunities to reserve voting rights in limited guardianship. For similar reasons, the judge granted defendants summary judgment against a substituted plaintiff who was erroneously denied the vote because of a misunderstanding about the plaintiff's reserved voting rights. The court of appeals affirmed the summary judgment because the

970. *Id.* at 921.

971. *Id.* at 917, 922–23.

972. Order, *Miller*, No. 1:04-cv-735 (S.D. Ohio Oct. 28, 2004), D.E. 17.

973. Order, *id.* (Oct. 29, 2004), D.E. 24; *see* Amended Complaint, *id.* (Oct. 29, 2004), D.E. 25; *see also* Bill Sloat, *Judge Orders Halt to County Hearings Challenging Voters*, Cleveland Plain Dealer, Oct. 30, 2004, at A1.

974. Order, *Miller*, No. 1:04-cv-735 (S.D. Ohio Nov. 1, 2004), D.E. 33.

975. Transcript, *id.* (Oct. 29, 2004, filed Jan. 14, 2005), D.E. 47.

976. Transcript, *id.* (Nov. 1, 2004, filed Dec. 20, 2004), D.E. 45.

977. Order, *id.* (Apr. 28, 2005), D.E. 51.

978. *Id.*

979. Docket Sheet, Miller v. Blackwell, No. 05-3773 (6th Cir. June 23, 2005).

substituted plaintiff had already received a remedy and an advocacy organization coplaintiff did not have standing to represent the interests of mere constituents.

Topics: Registration challenges; matters for state courts.

Steven Prye, a St. Louis resident, filed a federal complaint on October 8, 2004, in the Western District of Missouri challenging a state law preventing the plaintiff from voting in the November 2 general election because he had "been adjudged incapacitated and appointed a guardian of his person and estate because of mental incapacity."[980] With his complaint, the plaintiff filed a motion for a preliminary injunction.[981]

Judge Ortrie D. Smith set the case for hearing on October 19.[982] The parties agreed to postpone the hearing until October 21.[983] Some briefing on the plaintiff's treatment for mental illness was filed under seal.[984]

On October 26, Judge Smith denied the plaintiff a preliminary injunction.[985]

> Missouri is denying Prye the right to register to vote because the State of Illinois adjudged him mentally incapacitated and appointed him a guardian. In Illinois, such a judgment does not automatically deprive a person of his or her right to vote, but in Missouri it does. . . .
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> . . .
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> . . . Prye had and still has the opportunity to pursue limitations on the Illinois guardianship, and he also has the opportunity to argue that the petition for guardianship pending in Missouri should be a limited guardianship, entitling him to vote.[986]

On July 7, 2006, Judge Smith granted the defendants summary judgment against a substituted plaintiff and an advocacy organization.[987] "Mis-

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980. Complaint, Prye v. Blunt, No. 2:04-cv-4248 (W.D. Mo. Oct. 8, 2004), D.E. 1; *see* Mo. Const. art. 8, § 2 (disqualification from voting); Mo. Rev. Stat. § 115.133.2 (disqualification from voter registration and voting); *see also* Pam Belluck, *States Face Touchy Decisions on Who Is Mentally Fit to Vote*, N.Y. Times, June 19, 2007, at A1; Kelly Wiese, *Suit Challenges Law Denying Vote to Some Mentally Ill*, St. Louis Post-Dispatch, Oct. 9, 2004, at 6.

981. Preliminary-Injunction Motion, *Prye*, No. 2:04-cv-4248 (W.D. Mo. Oct. 8, 2004), D.E. 3.

982. Order, *id.* (Oct. 12, 2004), D.E. 5.

983. Order, *id.* (Oct. 18, 2004), D.E. 18; *see* Minutes, *id.* (Oct. 21, 2004), D.E. 33.

984. Order, *id.* (Oct. 25, 2004), D.E. 36; *see* Protective Order, *id.* (Sept. 2, 2005), D.E. 95; Motion, *id.* (Oct. 24, 2004), D.E. 30.

985. Preliminary-Injunction Denial, *id.* (Oct. 26, 2004), D.E. 37 [hereinafter *Prye* Preliminary-Injunction Denial]; *see* Order, *id.* (Nov. 1, 2004), D.E. 43.

986. *Prye* Preliminary-Injunction Denial, *supra* note 985, at 5, 8.

987. Summary-Judgment Opinion, *Prye*, No. 2:04-cv-4248 (W.D. Mo. July 7, 2006),

souri affords an individualized determination of a person's abilities and limitations and denies the right to vote to those who lack the mental capacity to exercise that right and therefore are not qualified to do so."[988]

The substituted plaintiff was prevented from voting in the November 2004 election because of an erroneous interpretation of a guardianship order that expressly reserved his right to vote, and the error was prospectively remedied after the election.[989] Because the plaintiff did not include a claim for damages, the court of appeals determined on October 18, 2007, that he no longer had an injury to remedy, and he did not have standing to sue on behalf of others for prospective relief.[990]

The court of appeals also determined that the advocacy group did not have standing to sue on behalf of mere constituents.[991] Moreover, determination of whether Missouri denied voting privileges to someone who was under guardianship but who retained the capacity to vote would require the prospective voter's participation in the case.[992]

Injunction Against Purging Minor-Party Registrations for the Party's Failure to Qualify as an Established Party

Green Party of New York State v. New York State Board of Elections (John Gleeson, E.D.N.Y. 1:02-cv-6465)

> Three days before the certification of a gubernatorial election would result in a minor party's demotion from established-party status because its candidate received an insufficient number of votes for governor, the party filed a federal complaint challenging the stripping of registered-party membership for all of its registered members. The district judge issued a temporary restraining order in the party's favor. Later, the court of appeals affirmed a preliminary injunction in the party's favor.
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> *Topics:* Registration procedures; interlocutory appeal; intervention; getting on the ballot; attorney fees; pro se party.

On December 10, 2002, following New York's 2002 gubernatorial election, the state's Green Party and six supporters filed a federal complaint in the

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D.E. 151 [hereinafter *Prye* Summary-Judgment Opinion], 2006 WL 1888639; *see* Amended Complaint, *id.* (Dec. 6, 2004), D.E. 54.

988. *Prye* Summary-Judgment Opinion, *supra* note 987, at 10.

989. Mo. Protection & Advocacy Servs., Inc. v. Carnahan, 499 F.3d 803, 811 (8th Cir. 2007).

990. *Id.* at 811–12; *see Federal Appeals Court Rules Against Mentally Ill Man in Voting Rights Case*, St. Louis Post-Dispatch, Aug. 26, 2007, at C2.

991. *Mo. Protection & Advocacy Servs., Inc.*, 499 F.3d at 810.

992. *Id.*

Eastern District of New York challenging state law that would strip party members' registered membership if the party failed to maintain recognized-party status by obtaining at least 50,000 votes in the election to be certified on December 13.[993] "New York is one of only three states (Iowa and Kansas are the others) that limit the voters' enrollment choices to parties that have received a certain level of political support."[994]

> The sole purpose of that statute, the State Board argued, "is to provide a list of people who can vote in primary elections." The State Board conceded that whatever the intended purpose of the voter enrollment scheme, the enrollment lists published by the local boards of elections are in fact *used* by political parties for associational purposes, including get-out-the-vote efforts and disseminating information about party positions.[995]

Judge John Gleeson heard the case on December 10 and 12.[996] He granted the plaintiffs a temporary restraining order:

> I concluded that plaintiffs had convincingly alleged that the law imposed a severe burden on their First and Fourteenth Amendment rights to associate and express their political beliefs, and that the State's purported interests in protecting Green Party candidates and the more-established political parties were neither compelling nor reasonable. Given that the harm was to take effect on December 13, 2002, plaintiffs had therefore demonstrated an irreparable injury and a likelihood of success on the merits.[997]

On December 17, Judge Gleeson issued an interim injunction giving minor parties recognized status so long as they obtained at least 50,000

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993. Complaint, Green Party of N.Y. State v. N.Y. State Bd. of Elections, No. 1:02-cv-6465 (E.D.N.Y. Dec. 10, 2002), D.E. 1; Green Party of N.Y. State v. N.Y. State Bd. of Elections, 389 F.3d 411, 415–16 (2d Cir. 2004); Green Party of N.Y. State v. N.Y. State Bd. of Elections, 267 F. Supp. 2d 342, 348 (E.D.N.Y. 2003).

994. *Green Party of N.Y. State*, 267 F. Supp. 2d at 345; *see id.* at 344 ("there are political organizations that are commonly and correctly referred to as political parties that are not 'parties' within the meaning of New York law").

995. *Id.* at 349.

996. Docket Sheet, *Green Party of N.Y. State*, No. 1:02-cv-6465 (E.D.N.Y. Dec. 10, 2002) [hereinafter *Green Party of N.Y. State* Docket Sheet] (D.E. 4, 5); *Green Party of N.Y. State*, 267 F. Supp. 2d at 348.

Judge Gleeson resigned on March 9, 2016. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

997. Temporary Restraining Order at 1–2, *Green Party of N.Y. State*, No. 1:02-cv-6465 (E.D.N.Y. Dec. 17, 2002, filed Jan. 17, 2003), D.E. 9; *Green Party of N.Y. State*, 389 F.3d at 417; *Green Party of N.Y. State*, 267 F. Supp. 2d at 349–50 & n.8; *see* Joel Siegel, *3 Parties Not Yet Over for N.Y. Voters*, N.Y. Daily News, Dec. 13, 2002, at 52.

votes in either the 1998 or the 2002 gubernatorial election and ordering defendant election officials to show cause on January 16, 2003, why the plaintiffs' relief should not be extended in time.[998] On May 30, 2003, Judge Gleeson issued a published preliminary injunction.[999]

On July 18, 2003, Judge Gleeson granted motions to intervene by the Liberal Party, the Right to Life Party, the Libertarian Party, and the Marijuana Reform Party.[1000] On September 18, Judge Gleeson modified the injunction

> to require the State Board to open New York's voter enrollment scheme to all of the plaintiff political parties by placing an "Other" line on the state's voter registration form and directing the local boards of elections to maintain and update the enrollment information of voters who indicate their affiliation with the Green, Liberal, Libertarian, Marijuana Reform, or Right to Life Parties.[1001]

Judge Gleeson also ordered New York to cease regarding Green Party members as unenrolled on the board of elections' website.[1002]

On July 7, 2005, Judge Gleeson issued a stipulated fee award to the original plaintiffs of $132,528.91.[1003] Stipulated fee awards of $27,103.45 to

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998. Order, *Green Party of N.Y. State*, No. 1:02-cv-6465 (E.D.N.Y. Dec. 17, 2002), D.E. 2; *Green Party of N.Y. State*, 267 F. Supp. 2d at 349; *see Green Party of N.Y. State* Docket Sheet, *supra* note 996 (D.E. 13); *Green Party of N.Y. State*, 389 F.3d at 417; *Green Party of N.Y. State*, 267 F. Supp. 2d at 350.

999. *Green Party of N.Y. State*, 267 F. Supp. 2d 342, *aff'd*, 389 F.3d 411; *see* Andy Newman, *Judge Rules for Small Parties Seeking to Remain in Business*, N.Y. Times, June 4, 2003, at B6.

1000. *See* Opinion at 79–80, *Green Party of N.Y. State*, No. 1:02-cv-6465 (E.D.N.Y. Sept. 18, 2003), D.E. 80 [hereinafter *Green Party of N.Y. State* Injunction Modification], 2003 WL 22170603; *Green Party of N.Y. State*, 389 F.3d at 414, 417; *see also* Elizabeth Benjamin, *Ruling Boosts Minor Parties*, Albany Times Union, July 17, 2003, at B2.

On July 1, 2004, Judge Gleeson denied intervention to pro se litigants seeking to challenge New York's delaying the effect of a change in party enrollment until after an intervening general election. Opinion, *Green Party of N.Y. State*, No. 1:02-cv-6465 (E.D.N.Y. July 1, 2004), D.E. 106, *appeal dismissed*, Order, Strunk v. Green Party of N.Y. State, No. 04-1085 (2d Cir. Oct. 5, 2005), *filed as* Mandate, *Green Party of N.Y. State*, No. 1:02-cv-6465 (E.D.N.Y. July 11, 2006), D.E. 157.

1001. *Green Party of N.Y. State* Injunction Modification, *supra* note 1000, at 9; *see Green Party of N.Y. State*, 389 F.3d at 414, 417; *see also* Elizabeth Benjamin, *Court Spares Minor Political Parties*, Albany Times Union, Sept. 25, 2003, at B2.

1002. Order, *Green Party of N.Y. State*, No. 1:02-cv-6465 (E.D.N.Y. Sept. 18, 2003), D.E. 81, 2003 WL 22170605; *Green Party of N.Y. State*, 389 F.3d at 418.

1003. Stipulated Order, *Green Party of N.Y. State*, No. 1:02-cv-6465 (E.D.N.Y. July 7, 2005), D.E. 135.

the Marijuana Reform Party[1004] and $26,037.90 to the Liberal Party[1005] were issued in August and September. Awards of $39,447.65 to the Libertarian Party and $76,602.50 to the Right to Life Party were issued in 2006.[1006]

Nullifying University Students' Voter Registrations

Copeland v. Priest (George Howard, Jr., E.D. Ark. 4:02-cv-675)

> An October 25, 2002, federal complaint sought the restoration of voter registrations for students and other persons living in university housing. The first judge assigned recused himself because he was out of town, and the second judge recused himself because one plaintiff's father was the governor, whose opponent the judge's wife supported. A third judge granted the plaintiffs relief, finding that the state judge's order nullifying registrations improperly created "an irrebuttable presumption that would-be voters who live at a university address and are not members of the staff at a university are not residents." The court awarded the plaintiffs $28,221.92 in attorney fees and costs.
>
> *Topics:* Student registration; registration challenges; intervention; matters for state courts; case assignment; attorney fees.

Four students at Ouachita Baptist University and another student's wife filed a federal class-action complaint in the Eastern District of Arkansas on October 25, 2002, to restore to the voting rolls students and other persons living in university housing.[1007] With their complaint, the plaintiffs filed a motion for a temporary restraining order.[1008]

The court assigned the case to Judge G. Thomas Eisele, but because Judge Eisele was to be out of town for two weeks, he recused himself, and the court assigned the case to Judge William R. Wilson, Jr.[1009] Judge Wilson, now known as Judge Billy Roy Wilson, also recused himself because

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1004. Stipulated Order, *id.* (Aug. 29, 2005), D.E. 149.

1005. Stipulated Order, *id.* (Sept. 9, 2005), D.E. 152.

1006. Order, *id.* (Apr. 10, 2006), D.E. 156.

1007. Complaint, Copeland v. Priest, No. 4:02-cv-675 (E.D. Ark. Oct. 25, 2002), D.E. 1; *see Ruling Bars Student Voters, Suit Charges*, St. Louis Post-Dispatch, Oct. 26, 2002, at 26; *Suit Claims Campus Local Voting Address*, Akron Beacon J., Oct. 28, 2002, at A3.

1008. Temporary-Restraining-Order Motion, *Copeland*, No. 4:02-cv-675 (E.D. Ark. Oct. 25, 2002), D.E. 2.

1009. Transfer Order, *id.* (Oct. 25, 2002), D.E. 5.

Judge Eisele died on November 26, 2017. Federal Judicial Center Biographical Directory of Article III Federal Judges [hereinafter FJC Biographical Directory], www.fjc.gov/history/judges.

one of the plaintiffs was Governor Huckabee's daughter; the court reassigned the case to Judge George Howard, Jr.[1010]

On October 28, another voter filed a motion to intervene, opposing the complaint as the person whose state-court action resulted in the order creating the plaintiffs' grievance.[1011] An amended complaint filed that day added the governor as a defendant.[1012] The parties filed a joint stipulation of facts on the following day.[1013]

On October 30, Judge Howard issued a temporary restraining order requiring election officials to restore voter registrations purged as a result of the state judge's order.[1014] Noting that no defendant opposed the plaintiffs' complaint, Judge Howard concluded that the state judge's order improperly "creates an irrebuttable presumption that would-be voters who live at a university address and are not members of the staff at a university are not residents of Clark County and are therefore ineligible to vote in Clark County."[1015]

Judge Howard denied the motion to intervene for procedural defects.[1016] On November 21, 2003, Judge Howard awarded the plaintiffs $28,221.92 in attorney fees and costs.[1017]

1010. Transfer Order, *Copeland*, No. 4:02-cv-675 (E.D. Ark. Oct. 28, 2002), D.E. 6; *see Court Asked to Shun Student Suit*, Memphis Commercial Appeal, Oct. 29, 2002, at B6 [hereinafter *Asked to Shun*] ("U.S. Dist. Judge Bill Wilson withdrew from hearing the case because his wife contributed to and is active in the campaign of Jimmie Lou Fisher, Huckabee's Democratic challenger in the Nov. 5 general election.").

Judge Howard died on April 21, 2007. FJC Biographical Directory, *supra* note 1009.

1011. Intervention Motion, *Copeland*, No. 4:02-cv-675 (E.D. Ark. Oct. 28, 2002), D.E. 11; *see* Motion That the Court Abstain from These Proceedings or, Alternatively, Motion to Dismiss for Improper Venue, *id.* (Oct. 28, 2002), D.E. 8; *see also Asked to Shun*, *supra* note 1010.

1012. Amended Complaint, *Copeland*, No. 4:02-cv-675 (E.D. Ark. Oct. 28, 2002), D.E. 14; *see* Adam Liptak, *With Suit, Governor's Daughter Gets a Spotlight*, N.Y. Times, Nov. 1, 2002, at A28.

1013. Stipulation, *Copeland*, No. 4:02-cv-675 (E.D. Ark. Oct. 29, 2002), D.E. 15.

1014. Temporary Restraining Order at 11, *id.* (Oct. 30, 2002), D.E. 18 [hereinafter *Copeland* Temporary Restraining Order]; *see* Liptak, *supra* note 1012.

An appeal was dismissed as settled. Docket Sheet, Copeland v. Williams, No. 03-3956 (8th Cir. May 27, 2003).

1015. *Copeland* Temporary Restraining Order, *supra* note 1014, at 10.

1016. *Id.* at 4–6.

1017. Order, *Copeland*, No. 4:02-cv-675 (E.D. Ark. Nov. 21, 2003), D.E. 57.

Spouses Registered in Different Precincts

Bell v. Marinko (James G. Carr, N.D. Ohio 3:02-cv-7204)

> With a primary election eighteen days away, a voter filed a federal complaint seeking injunctive relief against the county's hearing a challenge to his voter registration on residency grounds. The district court determined that challenge procedures did not violate the National Voter Registration Act, but there was a probable equal-protection violation by a statutory provision raising a question of residence for spouses not separated and not registered in the same precinct. The court temporarily enjoined application of that statutory provision. After the election, the court heard summary-judgment motions on an amended complaint adding plaintiffs whose residency challenges were successful; the original plaintiff prevailed in his challenge. The district court dismissed the action, and the court of appeals affirmed the dismissal.
>
> *Topics:* Registration challenges; equal protection; National Voter Registration Act; primary election.

On April 19, 2002, an Ohio voter filed a federal complaint in the Northern District of Ohio's Toledo courthouse against Erie County's board of elections and its members, claiming a violation of the National Voter Registration Act—commonly referred to as the Motor Voter Act—and other laws in the board's pursuing a challenge to the residency of the plaintiff and eighty-eight others, including an investigation of private household matters.[1018] The plaintiff claimed that he and his wife were each registered to vote in the family residence nearer each spouse's place of employment.[1019] Three days later, the plaintiff moved for a temporary restraining order and a preliminary injunction.[1020]

Judge James G. Carr held a teleconference with the parties and learned that action on the challenge to the plaintiff's voter registration could happen either before or after the upcoming May primary election.[1021] On April

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1018. Complaint, Bell v. Marinko, No. 3:02-cv-7204 (N.D. Ohio Apr. 19, 2002), D.E. 1 [hereinafter *Bell* Complaint]; Bell v. Marinko, 235 F. Supp. 2d 772, 774 (N.D. Ohio 2002); *see* Pub. L. No. 103-31, 107 Stat. 77 (1993), *as amended*, 52 U.S.C. §§ 20501–20511. *See generally* Robert Timothy Reagan, Motor Voter: The National Voter Registration Act (Federal Judicial Center 2014).

1019. Opinion at 2, *Bell*, No. 3:02-cv-7204 (N.D. Ohio Apr. 25, 2002), D.E. 9 [hereinafter Apr. 25, 2002, *Bell* Opinion]; Ex. 3, *Bell* Complaint, *supra* note 1018.

1020. Motion, *Bell*, No. 3:02-cv-7204 (N.D. Ohio Apr. 22, 2002), D.E. 6; *Bell*, 235 F. Supp. 2d at 774.

1021. Apr. 25, 2002, *Bell* Opinion, *supra* note 1019, at 2.

25, Judge Carr determined, "There certainly is nothing specific in the [Motor Voter Act] that either bars or prescribes restrictions on a state's ability to consider a claim, such as that made by the challenge in this case, that a voter is not a resident."[1022] Judge Carr, however, found a probably valid equal-protection challenge to an Ohio statute providing,

> The place where the family of a married man or woman resides shall be considered to be his or her place of residence; except that when the husband or wife have separated and live apart, the place where he or she resides the length of time required to entitle a person to vote shall be considered to be his or her place of residence.[1023]

As a result, Judge Carr issued a temporary restraining order forbidding the board

> from considering or adjudicating the pending challenge to plaintiff's entitlement to remain a registered voter in the Kelleys Island, Ohio, precinct on the basis of that portion of such challenge that asserts that plaintiff's wife works in another city outside of commuting range; and votes in another precinct, and their children go to school in another precinct.[1024]

After an April 29 pretrial conference, Judge Carr ordered provisional voting in the May 7 primary election for thirty-one persons whose registration challenges were successful.[1025]

The original plaintiff's claims became moot when the election board determined that he was properly registered.[1026]

Reviewing summary-judgment motions on a second amended complaint with seven plaintiffs,[1027] Judge Carr, on October 22, dismissed the action.[1028] Judge Carr did not reach the constitutionality of Ohio's marital-

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1022. *Id.* at 6.

1023. *Id.* at 7 (quoting Ohio Rev. Code § 3503.02(D)).

Ohio's voter residency statute was later revised to provide the following:

> The place where the family of a married person resides shall be considered to be the person's place of residence; except that when the spouses have separated and live apart, the place where such a spouse resides the length of time required to entitle a person to vote shall be considered to be the spouse's place of residence.

Ohio Rev. Code § 3503.02(D).

1024. Apr. 25, 2002, *Bell* Opinion, *supra* note 1019, at 9; *Bell*, 235 F. Supp. 2d at 774.

1025. Order, *Bell*, No. 3:02-cv-7204 (N.D. Ohio May 2, 2002), D.E. 14.

1026. Bell v. Marinko, 367 F.3d 588, 590–91 & n.3 (6th Cir. 2004); *Bell*, 235 F. Supp. 2d at 774.

1027. Second Amended Complaint, *Bell*, No. 3:02-cv-7204 (N.D. Ohio July 16, 2002), D.E. 28; *see* First Amended Complaint, *id.* (May 15, 2002), D.E. 16.

1028. *Bell*, 235 F. Supp. 2d 772.

residency statute because that statute did not determine the outcome in any of the plaintiffs' residency challenges.[1029]

On March 12, 2004, the court of appeals affirmed the dismissal.[1030] As to the constitutionality of Ohio's married-voter residency statute, the court determined that it did not violate equal protection because it did not create an irrebuttable presumption.[1031]

Denial of the Right to Vote Because of Eviction

Dowd v. Town of Dedham (Joseph L. Tauro and Marianne B. Bowler, D. Mass. 1:01-cv-10944)

> A frequent pro se plaintiff filed a federal complaint four days before a municipal election. The plaintiff challenged denial of his right to vote arising from his eviction from a residence in the town. The judge granted the plaintiff in forma pauperis status and ordered him to show cause why the complaint should not be dismissed for lack of merit. The court of appeals affirmed dismissal of the action.
>
> *Topics:* Pro se party; registration challenges.

A pro se plaintiff filed a federal complaint in the District of Massachusetts on Tuesday, June 5, 2001, four days before an election scheduled for Dedham, Massachusetts.[1032] The plaintiff challenged denial of his right to vote in Dedham arising from his eviction from a residence there.[1033] On June 6, Judge Joseph L. Tauro granted the plaintiff's motion to proceed in forma pauperis,[1034] and Judge Tauro issued an order for the plaintiff to show cause why the complaint should not be dismissed for lack of merit.[1035]

Based on an amended complaint filed on June 7,[1036] Judge Tauro ordered that day that the case be referred to a magistrate judge.[1037] On June 8,

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1029. *Id.* at 779–82

1030. *Bell*, 367 F.3d 588.

1031. *Id.* at 593–94.

1032. Complaint, Dowd v. Town of Dedham, No. 1:01-cv-10944 (D. Mass. June 6, 2001), D.E. 4.

1033. Dowd v. Dedham, 25 F. App'x 6 (1st Cir. 2002); *see* Complaint, Dowd v. McIntyre, No. 1:00-cv-11611 (D. Mass. Aug. 14, 2000), D.E. 4 (unsuccessful eviction challenge); Complaint, Dowd v. Town of Dedham, No. 1:00-cv-10421 (D. Mass. Mar. 6, 2000), D.E. 2 (unsuccessful 2000 action for the right to vote in Dedham).

1034. Docket Sheet, *Dowd*, No. 1:01-cv-10944 (D. Mass. June 5, 2001) [hereinafter *Dowd* Docket Sheet] (D.E. 2).

Judge Tauro died on November 30, 2018. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

1035. Order, *Dowd*, No. 1:01-cv-10944 (D. Mass. June 6, 2001), D.E. 3.

1036. *Dowd* Docket Sheet, *supra* note 1034 (D.E. 5).

Magistrate Judge Marianne B. Bowler recommended dismissal of the action.[1038] On July 8, Judge Tauro adopted Judge Bowler's recommendation and dismissed the case.[1039] The court of appeals affirmed the dismissal on January 3, 2002.[1040]

Voter Registrations Voided Because a Deputy Registrar Was Dismissed

Johnson v. Helander (Charles R. Norgle, Sr., N.D. Ill. 1:00-cv-6926)

> A high-school student filed a federal complaint to validate high-school voter registrations that had been voided because of sloppy work by a deputy registrar. The district judge denied class certification, and he denied immediate injunctive relief. The county attorney presented evidence that the plaintiff had received notice of his voided registration in time to cure it.
>
> *Topics:* Registration procedures; student registration; class action.

The high-school son of North Chicago's mayor filed a federal complaint against Lake County's clerk on the Sunday before the 2000 general election, seeking validation of his and some of his classmates' voter registrations.[1041] The deputy registrar who had registered them was dismissed for submitting "inaccurate, incomplete and unverifiable" registration applications, so the clerk voided, at the close of the registration period, applications submitted by the dismissed deputy registrar, including the plaintiff's.[1042] The complaint sought a temporary restraining order allowing the plaintiff and his classmates to vote.[1043]

On the day that the complaint was filed, Judge Charles R. Norgle, Sr., denied class certification and denied immediate injunctive relief.[1044]

According to the *Chicago Sun-Times*,

1037. Order, *Dowd*, No. 1:01-cv-10944 (D. Mass. June 7, 2001), D.E. 6.

1038. *Dowd* Docket Sheet, *supra* note 1034 (D.E. 9).

1039. *Id.* (D.E. 14).

1040. Dowd v. Dedham, 25 F. App'x 6 (1st Cir. 2002).

1041. Complaint, Johnson v. Helander, No. 1:00-cv-6926 (N.D. Ill. Nov. 6, 2000), D.E. 1 [hereinafter *Johnson* Complaint]; *see* Dave McKinney, *Teen Sues Lake Clerk to Regain Voting Right*, Chi. Sun-Times, Nov. 6, 2000, at 21.

1042. *See Johnson* Complaint, *supra* note 1041; *see also* McKinney, *supra* note 1041; Evan Osnos & Rummana Hussain, *N. Chicago Teens Lose in Bid to Cast Ballots*, Chi. Trib., Nov. 7, 2000, at 1.

1043. *Johnson* Complaint, *supra* note 1041.

1044. Minutes, *Johnson*, No. 1:00-cv-6926 (N.D. Ill. Nov. 6, 2000), D.E. 9; *see* Osnos & Hussain, *supra* note 1042.

> Assistant Lake County State's Attorney Daniel Jasica argued that a clerk's office employee tried to contact [the plaintiff] by phone well before the [October 10 registration] deadline and that [the plaintiff] had received and signed for a letter on Oct. 8 telling him about the need to register again. Moreover, four of the 14 other students in the same group as [the plaintiff] did formally register to vote.[1045]

On January 25, 2001, Judge Norgle granted the parties' stipulated dismissal.[1046]

Voting and Mental Illness

Doe v. Attorney General (George Z. Singal, D. Me. 1:00-cv-206)

> One month before the 2000 general election, three women under psychiatric guardianships filed a federal complaint challenging Maine's exclusion of persons under such guardianships from the right to vote. Approximately three weeks later, the court denied injunctive relief. On a more complete record the following year, the court invalidated the franchise exclusion.
>
> *Topic:* Equal protection.

On October 4, 2000, three women under psychiatric guardianship filed a federal complaint in the District of Maine's Bangor courthouse challenging the constitutionality of Maine's excluding from the right to vote "persons under guardianship for reasons of mental illness."[1047] With their complaint, the plaintiffs filed a motion for a preliminary injunction and a motion for expedited hearing.[1048]

Meanwhile, the November election would include a ballot referendum to remove the mental-health guardianship exclusion from Maine's constitution.[1049]

The court assigned the case to Judge George Z. Singal,[1050] the only district judge in Bangor at the time.[1051] Judge Singal had been on the bench

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1045. Steve Warmbir, *N. Chicago Teen Loses Suit Over Registration*, Chi. Sun-Times, Nov. 7, 2000, at 8.

1046. Minutes, *Johnson*, No. 1:00-cv-6926 (N.D. Ill. Jan. 24, 2001), D.E. 11; Docket Sheet, *id.* (Nov. 6, 2000) (noting a January 8, 2001, dismissal stipulation).

1047. Docket Sheet, Doe v. Att'y Gen., No. 1:00-cv-206 (D. Me. Oct. 4, 2000) [hereinafter *Doe* Docket Sheet]; Doe v. Rowe, 156 F. Supp. 2d 35, 38 (D. Me. 2001); *see* Me. Const. art. II, § 1.

1048. *Doe* Docket Sheet, *supra* note 1047.

1049. *See Voting Rights Urged for Mentally Ill*, Bangor Daily News, Oct. 5, 2000.

1050. *Doe* Docket Sheet, *supra* note 1047.

Tim Reagan interviewed Judge Singal for this report by telephone on July 26, 2012.

1051. Interview with Judge George Z. Singal, July 26, 2012.

for less than three months.[1052] He held an injunction hearing on October 24 and denied the injunction on October 27.[1053]

He determined that the record at that time did not justify the extraordinary relief of ordering a right to vote for the plaintiffs in the November 7 election.[1054]

Jane Doe was under guardianship for bipolar disorder.[1055] "As a result of this litigation, Jane Doe learned that it was the position of the State of Maine that a person under full guardianship by reason of mental illness could vote if the Probate Court specifically reserved the individual's right to vote."[1056] She obtained a right-to-vote order from the probate court on November 3.[1057] Jill Doe was also under guardianship for bipolar disorder, but the probate judge hearing her petition for amendment determined that Maine's constitution deprived her of the right to vote, so her petition was denied.[1058] June Doe was under guardianship for intermittent explosive disorder, antisocial personality, and mild organic brain syndrome.[1059] Because her amendment petition would be heard by the same probate judge as Jill Doe's, she did not file one.[1060]

On November 7, the referendum failed.[1061]

On August 9, 2001, after briefing on cross-motions for summary judgment, Judge Singal determined that Maine's disfranchisement of persons under guardianship for mental illness violated the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment.[1062]

1052. *Id.*; Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges (noting commission received on July 11, 2000).

1053. Findings of Fact and Conclusions of Law, Doe v. Att'y Gen., No. 1:00-cv-206 (D. Me. Oct. 27, 2000), D.E. 16 [hereinafter *Doe* Findings of Fact and Conclusions of Law], www.med.uscourts.gov/Opinions/Singal/2000/GZS_10272000_1-00cv-206_Doe_v_Ketterer.pdf, *archived at* web.archive.org/web/20181202135955/www.med.uscourts.gov/Opinions/Singal/2000/GZS_10272000_1-00cv-206_Doe_v_Ketterer.pdf; *Doe* Docket Sheet, *supra* note 1047; *see* Jeff Tuttle, *Judge Denies Three Women Right to Vote*, Bangor Daily News, Oct. 28, 2000.

1054. *Doe* Findings of Fact and Conclusions of Law, *supra* note 1053, at 4.

1055. Doe v. Rowe, 156 F. Supp. 2d 35, 39 (D. Me. 2001).

1056. *Id.*

1057. *Id.*

1058. *Id.* at 39–40.

1059. *Id.* at 40.

1060. *Id.* at 40–41.

1061. *See* Jeff Tuttle, *Mainers Reject Voting Rights for Mentally Ill*, Bangor Daily News, Nov. 8, 2000.

1062. *Doe*, 156 F. Supp. 2d at 59 (also finding violations of the Americans with Disabilities Act and the Rehabilitation Act); *see Developments in the Law—The Law of Mental*

There was a much better record supporting the plaintiffs' claims by then.[1063] The full record included not only affidavits from psychiatrists about the capacity to vote by persons under guardianship but also psychiatric evidence supporting the plaintiffs' capacity to vote.[1064] The full record also showed inconsistent applications of the franchise exclusion in the probate courts.[1065] The state declined to appeal Judge Singal's decision.[1066]

Challenge to Voter Registrations in an RV Park

Curtis v. Smith (Howell Cobb, E.D. Tex. 9:00-cv-241)

> The plaintiffs in this federal action sued to enjoin challenges to 9,000 voter registrations in an RV park that could hold only a fraction of the voters at any one time. The plaintiffs alleged that procedures on the en masse challenge had not been precleared pursuant to section 5 of the Voting Rights Act, and a three-judge district court ultimately agreed.
>
> *Topics:* Section 5 preclearance; three-judge court; registration challenges; matters for state courts; intervention.

On the afternoon of October 4, 2000, three residents of an RV park near Livingston, Texas, filed a federal complaint in the Eastern District of Texas's Lufkin courthouse against Polk County's tax assessor-collector—whose duties include those of the voting registrar—alleging that procedures in place to cancel voter registrations for RV-park residents had not received preclearance as required by section 5 of the Voting Rights Act.[1067]

Illness, 121 Harv. L. Rev. 1114, 1185–87 (2008); Sally Balch Hurme & Paul S. Appelbaum, *Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on the Rights of Voters*, 38 McGeorge L. Rev. 931, 953, 957 (2007); Kingshuk K. Roy, *Sleeping Watchdogs of Personal Liberty: State Laws Disenfranchising the Elderly*, 11 Elder L.J. 109, 129–36 (2003); Daniel P. Tokaji & Ruth Colker, *Absentee Voting by People with Disabilities: Promoting Access and Integrity*, 38 McGeorge L. Rev. 1015, 1028–29 (2007); Jeff Tuttle, *Voter Restriction Unconstitutional*, Bangor Daily News, Aug. 11, 2001, at A1; *see also* Paul S. Appelbaum, Richard J. Bonnie & Jason H. Karlawish, *The Capacity to Vote of Persons with Alzheimer's Disease*, 162 Am. J. Psychiatry 2094 (2005) (developing a method of assessing capacity to vote based on Judge Singal's opinion).

1063. Interview with Judge George Z. Singal, July 26, 2012.

1064. *Id.*

1065. *Id.*

1066. *Id.*

1067. Complaint, Curtis v. Smith, No. 9:00-cv-241 (E.D. Tex. Oct. 4, 2000), D.E. 1; Curtis v. Smith, 121 F. Supp. 2d 1054, 1056–57 (E.D. Tex. 2000); *see* Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination and requiring that preclearance disputes be heard by a three-judge district court).

The registration challenge was based on the fact that there were many more voters registered at the RV park than could actually lodge there at any one time.[1068] Litigation on the matter was already pending in state courts.[1069]

With the complaint, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction[1070] and a motion to convene a three-judge district court to hear the section 5 claim.[1071]

At 4:05 p.m., Judge Howell Cobb convened a telephone hearing on the motion for a temporary restraining order.[1072] At 4:40, Judge Cobb issued a temporary restraining order stopping the county from proceeding with 9,000 registration challenges.[1073] Judge Cobb set another hearing for two mornings later in Beaumont.[1074]

On October 6, three persons responsible for challenging the residency status of the 9,000 registered voters moved to intervene in the lawsuit.[1075] At the day's hearing, Judge Cobb granted intervention.[1076] He decided to

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On June 25, 2013, the Supreme Court declined to hold section 5 unconstitutional, but the Court did hold unconstitutional the criteria for which jurisdictions require section 5 preclearance. Shelby County v. Holder, 570 U.S. 529 (2013).

1068. *Curtis*, 121 F. Supp. 2d at 1055–56; *see* Kathy Walt & James Kimberly, *Residents on Wheels Add New Spin to Senate Race*, Hous. Chron., Sept. 23, 2000, at A1.

1069. *Curtis*, 121 F. Supp. 2d at 1057; Order, *Curtis*, No. 9:00-cv-241 (E.D. Tex. Oct. 6, 2000), D.E. 13 [hereinafter Oct. 6, 2000, *Curtis* Order]; *see Challenge to Voting Rights of RV Owners Halted*, Dallas Morning News, Sept. 16, 2000, at 40A; Jay Root, *RV Travelers Key in E. Texas Political Brawl*, Fort Worth Star-Telegram, Oct. 1, 2000, at 1; Terrence Stutz, *3rd Court Enters Fray Over RV Park's Voter Eligibility*, Dallas Morning News, Oct. 5, 2000, at 31A; Terrence Stutz, *Judge Upholds RV Residents' Right to Vote*, Dallas Morning News, Oct. 3, 2000, at 21A; John Williams, *Confusion Rules for RV Voters*, Hous. Chron., Oct. 5, 2000, at A31; John Williams, *RV Owners Win Right to Vote in Texas*, Hous. Chron., Oct. 3, 2000, at A15.

1070. Motion, *Curtis*, No. 9:00-cv-241 (E.D. Tex. Oct. 4, 2000), D.E. 2; *Curtis*, 121 F. Supp. 2d at 1057.

1071. Motion, *Curtis*, No. 9:00-cv-241 (E.D. Tex. Oct. 4, 2000), D.E. 3; *Curtis*, 121 F. Supp. 2d at 1057.

1072. Minutes, *Curtis*, No. 9:00-cv-241 (E.D. Tex. Oct. 4, 2000), D.E. 8.

Judge Cobb died on September 16, 2005. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

1073. Temporary Restraining Order, *Curtis*, No. 9:00-cv-241 (E.D. Tex. Oct. 4, 2000), D.E. 4.

1074. Docket Sheet, *id.* (Oct. 4, 2000).

1075. Intervention Motion, *id.* (Oct. 6, 2000), D.E. 5; *see also* James Kimberly, *RV Owners' Polling Place Is Contested*, Hous. Chron., Sept. 27, 2000, at A19 (reporting that the challengers had ties to the Polk County Democratic Party).

1076. Minutes, *Curtis*, No. 9:00-cv-241 (E.D. Tex. Oct. 6, 2000), D.E. 10.

extend the temporary restraining order,[1077] and he recommended that the circuit's chief judge appoint a three-judge court.[1078]

The three-judge court heard the case on October 25.[1079] On November 3, the court issued a preliminary injunction, finding that the en masse challenge to voters' residency statuses required preclearance.[1080]

Preclearance of the en masse challenge never was sought.[1081] Following the 2000 general election, however, a trailing candidate for Polk County commissioner challenged votes for his opponent on the grounds that persons who were not valid residents were allowed to vote.[1082] The federal plaintiffs asked the federal court to enjoin the state-court contest.[1083] The federal court issued a temporary restraining order on May 23, 2001,[1084] but the court determined on June 4 that the state-court action could proceed.[1085] The federal court also dissolved its original injunction.[1086]

On October 24, 2002, Texas's court of appeals for Beaumont determined, "The trial court correctly concluded that [the trailing candidate] did not meet his burden of proving violations of the Election Code that materially affected the election."[1087]

1077. *Id.*; Curtis v. Smith, 121 F. Supp. 2d 1054, 1057 (E.D. Tex. 2000); *see* Richard Stewart, *RVers Win Once Again in Vote Case*, Hous. Chron., Oct. 7, 2000, at A33; Terrence Stutz, *Judge Reaffirms Order Banning Voting Checks*, Dallas Morning News, Oct. 7, 2000, at 33A.

1078. Oct. 6, 2000, *Curtis* Order, *supra* note 1069; *Curtis*, 121 F. Supp. 2d at 1057.

1079. Transcript, *Curtis*, No. 9:00-cv-241 (E.D. Tex. Oct. 25, 2000, filed Nov. 26, 2001), D.E. 35; Minutes, *id.* (Oct. 25, 2000), D.E. 18; *Curtis*, 121 F. Supp. 2d at 1057.

1080. *Curtis*, 121 F. Supp. 2d at 1058–63; *see* Juan A. Lozano, *Judges Rule for RV Voters*, San Antonio Express-News, Nov. 4, 2000, at 1B.

1081. Curtis v. Smith, 145 F. Supp. 2d 814, 815–16 (E.D. Tex. 2001).

1082. Speights v. Willis, 88 S.W.3d 817, 818 (Tex. App. 2002); *Curtis*, 145 F. Supp. 2d at 816.

1083. Motion, *Curtis*, No. 9:00-cv-241 (E.D. Tex. May 8, 2001), D.E. 24; *Curtis*, 145 F. Supp. 2d at 816.

1084. Temporary Restraining Order, *Curtis*, No. 9:00-cv-241 (E.D. Tex. May 23, 2001), D.E. 26.

1085. *Curtis*, 145 F. Supp. 2d at 816–18.

1086. *Id.* at 818.

1087. *Speights*, 88 S.W.3d at 821.

4. District Lines

Litigation over district lines is a common and important activity in election law.[1088] Some lawsuits allege malapportionment in that populations among the districts have become unequal over time. Malapportionment litigation is especially common after a decennial census. Gerrymander litigation alleges that district lines are drawn for improper purposes in violation of either voting-rights statutes or the Constitution. The propriety of partisan gerrymandering is a matter of legal debate,[1089] but the Supreme Court determined in 2019 that partisan-gerrymandering claims are political questions over which federal courts have no jurisdiction.[1090]

It is somewhat unusual for litigation over district lines to call for emergency judicial review, and judges are reluctant to provide emergency relief when a delay in seeking relief is unreasonable.[1091] An emergency can arise if election authorities set up an election using erroneous lines.[1092] Emergencies arose in Mississippi in 2011 because Mississippi elects its county boards of supervisors in years immediately preceding presidential election years, and every twenty years the elections are held the year after the census year, so there is little time to draw new lines reflecting new census data.[1093] Such quick drawing was more feasible in 2011 than it was in 1991, but it still posed a challenge.

Federal courts have presided over emergency lawsuits about district lines drawn for members of the U.S. House of Representatives,[1094] state leg-

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1088. Professors Justin Levitt and Doug Spencer maintain a website collecting cases: All About Redistricting, redistricting.lls.edu/cases/.

1089. *See, e.g.*, "Unsuccessful Injunction Against State-Court Proscription on Political Gerrymandering," *infra* page 161.

1090. Bucho v. Common Cause, 588 U.S. ___, 139 S. Ct. 2484 (2019).

1091. Case studies in which litigation delay was an issue have "laches" among their case-study topics.

1092. *See, e.g.*, "Inadvertent Use of Wrong District Lines in a Primary Election," *infra* page 176.

1093. *See* "Malapportionment for Mississippi's County Boards of Supervisors," *infra* page 216; *see also* "Malapportioned Districts in an Election Held Soon After the Release of New Census Data," *infra* page 211 (litigation over Montgomery, Alabama's city council districts).

1094. *See, e.g.*, "Redistricting Kansas," *infra* page 186; "Communities of Interest in

islatures,[1095] state and local school boards,[1096] and other county[1097] and city[1098] representative bodies.

Districting complaints can challenge the number of districts[1099] and whether representatives are elected at large or within districts[1100] as well as district boundaries. Litigation can also arise from a restructuring of legislative bodies.[1101]

Congressional Districts," *infra* page 237.

1095. *See, e.g.*, "Preclearance of Court-Ordered Redistricting in Alaska," *infra* page 180; "Redistricting Kansas," *infra* page 186; "Using an Old Legislative Districting Plan," *infra* page 191; "Emergency Evaluation of Gerrymandering," *infra* page 228; "Redistricting New Jersey in 2001," *infra* page 245.

1096. *See, e.g.*, "Inadvertent Use of Wrong District Lines in a Primary Election," *infra* page 176 (county board); "Redistricting the Bibb County School District," *infra* page 179 (county board); "Redistricting the Sumter County School Board," *infra* page 182 (county board); "Redistricting Clayton County's Board of Education," *infra* page 184 (county board); "Redistricting Kansas," *infra* page 186 (state board); "Redistricting an Incumbent Out of His District," *infra* page 230 (county board); "New School-Board Elections to Accommodate the Decennial Census," *infra* page 236 (local board); "Redistricting Elbert County," *infra* page 238 (county board); "School-District Election Enjoined for Lack of Preclearance," *infra* page 240 (local board).

1097. *See, e.g.*, "Consent Litigation Over Section 5 Preclearance," *infra* page 173; "A Transitionally Unrepresented District Because of District Restructuring," *infra* page 189; "Imminent Elections for a Districting Plan Not Yet Precleared," *infra* page 193; "Court-Ordered County Precinct Lines While Preclearance Is Pending," *infra* page 196; "Hasty Redistricting of a County Legislature," *infra* page 213; "Malapportionment for Mississippi's County Boards of Supervisors," *infra* page 216; "Redistricting Elbert County," *infra* page 238; "Elimination of a Constable Precinct," *infra* page 243.

1098. *See, e.g.*, "No Second Majority-White District for Quincy, Florida," *infra* page 160; "Injunction Against a State Law Singling Out One Municipality for a Change in Local Control," *infra* page 167; "Malapportioned Districts in an Election Held Soon After the Release of New Census Data," *infra* page 211; "At-Large Election to Districts in Memphis," *infra* page 227; "Enjoining an Election for New District Lines," *infra* page 233; "Malapportioned City Commission Districts," *infra* page 234; "Postponement of a City Council Election for Preclearance of New Districts," *infra* page 239; "Remedying Malapportionment in Place for Decades," *infra* page 241 (town commission).

1099. *See, e.g.*, "Injunction Against a State Law Singling Out One Municipality for a Change in Local Control," *infra* page 167.

1100. *See, e.g.*, "At-Large Election to Districts in Memphis," *infra* page 227; "Remedying Malapportionment in Place for Decades," *infra* page 241.

"The original states with more than one representative were about evenly divided between at-large and district elections for Congress." Allan J. Lichtman, The Embattled Vote in America 30 (2018).

1101. *See, e.g.*, "A Transitionally Unrepresented District Because of District Restructuring," *infra* page 189.

The consolidation of territory for the purposes of governance can trigger litigation. A 2010 case in the Western District of Tennessee concerned an effort to consolidate city and county governments.[1102] A 2013 case filed in the Southern District of Texas challenged the consolidation of school districts.[1103] In 2000, residents of annexed municipal territory sued to stop an election held before the annexation became effective, because although they would be subject to taxation as a result of the annexation they would not be able to vote.[1104] A 2008 case in the Northern District of Georgia arose when Atlanta acquired an apartment building in neighboring College Park to raze it for the benefit of Atlanta's airport, and plaintiffs claimed an improper impact on College Park's voting population.[1105]

One of the emergency cases described here was a case challenging districting in Texas following the 2010 census that had to be incorporated quickly into complex litigation already underway.[1106]

How much time the Census Bureau would devote to data collection and processing was a subject of litigation in 2020 that was finally resolved in 2021 by a new presidential administration.[1107]

If the proper remedy in litigation over district lines includes new lines drawn by the courts, judges may rely, perhaps confidentially, on experts and computer programs to assist them in that task.[1108] Alternatively, districting remedies might be negotiated by the parties.[1109]

Enjoining Truncated Data Collection for the 2020 Census

National Urban League v. Ross (Lucy H. Koh, N.D. Cal. 5:20-cv-5799)

> An August 2020 federal complaint filed in the Northern District of California challenged a recent decision to cut short data collection for the 2020 census. A temporary restraining order issued eighteen days later enjoined the truncated data-collection sched-

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1102. *See* "Constitutionality of a Dual-Majority Requirement," *infra* page 222.

1103. *See* "Voting-Rights Challenge to a School-District Consolidation," *infra* page 172.

1104. *See* "Voting Rights for Annexed Territory," *infra* page 247.

1105. *See* "Section 5 Preclearance for Acquisition of Property," *infra* page 225.

1106. *See* "Texas Redistricting in 2011," *infra* page 197.

1107. *See* "Enjoining Truncated Data Collection for the 2020 Census," *infra* page 155.

1108. *See, e.g.*, "Redistricting the Sumter County School Board," *infra* page 182; "Redistricting Clayton County's Board of Education," *infra* page 184; "Redistricting Kansas," *infra* page 186; "Texas Redistricting in 2011," *infra* page 197; "Redistricting Elbert County," *infra* page 238.

1109. *See, e.g.*, "Imminent Elections for a Districting Plan Not Yet Precleared," *infra* page 193; "Court-Ordered County Precinct Lines While Preclearance Is Pending," *infra* page 196.

> ule. Another nineteen days later, the district court issued a preliminary injunction, but nineteen days after that, the Supreme Court stayed the injunction. Following an amended complaint and a January 2021 change in administration, the case was resolved by settlement.
>
> *Topics:* Malapportionment; Covid-19; case assignment.

According to a federal complaint filed in the Northern District of California on August 18, 2020,

> This lawsuit challenges the unconstitutional and illegal decision by Secretary of Commerce Wilbur Ross, and Census Bureau . . . Director Steven Dillingham to sacrifice the accuracy of the 2020 Census by forcing the Census Bureau to compress eight and a half months of vital data-collection and data-processing into four and a half months, against the judgment of the Bureau's staff and in the midst of a once-in-a-century pandemic.[1110]

The initial plaintiffs in the action were three organizations, two counties, three cities, and two county officials.[1111] Three days later, the court assigned the case to Judge Lucy H. Koh as related to two cases already pending before her,[1112] and Judge Koh scheduled a case-management videoconference for August 26.[1113]

The related cases, which included some plaintiffs in the new case, challenged President Trump's decision to exclude unauthorized immigrants from Congressional apportionment counts.[1114] A three-judge district court determined on October 22 that excluding unauthorized immigrants from House of Representatives apportionments "has already been rejected by the Constitution, the applicable statutes, and 230 years of history."[1115] The Supreme Court, however, ordered the case dismissed on December 28 for

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1110. Complaint at 1, Nat'l Urban League v. Ross, No. 5:20-cv-5799 (N.D. Cal. Aug. 18, 2020), D.E. 1.

1111. *Id.* at 7–12.

1112. Order, *id.* (Aug. 21, 2020), D.E. 29; *see* Judicial Referral, *id.* (Aug. 18, 2020), D.E. 6 (referral by the assigned magistrate judge for possible relatedness).

Judge Koh was elevated to the court of appeals on December 14, 2021. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

1113. Order, *Nat'l Urban League*, No. 5:20-cv-5799 (N.D. Cal. Aug. 21, 2020), D.E. 31; *see* Transcript, *id.* (Aug. 26, 2020, filed Sept. 3, 2020), D.E. 65.

1114. Amended Complaint, California v. Trump, No. 5:20-cv-5169 (N.D. Cal. Aug. 24, 2020), D.E. 28; Amended Complaint, City of San Jose v. Trump, No. 5:20-cv-5167 (N.D. Cal. Aug. 18, 2020), D.E. 46.

1115. City of San Jose v. Trump, 497 F. Supp. 3d 680, 687 (N.D. Cal. 2020).

lack of jurisdiction.[1116] Ten days before that, the Supreme Court concluded in a case arising in the Southern District of New York, "Everyone agrees by now that the Government cannot feasibly [exclude] the estimated 10.5 million aliens without lawful status."[1117] It was no more than speculative whether the government would attempt to exclude unauthorized immigrants from apportionment.[1118]

Meanwhile, the plaintiffs in the August 18 case filed an amended complaint adding additional plaintiffs on September 1[1119] and a motion for a temporary restraining order (TRO) on September 3.[1120] Judge Koh heard the motion on Friday, September 4.[1121]

On Saturday, September 5, Judge Koh issued a TRO enjoining the Census Bureau from "winding down or altering any Census field operations" until a September 17, 2020, preliminary-injunction hearing.[1122]

The government defendants briefed the court on their compliance efforts on Tuesday, the day of a case-management conference:[1123]

> Immediately upon receiving the TRO around 10 p.m. Eastern time on September 5, Defendants began taking steps to determine what concrete efforts would be required for Defendants to come into compliance with the TRO. . . .
>
> The night of Sunday, September 6, Defendants transmitted a detailed list of instructions to Regional Directors regarding what steps the field offices must take and what they must refrain from doing to comply with the TRO. . . .

1116. Trump v. City of San Jose, 592 U.S. ___, 141 S. Ct. 1231 (2020).

1117. Trump v. New York, 592 U.S. ___, ___, 141 S. Ct. 530, 536 (2020), *vacating* 485 F. Supp. 3d 422 (S.D.N.Y. 2020); *see* New York v. Trump, 490 F. Supp. 3d 736 (S.D.N.Y. 2020) (denying a stay); Docket Sheet, New York v. Trump, No. 1:20-cv-5770 (S.D.N.Y. July 24, 2020).

1118. *Trump*, 592 U.S. at ___, 141 S. Ct. at 535–36.

1119. Amended Complaint, Nat'l Urban League v. Ross, No. 5:20-cv-5799 (N.D. Cal. Sept. 1, 2020), D.E. 61 (adding as plaintiffs an organization, a California city, a California county, and two American Indian entities); *see* Nat'l Urban League v. Ross, 489 F. Supp. 3d 939, 950 (N.D. Cal. 2020); Nat'l Urban League v. Ross, 484 F. Supp. 3d 802, 804 (N.D. Cal. 2020).

1120. Temporary-Restraining-Order Motion, *Nat'l Urban League*, No. 5:20-cv-5799 (N.D. Cal. Sept. 3, 2020), D.E. 66.

1121. Transcript, *id.* (Sept. 4, 2020, filed Sept. 5, 2020), D.E. 82.

1122. *Nat'l Urban League*, 484 F. Supp. 3d at 808; *see* Bob Egelko, *Judge Halts Shutdown of Census Bureau Tally*, S.F. Chron., Sept. 7, 2020, at B1.

1123. Transcript, *Nat'l Urban League*, No. 5:20-cv-5799 (N.D. Cal. Sept. 8, 2020, filed Sept. 11, 2020), D.E. 98.

> Defendants understand that, by its terms, the TRO is effective until the Court holds the scheduled preliminary injunction hearing on September 17, 2020. Defendants will fully comply with the TRO in the meantime. If the Court intends to extend the TRO or otherwise believes that the effect of the TRO lasts beyond September 17, Defendants respectfully request that the Court convert the TRO to a preliminary injunction now in order to afford adequate time for any appellate review.[1124]

On September 14, Judge Koh set the case for a hearing the following afternoon regarding allegations of the defendants' noncompliance.[1125] On September 17, Judge Koh extended the TRO seven days and reset the preliminary-injunction hearing for September 22 because of the defendants' not producing the administrative record on time.[1126]

On September 24, Judge Koh issued a preliminary injunction staying the Census Bureau's September 30 deadline for the completion of data collection and its December 31 deadline for reporting the tabulation of the total population.[1127] By a vote of two to one, the court of appeals denied the defendants an administrative stay of the injunction on September 30.[1128]

> Here, not only would the status quo be upended by an administrative stay, the Bureau's ability to resume field operations would be left in serious doubt. . . .
>
> . . .
>
> Given the extraordinary importance of the census, it is imperative that the Bureau conduct the census in a manner that is most likely to produce a workable report in which the public can have confidence.[1129]

In light of the defendants' injunction violations, Judge Koh issued an order on October 1 clarifying the injunction and noting, "The Court will subject Defendants to sanctions or contempt proceedings if Defendants violate the Injunction Order again."[1130]

1124. Notice, *id.* (Sept. 8, 2020), D.E. 86.

1125. Order, *id.* (Sept. 14, 2020), D.E. 113.

1126. Opinion, *id.* (Sept. 17, 2020), D.E. 142; *see* Nat'l Urban League v. Ross, 489 F. Supp. 3d 939, 950 (N.D. Cal. 2020).

1127. *Nat'l Urban League*, 489 F. Supp. 3d at 1003; Nat'l Urban League v. Ross, 977 F.3d 698, 700 (9th Cir. 2020); *see* Bob Egelko, *Judge Rules Census Count Must Not Be Ended Early*, S.F. Chron., Sept. 26, 2020, at B1; Michael Wines, *Federal Judge Blocks Trump Administration from Ending the Census Count Early*, N.Y. Times, Sept. 26, 2020, at A16.

1128. *Nat'l Urban League*, 977 F.3d 698; *see* Bob Egelko, *Court Thwarts Move to Conclude Census Count Early*, S.F. Chron., Oct. 1, 2020, at B1.

1129. *Nat'l Urban League*, 977 F.3d at 701–02.

1130. Nat'l Urban League v. Ross, 491 F. Supp. 3d 572, 584 (N.D. Cal. 2020); *see* Bob Egelko, *Judge's Order: Census Count Must Continue*, S.F. Chron., Oct. 3, 2020, at B1.

On October 7, a new panel of the court of appeals gave the government partial relief:

> The government has . . . failed to meet its burden to justify a stay pending appeal as to the district court's injunction of the September 30, 2020 data collection deadline.
>
> . . .
>
> [But t]o the extent that the district court enjoined the Defendants from attempting to meet the [statutory] December 31 date, that injunction is stayed pending appeal.[1131]

But, over Justice Sotomayor's dissent, the Supreme Court stayed the injunction on October 13 "pending disposition of the appeal in the United States Court of Appeals for the Ninth Circuit and disposition of the petition for a writ of certiorari, if such writ is timely sought."[1132]

On December 22, Judge Koh denied a motion to dismiss a second amended complaint or stay proceedings.[1133] Five days before the inauguration of a new President, however, Judge Koh approved a stipulated stay "in order to provide for an orderly transition and to let the new Administration assess this case."[1134] On January 22, 2021, news media reported,

> After the bureau missed a year-end deadline for turning in the apportionment numbers, it said the figures would be completed as close to the previous deadline as possible. Trump administration attorneys recently said they won't be ready until early March because the bureau needs time to fix irregularities in the data.[1135]

Judge Koh dismissed the case as settled on April 22, 2021,[1136] and the court of appeals accepted a voluntary dismissal of the appeal five days later.[1137] According to the *San Francisco Chronicle*,

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1131. *Nat'l Urban League*, 977 F.3d at 780–81.

1132. Ross v. Nat'l Urban League, 592 U.S. ___, 141 S. Ct. 18 (2020); *see* Bob Egelko, *High Court Overturns Ruling, Halts 2020 Census*, S.F. Chron., Oct. 14, 2020, at B1; Adam Liptak & Michael Wines, *Supreme Court Permits Freeze of Census, Giving Trump a Win*, N.Y. Times, Oct. 14, 2020, at A1; David G. Savage, *Justices Rule That Administration Can Halt Census Counting Early*, L.A. Times, Oct. 14, 2020, at A1.

1133. Nat'l Urban League v. Ross, 508 F. Supp. 3d 663 (N.D. Cal. 2020); *see* Second Amended Complaint, Nat'l Urban League v. Ross, No. 5:20-cv-5799 (N.D. Cal. Oct. 27, 2020), D.E. 352.

1134. Stipulated Order, *Nat'l Urban League*, No. 5:20-cv-5799 (N.D. Cal. Jan. 15, 2021), D.E. 456.

1135. *Time and Transparency Needed as Biden Inherits Frazzled Census*, L.A. Times, Jan. 22, 2021, at A1.

1136. Order, *Nat'l Urban League*, No. 5:20-cv-5799 (N.D. Cal. Apr. 22, 2021), D.E. 489.

> Under the settlement, population figures to be released [soon] will inform states how many congressional seats they will have in 2022, said attorney Thomas Wolf of the Brenan Center for Justice at New York University. After further Census Bureau analysis and reports, he said, data allowing states to draw district lines based on equal populations will be available by the end of September.[1138]

No Second Majority-White District for Quincy, Florida

Baroody v. City of Quincy (Allen Winsor, N.D. Fla. 4:20-cv-217)

> Three days before a city-commission election, a federal district judge denied a claim that the newly redistricted commission should include a second majority-White district.
>
> *Topic:* Section 2 discrimination.

A federal complaint filed on April 28, 2020, in the Northern District of Florida challenged a March 26 redistricting plan for Quincy's city commission.[1139] Nine days later, the two plaintiffs—citizen residents of Quincy—filed an emergency motion for a case-management conference and a scheduling order, noting upcoming elections on June 9.[1140]

Judge Allen Winsor set the case for a telephonic status conference on May 12, noting that no injunction motion was pending and posting contact information for the call in the public docket sheet.[1141] Complying with Judge Winsor's order, the parties submitted a joint status report on the day before the conference, stating,

> The parties understand that Plaintiffs will soon be filing a motion seeking preliminary injunctive relief, and request that Defendants be allowed two (2) weeks from the filing of such motion to respond thereto, and that Plaintiffs be allowed to file a reply brief prior to a hearing upon such motion, to be set at the Court's convenience prior to the June 9 2020 Quincy City Commissioner elections.[1142]

1137. Order, Nat'l Urban League v. Ross, No. 20-16868 (9th Cir. Apr. 27, 2021), D.E. 67.

1138. Bob Egelko, *Settlement Means Census Counts All, Regardless of Status*, S.F. Chron., Apr. 23, 2021, at A10.

1139. Complaint, Broody v. City of Quincy, No. 4:20-cv-217 (N.D. Fla. Apr. 28, 2020), D.E. 1; *see* Amended Complaint, *id.* (May 22, 2020), D.E. 18.

"The City of Quincy is the county seat of Gadsden County and home to some 8,670 residents." Opinion at 1, *id.* (June 7, 2020), D.E. 31 [hereinafter *Broody* Opinion].

1140. Motion, *id.* (May 7, 2020), D.E. 6.

1141. Order, *id.* (May 8, 2020), D.E. 8; Docket Sheet, *id.* (Apr. 28, 2020) [hereinafter *Broody* Docket Sheet] (D.E. 9).

1142. Status Report at 2, *id.* (May 11, 2020), D.E. 11.

At the status conference, Judge Winsor noted that the injunction motion would be filed on May 15, and he set the case for another public telephonic status conference on May 20.[1143] The May 15 injunction motion argued, "Absent an injunction, hundreds (if not thousands) of White/Anglo voters in existing District 5 will have their vote in the 2020 City Commissioner elections diluted and rendered meaningless because of the color of their skin."[1144] Judge Winsor set the motion for a courthouse hearing on June 4.[1145]

On Sunday, June 7, two days before the election, Judge Winsor denied the plaintiffs immediate relief.[1146]

> For decades, the district lines were essentially untouched. The districting plan enacted in 1974 was the districting plan in place in 2020—at least until March 2020, when the City enacted a new districting plan. . . .
>
> A majority of Quincy residents are black. A minority are White. According to the complaint, it has been this way for more than one hundred years.[1147]

Judge Winsor found that the plaintiffs could not show either the feasibility of a second compact majority-White district or that White voters voted as a bloc.[1148]

Judge Winsor issued a voluntary dismissal on June 19.[1149]

Unsuccessful Injunction Against State-Court Proscription on Political Gerrymandering

League of Women Voters of Pennsylvania v. Pennsylvania (Michael M. Baylson, E.D. Pa. 2:17-cv-5137) and Corman v. Torres (Christopher C. Conner, Kent A. Jordan, and Jerome B. Simandle, M.D. Pa. 1:18-cv-443)

> After a state supreme court redrew congressional district lines to remedy excessive partisan gerrymandering, opponents of the new lines sought a federal-court injunction against the state-court decision. A three-judge district court declined to enjoin the state court's new lines. An earlier attempt to remove the litiga-

1143. Order, *id.* (May 12, 2020), D.E. 12; Minutes, *id.* (May 12, 2020), D.E. 12; *Broody* Docket Sheet, *supra* note 1141 (D.E. 14); *see id.* (minutes, D.E. 16).

1144. Preliminary-Injunction Motion, *Broody*, No. 4:20-cv-217 (N.D. May 15, 2020), D.E. 15.

1145. *Broody* Docket Sheet, *supra* note 1141 (D.E. 17); *see* Minutes, *Broody*, No. 4:20-cv-217 (N.D. Fla. June 4, 2020), D.E. 29.

1146. *Broody* Opinion, *supra* note 1139.

1147. *Id.* at 1–2.

1148. *Id.* at 6–21.

1149. Order, *Broody*, No. 4:20-cv-217 (N.D. Fla. June 19, 2020), D.E. 34.

> tion to federal court was unsuccessful because the removal was attempted without the consent of all defendants.
>
> *Topics:* Matters for state courts; malapportionment; three-judge court; intervention; case assignment; removal; attorney fees.

Litigation over partisan gerrymandering in 2017 and 2018 included a federal-court challenge to a state supreme court's redistricting of Pennsylvania's members of Congress. Related actions were resolved in one of the commonwealth's other districts.

Challenging Pennsylvania's Supreme Court

According to a federal complaint filed in the Middle District of Pennsylvania on February 22, 2018, "This is an action concerning, *inter alia*, the Pennsylvania Supreme Court's striking of a validly-enacted congressional districting plan and issuance of a substitute plan, each action in direct violation of the Elections Clause of the United States Constitution (the 'Elections Clause')."[1150]

Pennsylvania's supreme court declared on January 22 "that the Congressional Redistricting Act of 2011 clearly, plainly and palpably violates the Constitution of the Commonwealth of Pennsylvania" and enjoined Pennsylvania from using the plan in 2018 congressional elections.[1151] On February 5, 2018, U.S. Supreme Court Justice Alito declined petitions to stay the injunction.[1152] The Pennsylvania court said that it would begin procedures to establish new districts unless the other two branches of government submitted a constitutional plan by February 15.[1153] A 139-page opinion issued on February 7 explained the court's conclusions.[1154] "The General Assembly failed to pass legislation for the Governor's approval,

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1150. Complaint, Corman v. Torres, No. 1:18-cv-443 (M.D. Pa. Feb. 22, 2018), D.E. 1 [hereinafter *Corman* Complaint]; Corman v. Torres, 287 F. Supp. 3d 558, 565 (M.D. Pa. 2018).

1151. League of Women Voters of Pa. v. Commonwealth, 175 A.3d 282 (Pa.), *cert. denied,* 586 U.S. ___, 139 S. Ct. 445 (2018); *see Corman*, 287 F. Supp. 3d at 564; *see also* Michael Wines & Trip Gabriel, *Pennsylvania District Map Is Ruled Unconstitutional*, N.Y. Times, Jan. 23, 2018, at A10.

1152. Docket Sheet, McCann v. League of Women Voters of Pa., No. 17A802 (U.S. Jan. 29, 2018); Docket Sheet, Turzai v. League of Women Voters of Pa., No. 17A795 (U.S. Jan. 26, 2018); *see* Adam Liptak, *Justices Decline to Halt Court's Order to Redraw a Partisan Election Map*, N.Y. Times, Feb. 6, 2018, at A10.

1153. *League of Women Voters of Pa.*, 175 A.3d 282; *see Corman*, 287 F. Supp. 3d at 564.

1154. *League of Women Voters of Pa.*, 175 A.3d 282; *see Corman*, 287 F. Supp. 3d at 564.

thereby making it impossible for our sister branches to meet the Court's deadline."[1155] So the court adopted a remedial plan, "which shall be implemented forthwith in preparation for the May 15, 2018 primary election."[1156] The U.S. Supreme Court declined to stay the ruling.[1157]

The plaintiffs—the majority leader of Pennsylvania's senate, the chair of the senate committee with jurisdiction over congressional districting, and eight Pennsylvania members of Congress—filed with their complaint against Pennsylvania's election officials a motion for a temporary restraining order and a preliminary injunction.[1158] Because the case challenged the state court's congressional redistricting, the plaintiffs also filed a notice requesting appointment of a three-judge district court.[1159]

On the day that the federal complaint was filed, state-court plaintiffs moved to intervene as additional defendants in the federal case.[1160]

On February 23, Chief Circuit Judge D. Brooks Smith appointed Circuit Judge Kent A. Jordan and District of New Jersey Judge Jerome B. Simandle to join Middle District of Pennsylvania Judge Christopher C. Conner as the three-judge district court.[1161] That day, the National Democratic Redistricting Committee moved to intervene as yet another defendant.[1162]

On the day that it was appointed, the three-judge court denied the plaintiffs immediate relief but set the case for expedited consideration with a hearing scheduled for March 9.[1163]

1155. League of Women Voters of Pa. v. Commonwealth, 181 A.3d 1083, 1086 (Pa. 2018).

1156. *Id.* at 1087; *see Corman*, 287 F. Supp. 3d at 561, 565 (noting, "Pennsylvania's Republican-dominated General Assembly and Democratic Governor were unable to agree on remedial congressional redistricting legislation by the deadlines mandated in the January 22 order.").

1157. Turzai v. League of Women Voters, 583 U.S. 1177 (2018); *see* Adam Liptak, *Justices Won't Block Pennsylvania Redistricting*, N.Y. Times, Mar. 20, 2018, at A20.

1158. Motion, Corman v. Torres, No. 1:18-cv-443 (M.D. Pa. Feb. 22, 2018), D.E. 3; *see Corman* Complaint, *supra* note 1150; *Corman*, 287 F. Supp. 3d at 561.

1159. Notice, *Corman*, No. 1:18-cv-443 (M.D. Pa. Feb. 22, 2018), D.E. 4; *see* 28 U.S.C. § 2284(a).

1160. Intervention Brief, *Corman*, No. 1:18-cv-443 (M.D. Pa. Feb. 22, 2018), D.E. 6; Intervention Motion, *id.* (Feb. 22, 2018), D.E. 5.

1161. Order, *id.* (Feb. 23, 2018), D.E. 11.

Judge Simandle died on July 19, 2019. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

1162. Intervention Brief, *Corman*, No. 1:18-cv-443 (M.D. Pa. Feb. 23, 2018), D.E. 13; Intervention Motion, *id.* (Feb. 23, 2018), D.E. 12; *Corman*, 287 F. Supp. 3d at 565–66.

1163. Order, *Corman*, No. 1:18-cv-443 (M.D. Pa. Feb. 23, 2018), D.E. 19.

Following a March 1 hearing on the intervention motions,[1164] the court decided on March 2 to grant intervention as defendants to individual voters who were plaintiffs in the state-court case but to deny intervention to the League of Women Voters—at one time a state-court plaintiff—and the National Democratic Redistricting Committee, allowing them nevertheless to participate as amici curiae.[1165]

On March 19, the district court determined that the federal plaintiffs did not have standing to pursue their complaint.[1166] The state legislators did not have standing because "a legislator suffers no Article III injury when alleged harm is borne equally by all members of the legislature."[1167] As to the members of Congress, "Case law strongly suggests that a legislator has no legally cognizable interest in the composition of the district he or she represents."[1168]

On April 10, the court denied a pro se motion to intervene and seek reconsideration of the court's decision.[1169] The court of appeals affirmed denial of intervention on September 25, because the movant's

> motion does not address how his particular participation would be required to achieve in some concrete fashion the relief sought. We note that, in seeking to intervene on the defendants' side, the eighteen individual state-court petitioners, who were granted leave to intervene by the District Court, were the only parties to present evidence at trial of the 2011 map's invalidity and the qualities of a map that would comply with the Pennsylvania Constitution.[1170]

The U.S. Supreme Court declined review of the decision by Pennsylvania's supreme court.[1171]

Federal Gerrymander Challenges Based on the Elections Clause

A federal complaint filed in the Eastern District of Pennsylvania on October 2, 2017, argued, "Because the Elections Clause is a source of only neutral procedural rules, it does not give [Pennsylvania's] General Assembly

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1164. Transcript, *id.* (Mar. 1, 2018, filed Mar. 8, 2018), D.E. 125 [hereinafter *Corman* Intervention Hearing Transcript].

1165. Order, *id.* (Mar. 2, 2018), D.E. 85; *Corman*, 287 F. Supp. 3d at 565; *see Corman* Intervention Hearing Transcript, *supra* note 1164, at 38 ("Judge Jordan: . . . The League of Women Voters was not a party to the suit at the end in the state system . . . .").

1166. *Corman*, 287 F. Supp. 3d 558.

1167. *Id.* at 567; *see* Raines v. Byrd, 521 U.S. 811, 821 (1997).

1168. *Corman*, 287 F. Supp. 3d at 569.

1169. Order, *Corman*, No. 1:18-cv-443 (M.D. Pa. Apr. 10, 2018), D.E. 140; *see* Intervention Motion, *id.* (Apr. 3, 2018), D.E. 139.

1170. Corman v. Secretary, 751 F. App'x 157, 160–61 (3d Cir. 2018).

1171. Turzai v. League of Women Voters of Pa., 586 U.S. ___, 139 S. Ct. 445 (2018).

the authority to draw Congressional districts based on the likely voting preferences of plaintiffs and other citizens."[1172] The Elections Clause, which is the first paragraph of the Constitution's Article I, section 4, authorizes states to determine how members of Congress will be selected and it also authorizes Congress to regulate the states on this issue: "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, except as to the Places of chusing Senators."[1173] In later briefing, the plaintiffs argued that gerrymanders meant to affect the outcome of congressional elections are ultra vires under the Elections Clause.[1174]

Following a four-day trial in December,[1175] a three-judge district court ruled on January 10, 2018, by a vote of two to one, against the plaintiffs.[1176] Chief Circuit Judge Smith did not see in the Elections Clause a role for the courts in selecting members of Congress.[1177]

Circuit Judge Patty Shwartz concluded that the plaintiffs could not prevail because, although they included voters in every one of Pennsylvania's congressional districts, the plaintiff in one district did not present a strong enough case.[1178] "Plaintiffs have adduced evidence that plaintiffs from seventeen of the eighteen districts suffered an injury in fact. They, however, failed to present facts to show that the plaintiff from the Fourth Congressional District sustained an injury sufficient to confer standing."[1179] The plaintiff from district 4 testified that her district was less gerrymandered than the others.[1180] "Although there may be a case in which a political gerrymandering claim may successfully be brought under the Elections Clause, this is not such a case."[1181]

District Judge Michael M. Baylson, to whom the case was originally assigned, concluded on the other hand, "Gerrymandering is a wrong in

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1172. Complaint at 1, Agre v. Wolf, No. 2:17-cv-4392 (E.D. Pa. Oct. 2, 2017), D.E. 1; *see* Amended Complaint, *id.* (Nov. 17, 2017), D.E. 88.

1173. U.S. Const. art. I, § 4.

1174. Plaintiff Brief at 1–2, *Agre*, No. 2:17-cv-4392 (E.D. Pa. Nov. 30, 2017), D.E. 157.

1175. Transcripts, *id.* (Dec. 4 to 7, 2017, filed Dec. 13, 2017), D.E. 195 to 198.

1176. Agre v. Wolf, 284 F. Supp. 3d 591 (E.D. Pa. 2018), *appeal dismissed for want of jurisdiction*, 584 U.S. ___, 138 S. Ct. 2602 (2018) (ruling by the district court on speech-or-debate immunity), *and appeal dismissed as moot*, 584 U.S. ___, 138 S. Ct. 2576 (2018).

1177. *Agre*, 284 F. Supp. 3d at 592–630.

1178. *Id.* at 630–48.

1179. *Id.* at 642.

1180. *Id.*

1181. *Id.* at 631.

search of a remedy."[1182] "In summary, the history of the Elections Clause and the United States Supreme Court decisions [interpreting the clause] establish that there are substantive restrictions on states when they determine the 'manner' of apportioning voters into congressional districts."[1183]

The court assigned to Judge Baylson as a related case another challenge to partisan gerrymandering as a violation of the Elections Clause, equal protection, and freedom of speech and association.[1184] On November 22, 2017, Judge Baylson stayed the second case, which was filed on November 9, pending completion of the first case's trial.[1185] Following resolution of the first case, Judge Baylson granted the parties in the second case a stipulated dismissal.[1186]

Improper Removal

A third related case before Judge Baylson was an action removed by a state senator concerning how a pending decision by Pennsylvania's supreme court on gerrymandering would affect an ongoing special election to fill a congressional vacancy.[1187] The plaintiffs filed an emergency motion to remand the case two days later,[1188] and Judge Baylson set the case for hearing at 2:00 that afternoon.[1189] Pennsylvania's lieutenant governor—one of the defendants—filed a motion to remand the case, noting his lack of consent to the removal.[1190] The removing senator then sought to withdraw his removal.[1191]

Following the hearing, at which Judge Baylson noted chambers time spent on the clearly improper removal,[1192] he remanded the case to state

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1182. *Id.* at 648 (Judge Baylson, dissenting).

1183. *Id.* at 696.

1184. Docket Sheet, Diamond v. Torres, No. 5:17-cv-5054 (E.D. Pa. Nov. 9, 2017); Complaint, *id.* (Nov. 9, 2017), D.E. 1; *see* Amended Complaint, *id.* (Nov. 2, 2017), D.E. 42.

1185. Order, *id.* (Nov. 22, 2017), D.E. 40.

1186. Stipulated Dismissal, *id.* (Apr. 9, 2018), D.E. 86.

1187. Notice of Removal, League of Women Voters of Pa. v. Pennsylvania, No. 2:17-cv-5137 (E.D. Pa. Nov. 14, 2017), D.E. 1; League of Women Voters of Pa. v. Pennsylvania, 921 F.3d 378, 381 (3d Cir. 2019).

1188. Motion, *League of Women Voters of Pa.*, No. 2:17-cv-5137 (E.D. Pa. Nov. 16, 2017), D.E. 2; *League of Women Voters of Pa.*, 921 F.3d at 381.

1189. Notice, *League of Women Voters of Pa.*, No. 2:17-cv-5137 (E.D. Pa. Nov. 16, 2017), D.E. 3.

1190. Motion, *id.* (Nov. 16, 2017), D.E. 5.

1191. Motion, *id.* (Nov. 16, 2017), D.E. 9; *League of Women Voters of Pa.*, 921 F.3d at 381–82.

1192. Transcript at 8, *League of Women Voters of Pa.*, No. 2:17-cv-5137 (E.D. Pa. Nov. 16, 2017, filed Nov. 21, 2017), D.E. 22.

court.[1193] On April 13, 2018, Judge Baylson awarded the plaintiffs $29,360.02 in attorney fees and costs.[1194]

The court of appeals decided to post a video recording of a November 7 oral argument on the court's website.[1195] On April 24, 2019, the court of appeals affirmed the fee award, but it determined that because the senator was named as a defendant in his official capacity it was not proper to hold him personally liable for fees.[1196]

Injunction Against a State Law Singling Out One Municipality for a Change in Local Control

City of Greensboro v. Guilford County Board of Elections (Catherine C. Eagles, M.D.N.C. 1:15-cv-559)

> On July 2, 2015, a state legislature restructured a city council from five members representing districts and three members elected at large to eight members representing districts, and the legislature removed control over the structure of city government from this city alone. On July 13, two weeks before the beginning of a candidate filing period, a federal complaint challenged the act, and the district judge determined that the act probably violated equal protection by treating the city differently from all other cities in the state, so the election proceeded according to the original council structure. Following a bench trial in 2017, the judge additionally determined that the new district lines unconstitutionally favored one political party. Because no party defended the constitutionality of the legislation, the district judge declined the plaintiffs an award of attorney fees, but the court of appeals reversed that decision.
>
> *Topics:* Equal protection; intervention; malapportionment; attorney fees.

On July 13, 2015, two weeks before the beginning of a candidate filing period for mayor and city council in Greensboro, North Carolina, the city and six of its citizens filed in the Middle District of North Carolina a federal complaint against the county board of elections challenging a state law

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1193. Order, *id.* (Nov. 16, 2017), D.E. 15; *League of Women Voters of Pa.*, 921 F.3d at 380.

1194. Opinion, *League of Women Voters of Pa.*, No. 2:17-cv-5137 (E.D. Pa. Apr. 13, 2018), D.E. 28, 2018 WL 1787211.

1195. Docket Sheet, League of Women Voters of Pa. v. Pennsylvania, No. 18-1838 (3d Cir. Apr. 18, 2018); Oral Argument, *id.* (Nov. 7, 2018), player.piksel.tech/v/refid/3CA/prefid/18_1838 (video recording).

1196. *League of Women Voters of Pa.*, 921 F.3d 378.

enacted on July 2 that, among other things, changed Greensboro's city council from five members elected from districts and three members elected at large for two-year terms to eight members elected from districts for four-year terms and removed from the city future power to amend its form of government in manners other municipalities in North Carolina retained.[1197] The same act converted the city council for Trinity from two members each elected from four districts for four-year terms to one member elected from each district plus one member elected at large, all for two-year terms, but the change in Trinity was not at issue in this case.[1198] With their complaint, the plaintiffs filed a motion for a temporary restraining order[1199] and a motion for a preliminary injunction.[1200]

Following a telephonic conference on July 14, Judge Catherine C. Eagles provisionally set the case for hearing on July 23, ordered briefing completed by July 21, and invited briefing from the state's attorney general.[1201]

At the end of the July 23 hearing, Judge Eagles asked the parties if they would prefer to return later that day for an oral ruling or if they could wait for a written opinion on the following day.[1202] The parties said that they would be fine with a prompt written ruling clearly stating what the election officials' obligations would be.[1203]

1197. Complaint, City of Greensboro v. Guilford Cty. Bd. of Elections, No. 1:15-cv-559 (M.D.N.C. July 13, 2015), D.E. 1; Brandon v. Guilford Cty. Bd. of Elections, 921 F.3d 194, 196–97 (4th Cir. 2019); City of Greensboro v. Guilford Cty. Bd. of Elections, 251 F. Supp. 3d 935, 938 (M.D.N.C. 2017); City of Greensboro v. Guilford Cty. Bd. of Elections, 120 F. Supp. 3d 479, 482–85 (M.D.N.C. 2015); *see* N.C. Sess. Law 2015-138, www.ncleg.net/EnactedLegislation/SessionLaws/PDF/2015-2016/SL2015-138.pdf; *see also* Second Amended Complaint, *City of Greensboro*, No. 1:15-cv-559 (M.D.N.C. Dec. 8, 2016), D.E. 109 (adding an additional citizen as a plaintiff); Amended Complaint, *id.* (Feb. 13, 2016), D.E. 65 (adding an additional citizen as a plaintiff).

1198. N.C. Sess. Law 2015-138: *City of Greensboro*, 120 F. Supp. 3d at 483 n.2.

1199. Temporary-Restraining-Order Motion, *City of Greensboro*, No. 1:15-cv-559 (M.D.N.C. July 13, 2015), D.E. 3.

1200. Preliminary-Injunction Motion, *id.* (July 13, 2015), D.E. 7.

1201. Order, *id.* (July 14, 2015), D.E. 23; *see* Order, *id.* (July 20, 2015), D.E. 28; *see also* Joe Killian, *First Hearing in Greensboro Council Lawsuit Set for Next Week*, Greensboro News & Rec., July 15, 2015.

Judge Eagles denied a pro se motion to file an amicus brief. Order, *City of Greensboro*, No. 1:15-cv-559 (M.D.N.C. July 21, 2015), D.E. 29; *see* Amicus Motion, *id.* (July 14, 2015), D.E. 21.

1202. Transcript at 58, *City of Greensboro*, No. 1:15-cv-559 (M.D.N.C. July 23, 2015, filed Aug. 29, 2017), D.E. 157.

1203. *Id.* at 59.

In fact, Judge Eagles issued a twenty-one-page opinion on the day of the hearing, determining that the plaintiffs were likely to prevail on their equal-protection claim arising from the statute's singling out Greensboro for deprivation of local control.[1204] The attorney general had declined to participate, and the record showed no rational basis for the unequal treatment.[1205] Judge Eagles ordered municipal elections to proceed as if the act had not been enacted.[1206]

Nine Greensboro voters moved to intervene in defense of the statute on August 25.[1207] Noting that "[t]he Court and the process will likely benefit from the inclusion of litigants who will defend the legislation," Judge Eagles granted intervention on October 30.[1208]

On March 23, 2016, Judge Eagles denied a motion by the intervenors to require joinder of one or more state parties.[1209] "Neither the plaintiffs, the defendant Guilford County Board of Elections, nor the defendant-intervenors have advised the Court of any problems or lack of power or authority experienced by the County Board in complying with this court's preliminary injunction issued last year which applied to elections held last fall."[1210] On December 7, 2016, Judge Eagles granted a motion by the inter-

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1204. City of Greensboro v. Guilford Cty. Bd. of Elections, 120 F. Supp. 3d 479, 489–91 (M.D.N.C. 2015); Docket Sheet, *City of Greensboro*, No. 1:15-cv-559 (M.D.N.C. July 13, 2015) [hereinafter *City of Greensboro* Docket Sheet]; *see* Joe Killian, *Judge Puts Stop to Redistricting*, Greensboro News & Rec., July 24, 2015.

1205. *City of Greensboro*, 120 F. Supp. 3d at 486, 488–89; *see* City of Greensboro v. Guilford Cty. Bd. of Elections, 248 F. Supp. 3d 692, 695, 697–98 (M.D.N.C. 2017); *see also* Joe Gamm, *N.C. Attorney General Asked to Defend Law Revamping Council*, Greensboro News & Rec., Sept. 2, 2015 (reporting that the attorney general declined to defend the act and the legislature declined to hire counsel to do so as well).

1206. *City of Greensboro*, 120 F. Supp. 3d at 492; Preliminary Injunction, *City of Greensboro*, No. 1:15-cv-559 (M.D.N.C. July 23, 2015), D.E. 36; City of Greensboro v. Guilford Cty. Bd. of Elections, 251 F. Supp. 3d 935, 938 (M.D.N.C. 2017).

1207. Intervention Motion, *City of Greensboro*, No. 1:15-cv-559 (M.D.N.C. Aug. 25, 2015), D.E. 37; Brandon v. Guilford Cty. Bd. of Elections, 921 F.3d 194, 197 (4th Cir. 2019); *see* Amended Intervention Motion, *City of Greensboro*, No. 1:15-cv-559 (M.D.N.C. Sept. 2, 2015), D.E. 41.

1208. Order, *id.* (Oct. 30, 2015), D.E. 53, 2015 WL 12752936; *see see City of Greensboro*, 248 F. Supp. 3d at 698.

1209. Order, *City of Greensboro*, No. 1:15-cv-559 (M.D.N.C. Mar. 23, 2016), D.E. 72 [hereinafter Mar. 23, 2016, *City of Greensboro* Order]; *Brandon*, 921 F.3d at 197; *see also* Joe Killian, *Federal Judge: Greensboro Residents Can Defend Redistricting Lawsuit*, Greensboro News & Rec., Oct. 30, 2015; Joe Killian, *Group to Speak Up for New Districts*, Greensboro News & Rec., Aug. 26, 2015; Margaret Moffett, *Greensboro Lawsuit on Redistricting to Proceed*, Greensboro News & Rec., Mar. 25, 2016.

1210. Mar. 23, 2016, *City of Greensboro* Order, *supra* note 1209, at 2.

venors to withdraw from the case.[1211] Their November 23 motion to withdraw said that further defense of the challenged statute would be futile.[1212]

On October 1, 2015, North Carolina's governor signed legislation restoring Greensboro's control over its form of government following the 2020 census.[1213]

Judge Eagles granted the plaintiffs summary judgment on their equal-protection claim on February 3, 2017,[1214] and held a bench trial on February 6 and 7.[1215]

> The sole defendant here, the Board, has indicated that it has only a "ministerial" role in elections and that taking a position on the constitutional issues raised would be inconsistent with its duty to administer elections in an impartial and nonpartisan manner. . . .
>
> . . . The Attorney General decided not to participate in the litigation . . . . Legislative leaders within the General Assembly appear to have standing to intervene, but have not asked to do so.
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> . . .
>
> . . . The crux of the [equal-protection question] is whether there is evidence of a legitimate governmental purpose behind [the] different treatment and whether there is a rational relationship between the Act and any such purpose. The Court places the burden on the plaintiffs to prove the absence of these things.
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> . . .
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> The plaintiffs have produced all available evidence of the Act's legislative history and have directed the Court's attention to the laws enacted over the past several decades in which the legislature has addressed referendum and initiative rights. No legitimate state purpose for treating citi-

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1211. *City of Greensboro* Docket Sheet, *supra* note 1204 (D.E. 107); *Brandon*, 921 F.3d at 197; *City of Greensboro*, 248 F. Supp. 3d at 698.

1212. Withdrawal Brief at 2, *City of Greensboro*, No. 1:15-cv-559 (M.D.N.C. Nov. 23, 2016), D.E. 103; City of Greensboro v. Guilford Cty. Bd. of Elections, 251 F. Supp. 3d 935, 939 (M.D.N.C. 2017); *see* Transcript at 24, *City of Greensboro*, No. 1:15-cv-559 (M.D.N.C. Dec. 13, 2016, filed Jan. 20, 2017), D.E. 124; *see also* Margaret Moffett, *Redistricting Case Takes a Twist*, Greensboro News & Rec., Nov. 26, 2016, at 1A.

1213. N.C. Sess. Law 2015-264, §85.5, www.ncleg.net/EnactedLegislation/SessionLaws/PDF/2015-2016/SL2015-264.pdf; *see City of Greensboro*, 248 F. Supp. 3d at 696–97; *City of Greensboro*, 251 F. Supp. 3d at 938.

1214. *City of Greensboro*, 248 F. Supp. 3d at 697.

1215. Transcripts, *City of Greensboro*, No. 1:15-cv-559 (M.D.N.C. Feb. 6 and 7, 2017, filed Mar. 14, 2017), D.E. 189, 190; *City of Greensboro* Docket Sheet, *supra* note 1204; Minutes, *City of Greensboro*, No. 1:15-cv-559 (M.D.N.C. Feb. 7, 2017), D.E. 131 (exhibit and witness list); *see* Danielle Battaglia, *Federal Trial on Districts Begins*, Greensboro News & Rec., Feb. 7, 2017, at 1A.

> zens of Greensboro differently has been offered or appears on the record.[1216]

Following the bench trial, Judge Eagles concluded on April 3 that the legislature's redistricting of Greensboro was unconstitutional, because "the evidence here establishes that the North Carolina General Assembly drew Greensboro City Council districts with materially unequal populations in an attempt to maximize success for Republican candidates."[1217]

The question of attorney fees and costs presented Judge Eagles with a dilemma: "assessing attorney's fees against a litigant who neither enacted nor defended the unconstitutional Act, or denying a fee award to the individual plaintiffs and their lawyers who prevailed on the merits of two equal protection claims, vindicating important constitutional rights."[1218]

> . . . The County Board reasonably took the position that it had a duty to fairly and impartially administer whatever elections laws validly apply and that it had no duty to determine whether a law is constitutional. . . .
>
> Despite receiving notice of the litigation as required by state law, the North Carolina Attorney General did not make an appearance to defend the Act. Legislative leaders possessing the statutory right to intervene were also aware of the litigation and took no steps to defend the Act in court. The primary legislative sponsor of the Act invoked legislative privilege and refused to be deposed.
>
> . . .
>
> The entity responsible for violating the plaintiffs' constitutional rights is not before the Court.[1219]

Noting in addition that a fee award "would perversely encourage future plaintiffs to avoid suing responsible entities, in favor of defendants unlikely to contest relief," Judge Eagles denied the plaintiffs fees and costs.[1220]

Although one judge opined that Judge Eagles' decision was within her discretion, the court of appeals decided by a vote of two to one that "there

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1216. *City of Greensboro*, 248 F. Supp. 3d at 697–98, 702, 705 (footnotes omitted); *see also City of Greensboro*, 251 F. Supp. 3d at 939 ("The primary legislative sponsor of the Act invoked legislative privilege and refused to testify.").

1217. *City of Greensboro*, 251 F. Supp. 3d 935; *see* Danielle Battaglia, *Federal Judge Rules Against City Redistricting*, Greensboro News & Rec., Apr. 4, 2017, at 1A.

1218. Opinion at 2–3, *City of Greensboro*, No. 1:15-cv-559 (M.D.N.C. Jan. 3, 2018), D.E. 169, 2018 WL 276688.

1219. *Id.* at 3–4, 13 (citations omitted).

1220. *Id.* at 14; Brandon v. Guilford Cty. Bd. of Elections, 921 F.3d 194, 197 (4th Cir. 2019).

is no injustice in requiring a *county* entity to pay fees in a lawsuit challenging the constitutionality of a *state* law."[1221]

Voting-Rights Challenge to a School-District Consolidation

North Forest Independent School District v. Texas Educational Agency (David Hittner, S.D. Tex. 4:13-cv-1786)

> School-district trustees filed a federal voting-rights challenge to consolidation of the school district with a neighboring school district. On the day after the case was heard, the challenge pursuant to section 5 of the Voting Rights Act became moot because of the Supreme Court's holding that the criteria for application of section 5 were unconstitutional. The district judge denied immediate relief on a section 2 claim, consolidation proceeded, and the parties stipulated a nonsuit.
>
> *Topics:* Section 2 discrimination; section 5 preclearance; laches.

The seven trustees of the North Forest Independent School District filed a federal complaint[1222] in the Southern District of Texas on June 19, 2013, claiming that state-ordered absorption of the North Forest school district into the Houston Independent School District violated section 2 of the Voting Rights Act,[1223] and the consolidation had not yet been precleared pursuant to section 5 of the Voting Rights Act.[1224] With their complaint, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction.[1225]

On the day that the case was filed, Judge David Hittner set a hearing for June 24.[1226] On June 25, the Supreme Court declined to hold section 5 unconstitutional, but the Court did hold unconstitutional the criteria for which jurisdictions require section 5 preclearance.[1227] On June 26, Judge

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1221. *Brandon*, 921 F.3d at 200; *see id.* at 202–04 (dissenting opinion).

1222. Complaint, North Forest Indep. School Dist. v. Tex. Educ. Agency, No. 4:13-cv-1786 (S.D. Tex. June 19, 2013), D.E. 1.

1223. Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437, *as amended*, 52 U.S.C. § 10301.

1224. *Id.*, § 5, 79 Stat. at 439, *as amended*, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination and requiring that preclearance disputes be heard by a three-judge court).

1225. Motion, *North Forest Indep. School Dist.*, No. 4:13-cv-1786 (S.D. Tex. June 19, 2013), D.E. 2.

1226. Order, *id.* (June 19, 2013), D.E. 6; *see* Minutes, *id.* (June 24, 2013), D.E. 11.

1227. Shelby County v. Holder, 570 U.S. 529 (2013); *see* Robert Barnes, *Court Blocks Key Part of Voting Rights Act*, Wash. Post, June 26, 2013, at A1; Adam Liptak, *Justices Void Oversight of States, Issue at Heart of Voting Rights Act*, N.Y. Times, June 26, 2013, at

Hittner determined that the plaintiffs' section 5 claim was no longer valid.[1228]

Judge Hittner did not dismiss the section 2 claim, but he denied the plaintiffs immediate relief.[1229] Noting the majority-minority North Forest school district's "well-documented educational struggles," Judge Hittner reasoned, "A halt in the further effectuation of this transition, just days before the consolidation goes into effect, would no doubt have dire consequences."[1230] Judge Hittner also noted the plaintiffs' late bringing of the case.[1231]

The North Forest school district had been absorbed by the Houston school district by the time that schools opened on August 26.[1232]

On September 9, Judge Hittner granted the parties a stipulated nonsuit.[1233]

Consent Litigation Over Section 5 Preclearance

Walker v. Cunningham (Lisa Godbey Wood, S.D. Ga. 2:12-cv-152)

After the Justice Department denied preclearance for county district lines already used in a July 2012 primary election, the incumbents and the county engaged in consent litigation to obtain new district lines from the federal court. A three-judge district court enjoined use of the election results. Enlisting the cooperation of the state's reapportionment office, the court drew new district lines, which were used for a special election to be held in May 2013.

Topics: Malapportionment; section 5 preclearance; three-judge court; enjoining elections; intervention; primary election.

A1; Harvey Rice, *Voting Rights Decision Ripples*, Hous. Chron., July 1, 2013, at 1.

1228. Opinion, *North Forest Indep. School Dist.*, No. 4:13-cv-1786 (S.D. Tex. June 26, 2013), D.E. 14 [hereinafter *North Forest Indep. School Dist.* Opinion] (noting that preclearance had been sought on April 2, 2013); Order, *id.* (June 27, 2013), D.E. 15 (denying as moot the plaintiffs' request for a three-judge court to hear their section 5 claim).

1229. *North Forest Indep. School Dist.* Opinion, *supra* note 1228, at 7–11; *see* Ericka Mellon, *North Forest Loses Another Court Ruling*, Hous. Chron., June 27, 2013, at 5.

1230. *North Forest Indep. School Dist.* Opinion, *supra* note 1228, at 10–11.

1231. *Id.* at 10 n.3.

1232. *See* Ericka Mellon, *HISD Staffers and Their Children Look to Future at Former N. Forest School*, Hous. Chron., Aug. 27, 2013, at 1; *see also* Ericka Mellon, *For North Forest ISD, It's All Over*, Hous. Chron., July 1, 2013, at 1.

1233. Order, *North Forest Indep. School Dist.*, No. 4:13-cv-1786 (S.D. Tex. Sept. 9, 2013), D.E. 19.

After the Justice Department denied preclearance for county district lines already used in an election, the incumbents and the county engaged in consent litigation to obtain new district lines from the federal court.

On September 11, 2012, the five members of Long County's board of commissioners and the five members of the county's board of education filed a federal complaint in the Southern District of Georgia against the three members of the county's board of elections, claiming that the July 31 primary election for the commission and the school board violated, among other things, section 5 of the Voting Rights Act, because the district lines drawn in 2012 had not been precleared.[1234] Among the relief sought by the plaintiffs were court-drawn district lines for use in the November election.[1235]

The 2012 district lines were drawn by the defendants to remedy population disparities that arose since the lines were drawn in 1988, and the 2012 plan was approved by the state's legislature and governor.[1236] On August 27, after elections were held for all positions on the two boards, the Justice Department denied preclearance of the district lines.[1237]

On September 14, recognizing the case as "extremely time-sensitive, as many Voting Rights Act cases are," Judge Lisa Godbey Wood, the district judge in the court's Brunswick Division, which includes Long County, ordered briefing by September 17 on whether a three-judge district court needed to be appointed.[1238] On September 19, Judge Wood requested that the circuit's chief judge appoint a three-judge court,[1239] which he did that day.[1240] Because of the case's time pressure, Judge Wood contacted Chief

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1234. Complaint, Walker v. Cunningham, No. 2:12-cv-152 (S.D. Ga. Sept. 11, 2012), D.E. 1 [hereinafter *Walker* Complaint]; *see* Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination and requiring that preclearance disputes be heard by a three-judge district court).

On June 25, 2013, the Supreme Court declined to hold section 5 unconstitutional, but the Court did hold unconstitutional the criteria for which jurisdictions require section 5 preclearance. Shelby County v. Holder, 570 U.S. 529 (2013).

1235. *Walker* Complaint, *supra* note 1234, at 3, 15.

1236. *See id.* at 7–8.

1237. *See* Ex. C, *id.*

1238. Order, *Walker*, No. 2:12-cv-152 (S.D. Ga. Sept. 14, 2012), D.E. 7; *see* 28 U.S.C. § 90(c)(5).

Tim Reagan interviewed Judge Wood for this report by telephone on January 25, 2013.

1239. Order, *Walker*, No. 2:12-cv-152 (S.D. Ga. Sept. 19, 2012), D.E. 17.

1240. Designation Order, *id.* (Sept. 19, 2012), D.E. 25 [hereinafter *Walker* Designation Order].

Judge Joel F. Dubina directly and immediately to let him know that her request was coming.[1241]

Judge Dubina named Circuit Judge Beverly B. Martin, who sat in Atlanta, and District Judge James Randal Hall, who sat in Augusta, to join Judge Wood on the three-judge court.[1242] Judge Wood contacted the other two judges by telephone, and they agreed to meet together in Brunswick on the earliest possible date.[1243]

The plaintiffs filed on September 19 an unopposed motion for a temporary restraining order against use of the July 31 election results.[1244] The three-judge court issued a temporary restraining order on September 21.[1245]

On September 20, the court issued an expedited scheduling order (1) setting a hearing for September 28, (2) setting September 27 as the deadline for intervention motions, and (3) prescribing text for a newspaper notice of the proceedings.[1246] Judge Wood found proactive scheduling orders to be very useful in managing time-pressured cases.[1247]

Five voters moved to intervene on September 26.[1248] The court denied intervention without prejudice because the voters sought the same relief as the plaintiffs, but the court permitted the voters to participate as amici curiae, and the court granted them notification rights.[1249]

On October 2, the court issued a consent order extending the temporary restraining order and agreeing to draw district lines.[1250] The court enlisted the cooperation of Georgia's legislative and congressional reapportionment office to draw the lines; the three judges met in Atlanta with one of the office's districting experts.[1251] The court presented a draft districting

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1241. Interview with Judge Lisa Godbey Wood, Jan. 25, 2013.

1242. *Walker* Designation Order, *supra* note 1240.

Judge Martin retired on September 30, 2021. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

1243. Interview with Judge Lisa Godbey Wood, Jan. 25, 2013.

1244. Temporary-Restraining-Order Motion, *Walker*, No. 2:12-cv-152 (S.D. Ga. Sept. 19, 2012), D.E. 21.

1245. Temporary Restraining Order, *id.* (Sept. 21, 2012), D.E. 27.

1246. Order, *id.* (Sept. 20, 2012), D.E. 26.

1247. Interview with Judge Lisa Godbey Wood, Jan. 25, 2013.

1248. Intervention Motion, *Walker*, No. 2:12-cv-152 (S.D. Ga. Sept. 26, 2012), D.E. 33.

1249. Consent Order at 9–10, *id.* (Oct. 2, 2012), D.E. 34 [hereinafter *Walker* Consent Order]; Interview with Judge Lisa Godbey Wood, Jan. 25, 2013.

1250. *Walker* Consent Order, *supra* note 1249, at 13–14.

1251. Interview with Judge Lisa Godbey Wood, Jan. 25, 2013.

map for public comment and adjusted the districts a bit in response to comments.[1252]

On December 14, the court adopted new lines for a special election to be held on May 7, 2013.[1253]

Inadvertent Use of Wrong District Lines in a Primary Election

Harris County Department of Education v. Harris County (Lee H. Rosenthal, S.D. Tex. 4:12-cv-2190)

> A county's department of education filed a federal complaint after a primary election for its board of trustees was held using malapportioned district lines instead of interim lines imposed by a federal judge in another case while preclearance of new lines was pending. The district judge presiding over the new case found no constitutional violation because of a lack of intent, and she found that the equities weighed against the plaintiff because it was unlikely that the districting error had an effect on the election's ultimate outcome.
>
> *Topics:* Election errors; enjoining elections; malapportionment; intervention; 42 U.S.C. § 1983; primary election.

A county's department of education filed a federal complaint in the Southern District of Texas against the county and county officers on July 20, 2012, to correct districting errors in a primary election for the school board that was held on May 29.[1254] With its complaint, the department filed an application for a temporary restraining order and a preliminary injunction.[1255]

On November 19, 2011, Judge Vanessa D. Gilmore established an interim districting plan for the county commission because the existing plan had become malapportioned and a new plan had not yet received preclear-

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1252. *Id.*

1253. Order, *Walker*, No. 2:12-cv-152 (S.D. Ga. Dec. 14, 2012), D.E. 55.

1254. Complaint, Harris Cty. Dep't of Educ. v. Harris County, No. 4:12-cv-2190 (S.D. Tex. July 20, 2012), D.E. 1; *see* Second Amended Complaint, *id.* (July 27, 2012), D.E. 12; First Amended Complaint, *id.* (July 27, 2012), D.E. 11; *see also* Ericka Mellon, *Lawsuit Claims Districting Errors Flubbed Election*, Hous. Chron., July 21, 2012, at 2.

1255. Application, *Harris Cty. Dep't of Educ.*, No. 4:12-cv-2190 (S.D. Tex. July 20, 2012), D.E. 7.

Judge Gilmore retired on January 2, 2022. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

ance pursuant to section 5 of the Voting Rights Act.[1256] Commission boundaries were also used for the county department of education's board of trustees; three trustees were elected at large, and four were elected from the four districts, which were called precincts.[1257] Of the three trustee seats up for election in 2012, one was at large and two were for precincts; the old precinct lines were mistakenly used for the primary election.[1258]

In precinct 4, a Democratic candidate ran unopposed, and the margin of victory for the Republican primary-election winner was considerably greater than the number of improperly cast votes.[1259] In precinct 6, a Republican candidate ran unopposed.[1260] There were three Democratic candidates.[1261] There were 872 improper votes and 1,396 registered voters improperly excluded from the election.[1262] The primary-election leader was fewer than 400 votes shy of a majority, so a runoff primary election was scheduled for July 31.[1263]

On July 30, the county Democratic Party moved to intervene as a defendant.[1264] Judge Lee H. Rosenthal heard the case that day, granted intervention, set August 6 as the deadline for other motions to intervene, and ordered briefing on motions to dismiss the action completed by August 8.[1265] The plaintiffs dropped their request for a temporary restraining order.[1266]

The leader of the primary election at issue was defeated by a wide margin in the runoff election.[1267] "It is mathematically possible—not probable—that, had the correct map been used in the May 31 primary, [the pri-

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1256. Order, Rodriguez v. Harris County, No. 4:11-cv-2907 (S.D. Tex. Nov. 19, 2011), D.E. 66; Rodriguez v. Harris County, 964 F. Supp. 2d 686, 706–07 (S.D. Tex. 2013); *see* Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination); *see also* Amended Complaint, *Rodriguez*, No. 4:11-cv-2907 (S.D. Tex. Oct. 19, 2011), D.E. 26; Complaint, *id.* (Aug. 5, 2011), D.E. 1.

1257. Opinion at 3, *Harris Cty. Dep't of Educ.*, No. 4:12-cv-2190 (S.D. Tex. Sept. 6, 2012), D.E. 30 [hereinafter *Harris Cty. Dep't of Educ.* Opinion], 2012 WL 3886427.

1258. *Id.* at 3–4.

1259. *Id.* at 4.

1260. *Id.*

1261. *Id.*

1262. *Id.*

1263. *Id.*

1264. Intervention Motion, *id.* (July 30, 2012), D.E. 13.

1265. Docket Sheet, *id.* (July 20, 2012) (D.E. 16).

1266. *Id.*; *see* Mike Morris, *Education Lawsuit Fails to Stop Runoff*, Hous. Chron., July 31, 2012, at 2.

1267. *Harris Cty. Dep't of Educ.* Opinion, *supra* note 1257, at 4.

mary-election leader] would have received the majority needed to win the primary outright, obviating the need for the July runoff that he lost."[1268]

After the runoff election, the runoff-election victor[1269] and the county's Republican Party[1270] moved on August 3 to intervene as defendants. A voter moved to intervene thirteen days later.[1271] Judge Rosenthal granted all motions to intervene but the last, which was untimely.[1272]

Judge Rosenthal dismissed the action on September 6.[1273] There was no constitutional violation, because there was no showing that use of the wrong map was anything other than inadvertent.[1274] Moreover, the equities were squarely against the candidate who lost so decisively in the runoff primary election.[1275]

The new districting plan for the county commission had been precleared on December 30, 2011, but the court-ordered plan was used because preclearance happened so late in the election calendar.[1276] On August 1, 2013, Judge Gilmore determined that the county's new districting plan was not quite unconstitutional.[1277]

Redistricting the Bibb County School District

Miller v. Bibb County School District (Hugh Lawson, M.D. Ga. 5:12-cv-239)

> A June 26, 2012, federal complaint alleged malapportionment for a county board of education. The district judge delayed the pending primary election until the day scheduled for a possible runoff primary election to give the county enough time to adopt a precleared redistricting plan. By consent order, the judge awarded the plaintiffs attorney fees and costs.
>
> *Topics:* Malapportionment; enjoining elections; section 5 preclearance; attorney fees.

1268. *Id.* at 4–5.

1269. Intervention Motion, *Harris Cty. Dep't of Educ.*, No. 4:12-cv-2190 (S.D. Tex. Aug. 3, 2012), D.E. 17.

1270. Intervention Motion, *id.* (Aug. 3, 2012), D.E. 18.

1271. Intervention Motion, *id.* (Aug. 16, 2012), D.E. 25.

1272. *Harris Cty. Dep't of Educ.* Opinion, *supra* note 1257, at 2, 6, 16.

1273. *Id.* at 16; *see* Erin Mulvaney, *Federal Judge Dismisses Suit Over Flawed Primary*, Hous. Chron., Sept. 7, 2012, at 2 ("Sarah Langlois, general counsel for the department of education, said the judge's ruling will protect the department from any future challenges alleging violation of federal law. She said the suit was filed to make sure the board was properly and lawfully elected.").

1274. *Harris Cty. Dep't of Educ.* Opinion, *supra* note 1257, at 11–13.

1275. *Id.* at 15.

1276. Rodriguez v. Harris County, 964 F. Supp. 2d 686, 707 (S.D. Tex. 2013).

1277. *Id.* at 804–05, *aff'd*, 601 F. App'x 255 (5th Cir. 2015).

Three voters, including a school-board member and two school-board candidates, filed a federal complaint in the Middle District of Georgia on June 26, 2012, alleging malapportionment of districts for Bibb County's board of education.[1278] With their complaint, the plaintiffs filed a motion for an injunction against planned July 31 elections until the county adopted a precleared redistricting plan adopted by Georgia's legislature.[1279]

Judge Hugh Lawson set the matter for hearing on June 29.[1280] That day, he enjoined the county from using old district lines for the school board, and he delayed the primary elections for the school board from July 31 until August 21, the day for runoff primary elections for other offices.[1281]

By consent order, on December 7, Judge Lawson awarded the plaintiffs $60,000 in attorney fees and costs.[1282]

Preclearance of Court-Ordered Redistricting in Alaska

Samuelsen v. Treadwell (Sharon L. Gleason, D. Alaska 3:12-cv-118)

> Six days after the candidate filing deadline for Alaska's legislature, four voters filed a federal complaint in the District of Alaska claiming that although Alaska's initial 2011 redistricting had been precleared pursuant to section 5 of the Voting Rights Act, modifications ordered by Alaska's supreme court in May had not. On the day before a three-judge district court was to hear the case, the modifications were precleared.
>
> *Topics:* Section 5 preclearance; three-judge court; recusal; case assignment; primary election.

1278. Complaint, Miller v. Bibb Cty. School Dist., No. 5:12-cv-239 (M.D. Ga. June 26, 2012), D.E. 1; Stipulation, *id.* (June 28, 2012), D.E. 7; *see* Andrea Castillo, *Suit Challenging Bibb BOE Voting Maps Filed in Federal Court*, Macon Telegraph, June 26, 2012.

1279. Injunction Motion, *Miller*, No. 5:12-cv-239 (M.D. Ga. June 26, 2012), D.E. 3, 2012 WL 2529440; *see also* Andrea Castillo, *Department of Justice Approves Bibb School Board Maps*, Macon Telegraph, June 19, 2012 (reporting that the school district had qualified candidates for the upcoming election under the old map while preclearance of the new map was pending).

1280. Order, *Miller*, No. 5:12-cv-239 (M.D. Ga. June 26, 2012), D.E. 4.

1281. Injunction, *id.* (June 29, 2012), D.E. 9; *see id.* at 5 (finding that a runoff primary election would be unlikely for the school board but setting September 18 as the date for one if necessary); *see also Georgia Senate, Bibb School Board, Other Runoff Races on Tuesday's Ballots*, Macon Telegraph, Aug. 21, 2012; Amy Leigh Womack, *Bibb County School Board Elections Delayed*, Macon Telegraph, June 29, 2012.

1282. Consent Order, *Miller*, No. 5:12-cv-239 (M.D. Ga. Dec. 7, 2012), D.E. 33; *see* Andrea Castillo, *Bibb BOE, County Government Expected to Split Attorneys Fees*, Macon Telegraph, Dec. 4, 2012.

Six days after the June 1, 2012, candidate filing deadline for Alaska's legislature, four voters filed a federal complaint in the District of Alaska challenging legislative districting as not precleared pursuant to section 5 of the Voting Rights Act.[1283] According to the complaint, June 13, 2011, redistricting had been precleared, but changes that Alaska's supreme court determined were required by Alaska's constitution had been submitted for preclearance but not yet precleared.[1284] With their complaint, the plaintiffs filed motions for a temporary restraining order,[1285] a preliminary injunction,[1286] and the designation of a three-judge district court to hear their section 5 claim.[1287]

At a proceeding on Monday, June 11, Judge Sharon L. Gleason granted the motion for a three-judge court,[1288] set a hearing on the temporary-restraining-order motion for June 14,[1289] and ordered briefing on the preliminary-injunction motion completed by June 25.[1290]

On June 15, Judge Gleason denied the plaintiffs a temporary restraining order.[1291]

> [T]his single-judge court has authority to consider the plaintiffs' pending Motion for Temporary Restraining Order (TRO) and to enter a TRO if necessary to prevent "specified irreparable damage" until the three-judge court convenes to determine the plaintiffs' Motion for Preliminary Injunction. . . .
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> . . .
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> [A] temporary restraining order must be supported by findings of specified actual and immediate irreparable damage that necessitate action

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1283. Complaint, Samuelsen v. Treadwell, No. 3:12-cv-118 (D. Alaska June 7, 2012), D.E. 1 [hereinafter *Samuelsen* Complaint]; *see* Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination and requiring that preclearance disputes be heard by a three-judge district court).

On June 25, 2013, the Supreme Court declined to hold section 5 unconstitutional, but the Court did hold unconstitutional the criteria for which jurisdictions require section 5 preclearance. Shelby County v. Holder, 570 U.S. 529 (2013).

1284. *Samuelsen* Complaint, *supra* note 1283, at 5–6.

1285. Temporary-Restraining-Order Motion, *Samuelsen*, No. 3:12-cv-118 (D. Alaska June 7, 2012), D.E. 3.

1286. Preliminary-Injunction Motion, *id.* (D. Alaska June 7, 2012), D.E. 4.

1287. Three-Judge-Court Motion, *id.* (D. Alaska June 7, 2012), D.E. 6.

1288. Order, *id.* (D. Alaska June 11, 2012), D.E. 13.

1289. Amended Minutes, *id.* (D. Alaska June 11, 2012), D.E. 15.

1290. *Id.*

1291. Opinion, *id.* (D. Alaska June 15, 2012), D.E. 19, 2012 WL 2236637.

> by [a] single judge before a three-judge panel can convene and determine the issues.
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> . . .
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> [T]he primary election is not scheduled to occur until August 28, 2012. On May 22 the Alaska Supreme Court ordered the Division [of Elections] to use the "Interim Plan" for the 2012 election cycle, a plan that had not been precleared by DOJ. The plaintiffs did not file this action until June 7, 2012—16 days later and after the June 1, 2012 candidate filing deadline had passed. The approximate two week delay at this time until the three-judge panel convenes is comparable.[1292]

That same day, Chief Circuit Judge Alex Kozinski named himself and District Judge James K. Singleton to join Judge Gleason as the three-judge court.[1293] On June 19, Judge Gleason recused herself: "I have just been informed that a person within [the third] degree of relationship to me has on this date, June 19, 2012, accepted an employment offer to work on the election campaign of an individual who is a political party candidate for the August 28, 2012 Primary Election."[1294] The court reassigned the case to Judge Ralph R. Beistline.[1295]

Two days before the scheduled June 28 hearing,[1296] the three-judge court provided the parties with four questions to address at the hearing.[1297] On the following day, the defendants notified the court that the redistricting plan had been precleared.[1298] On that day, the court dismissed the action.[1299]

Redistricting the Sumter County School Board

Bird v. Sumter County Board of Education (W. Louis Sands, M.D. Ga. 1:12-cv-76)

> The district court enjoined July 31, 2012, primary elections for Sumter County, Georgia's board of education on a May 22 federal complaint. The relief was sought by both the voter plaintiff and the county defendants because of the state's failure to seek timely preclearance for new district lines reflecting the 2010 cen-

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1292. *Id.* at 3, 6, 8.

1293. Order, *id.* (D. Alaska June 15, 2012), D.E. 20.

Judge Kozinski retired on December 18, 2017. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

1294. Recusal Order, *Samuelsen*, No. 3:12-cv-118 (D. Alaska June 19, 2012), D.E. 22.

1295. Order, *id.* (D. Alaska June 20, 2012), D.E. 23.

1296. Order, *id.* (D. Alaska June 18, 2012), D.E. 21.

1297. Order, *id.* (D. Alaska June 26, 2012), D.E. 89.

1298. Notice, *id.* (D. Alaska June 27, 2012), D.E. 98.

1299. Order, *id.* (D. Alaska June 27, 2012), D.E. 101.

> sus. The judge permitted an interest group to intervene for the purpose of proposing a new district plan, but the judge decided to draw his own plan with the assistance of the legislature's reapportionment office.
>
> *Topics:* Malapportionment; enjoining elections; intervention; section 5 preclearance.

On May 22, 2012, a Sumter County voter filed a federal complaint in the Middle District of Georgia, alleging malapportionment of the county's board-of-education districts.[1300] According to the complaint, a preclearance request—pursuant to section 5 of the Voting Rights Act—for new districts reflecting the 2010 census was withdrawn on January 31 and the May 23–25 ballot-qualification period was nigh.[1301] The complaint sought injunctive relief, including a temporary restraining order.[1302]

On May 25, Judge W. Louis Sands set the matter for hearing on May 31.[1303] He instructed the attorneys to notify persons who qualified as candidates during the qualification period.[1304] A second hearing on the plaintiff's standing was set for June 15.[1305]

On June 21, Judge Sands enjoined the July 31 primary elections, an action sought by both the plaintiff and the defendants.[1306] Although the seat for the plaintiff's district was not up for reelection in 2012, Judge Sands

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1300. Complaint, Bird v. Sumter Cty. Bd. of Educ., No. 1:12-cv-76 (M.D. Ga. May 22, 2012), D.E. 1 [hereinafter *Bird* Complaint]; *see* Amended Complaint, *id.* (Aug. 24, 2012), D.E. 65 (substituting, pursuant to court order, the Sumter County School District for the Sumter County Board of Education).

1301. *Bird* Complaint, *supra* note 1300, at 9; *see* Keven Gilbert, *No Decision Yet in Bird vs Board of Education, Elections*, Americus Times-Recorder, June 16, 2012 (reporting that the board was concerned by the legislature's creating two at-large seats, which history suggested could not be won by Black candidates); *Hearing Held on Federal Lawsuit*, Americus Times-Recorder, June 2, 2012 (same); *see also* Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination).

1302. *Bird* Complaint, *supra* note 1300, at 16.

1303. Hearing Order, *Bird*, No. 1:12-cv-76 (M.D. Ga. May 29, 2012), D.E. 19 [hereinafter *Bird* Hearing Order]; *see* Transcript, *id.* (May 31, 2012, filed June 14, 2012), D.E. 46.

1304. *Bird* Hearing Order, *supra* note 1303.

1305. Injunction, *Bird*, No. 1:12-cv-76 (M.D. Ga. June 21, 2012), D.E. 50 [hereinafter *Bird* Injunction]; Minutes, *id.* (June 15, 2012), D.E. 49; Minutes, *id.* (May 31, 2012), D.E. 21.

1306. *Bird* Injunction, *supra* note 1305, at 10, 13; *see* Keven Gilbert, *Federal Judge Stops School Board Election*, Americus Times-Recorder, June 23, 2012.

determined that the overpopulation of the district afforded the plaintiff standing to challenge the apportionment.[1307]

The NAACP's Sumter County branch and seven persons moved on July 18 to intervene and propose district lines.[1308] No party opposed intervention, although the plaintiff opposed the intervenors' plan, and Judge Sands granted intervention as of right.[1309]

On March 28, 2013, Judge Sands appointed the legislative and congressional reapportionment office of Georgia's general assembly as an adviser to help him draw district lines.[1310] On the same day, he declined to adopt the NAACP's plan.[1311]

On June 28, Judge Sands ordered the parties to brief the court on the impact of the Supreme Court's June 25 holding in *Shelby County v. Holder*[1312] that although section 5 remained good law, the criteria for which jurisdictions were covered by section 5, which are provided by section 4,[1313] were unconstitutional.[1314] Judge Sands dismissed the action on October 28 as rendered moot by *Shelby County*.[1315]

Redistricting Clayton County's Board of Education

Adamson v. Clayton County Elections and Registration Board (Charles A. Pannell, Jr., N.D. Ga. 1:12-cv-1665)

> A May 11, 2012, federal complaint alleged malapportionment for a county board of education's district lines, because the lines had not been redrawn after the 2010 census. On the first day of the qualifying period for the primary election, the district judge heard the case and enjoined election procedures until the district lines could be redrawn. With the assistance of the state's reapportionment office, the judge adopted a new districting map in June. There was no primary election that year; all candidates ran

1307. *Bird* Injunction, *supra* note 1305, at 4–7.

1308. Redistricting Motion, *Bird*, No. 1:12-cv-76 (M.D. Ga. July 18, 2012), D.E. 54; Intervention Motion, *id.* (July 18, 2012), D.E. 53.

1309. Order, *id.* (Aug. 15, 2012), D.E. 60.

1310. Order, *id.* (Mar. 28, 2013), D.E. 70; *see* Keven Gilbert, *Federal Court to Propose District Map*, Americus Times-Recorder, Mar. 31, 2013.

1311. Order, *Bird*, No. 1:12-cv-76 (M.D. Ga. Mar. 28, 2013), D.E. 71; *see* Gilbert, *supra* note 1310.

1312. 570 U.S. 529 (2013).

1313. Voting Rights Act of 1965, Pub. L. No. 89-110, § 4, 79 Stat. 437, 438, *as amended*, 52 U.S.C. § 10303.

1314. Order, *Bird*, No. 1:12-cv-76 (M.D. Ga. June 28, 2013), D.E. 75.

1315. Opinion, *id.* (Oct. 28, 2013), D.E. 82, 2013 WL 5797653.

in the general election. The court assessed half of the expert's fees to each side.

Topics: Malapportionment; enjoining elections; case assignment.

Six of Clayton County's nine board-of-education members filed a federal complaint on May 11, 2012, alleging that the board's district lines were unconstitutionally unequal because they had not been redrawn after the 2010 census.[1316] District populations ranged from 21,551 to 37,680.[1317] The complaint observed that qualifying for the July 31 primary election would begin on May 23.[1318]

Senior Judge J. Owen Forrester recused himself, and the court reassigned the case to Judge Charles A. Pannell, Jr.[1319] Judge Pannell held a telephone conference with the parties on May 22.[1320] On May 23, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction against using the malapportioned districts.[1321] Judge Pannell granted the motion at an in-court hearing that day.[1322] His injunction, among other things, put the qualifying period on hold.[1323]

1316. Complaint, Anderson v. Clayton Cty. Elections & Registration Bd., No. 1:12-cv-1665 (N.D. Ga. May 11, 2012), D.E. 1 [hereinafter *Adamson* Complaint]; Adamson v. Clayton Cty. Elections & Registration Bd., 876 F. Supp. 2d 1347, 1349 (N.D. Ga. 2012).

1317. *Adamson*, 876 F. Supp. 2d at 1349.

1318. *Adamson* Complaint, *supra* note 1316, at 11.

1319. Reassignment Order, *Anderson*, No. 1:12-cv-1665 (N.D. Ga. May 22, 2012), D.E. 8.

Tim Reagan interviewed Judge Pannell for this report by telephone on February 5, 2013.

Judge Forrester died on July 1, 2014. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

1320. Minutes, *Anderson*, No. 1:12-cv-1665 (N.D. Ga. May 22, 2010), D.E. 10.

1321. Motion, *id.* (May 23, 2012), D.E. 12; *see* Opinion at 2, Adamson v. Clayton Cty. Elections & Registration Bd., *id.* (May 23, 2012), D.E. 15 [hereinafter *Adamson* Opinion] ("Counsel for all parties stipulated that a [temporary restraining order] and preliminary injunction was appropriate in this case, and counsel for the defendants waived the right to respond in writing to the motion and further waived any additional notice of the hearing."); *see also id.* at 1 n.1 (noting that the lead plaintiff's last name was Adamson and not Anderson).

1322. *Adamson* Opinion, *supra* note 1321; Minutes, *Anderson*, No. 1:12-cv-1665 (N.D. Ga. May 23, 2012), D.E. 14; *see* Curt Yeomans, *Federal Judge: Stop Clayton BOE Elections Immediately*, Clayton News Daily, May 24, 2012 (reporting also, "The school board approved a new map, which they argued was based on 2010 Census data, in January and they then submitted it to the Clayton County Legislative Delegation for legislative approval. It was never brought forth as a piece of legislation, however.").

1323. *Adamson* Opinion, *supra* note 1321, at 5.

On June 7, Judge Pannell appointed the legislative and congressional reapportionment office of Georgia's general assembly as an adviser to help him draw district lines.[1324] "Communications between the court and the independent technical advisor may be ex parte and shall be considered part of the judicial deliberative process and therefore shall not be subject to disclosure or subpoena except by court order."[1325]

Judge Pannell was able to near completion of a draft map after a few hours' work with the expert.[1326] The expert then made additional refinements to the draft map.[1327] Because the school-board members had overlapping terms, Judge Pannell tried to ensure that incumbents would remain in their districts.[1328]

On June 15, Judge Pannell filed a proposed map; proposed district populations deviated from the ideal size of 28,824 by 137 persons (0.48%) or fewer.[1329] At a June 28 hearing, he adopted his map.[1330] There would be no primary election; all candidates would run in the general election.[1331] This plan obviated the need for an expensive special election later.[1332]

On August 1, Judge Pannell ordered each side to pay its own attorney fees and half of the expert's fees of $3,062.50; Judge Pannell awarded costs to the plaintiffs.[1333]

Redistricting Kansas

Essex v. Kobach (Kathryn H. Vratil, D. Kan. 5:12-cv-4046)

Kansas was the last state to redraw district lines in light of the 2010 census, and a voter filed a federal action for court-drawn districts on May 3, 2012, a little over one month before candidate filing deadlines. After a day-and-a-half bench trial, a three-judge

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1324. Appointment Order, *Adamson*, No. 1:12-cv-1665 (N.D. Ga. June 7, 2012), D.E. 23 [hereinafter *Adamson* Appointment Order]; Adamson v. Clayton Cty. Elections & Registration Bd., 876 F. Supp. 2d 1347, 1353 (N.D. Ga. 2012).

1325. *Adamson* Appointment Order, *supra* note 1324, at 2.

1326. Interview with Judge Charles A. Pannell, Jr., Feb. 5, 2013.

1327. *Id.*

1328. *Id.*

1329. Order, *Adamson*, No. 1:12-cv-1665 (N.D. Ga. June 15, 2012), D.E. 29; *Adamson*, 876 F. Supp. 2d at 1355; *see* Curt Yeomans, *New BOE Map Drawn by Federal Judge*, Clayton News Daily, June 19, 2012.

1330. *Adamson*, 876 F. Supp. 2d 1347; Minutes, Anderson v. Clayton Cty. Elections & Registration Bd., No. 1:12-cv-1665 (N.D. Ga. June 28, 2012), D.E. 33; *see* Curt Yeomans, *School Board Elections Get Green Light*, Clayton News Daily, June 28, 2012.

1331. *Adamson*, 876 F. Supp. 2d at 1359.

1332. Interview with Judge Charles A. Pannell, Jr., Feb. 5, 2013.

1333. Order, *Adamson*, No. 1:12-cv-1665 (N.D. Ga. Aug. 1, 2012), D.E. 36.

> district court issued new district lines for congressional seats, the state legislature, and the state board of education on June 7. The court awarded the plaintiff and some intervenors $379,447.15 in attorney fees and expenses.
>
> *Topics:* Malapportionment; three-judge court; intervention; attorney fees.

On May 3, 2012, a Kansas voter filed a federal complaint against Kansas's secretary of state in the federal courthouse in Topeka, seeking reapportionment in light of the 2010 census for congressional districts, districts for both of Kansas's legislative houses, and state board-of-education districts.[1334]

On May 16, the secretary filed an answer,[1335] and on the following day he filed an unopposed motion to expedite resolution of the case:[1336] "In the increasingly unlikely event that the Kansas Legislature somehow manages to complete reapportionment plans at this late hour, a motion can [be] entered [at] that time to dismiss this case as moot."[1337]

On May 17, Judge Kathryn H. Vratil set a hearing for May 30 on proposed reapportionment plans.[1338] The hearing was later reset for May 29.[1339] On May 18, Chief Tenth Circuit Judge Mary Beck Briscoe appointed herself, Judge Vratil, and Judge John Lungstrum as a three-judge district court to preside over the reapportionment action.[1340]

1334. Complaint, Essex v. Kobach, No. 5:12-cv-4046 (D. Kan. May 3, 2012), D.E. 1; Essex v. Kobach, 874 F. Supp. 2d 1069, 1074, 1078 (D. Kan. 2012); *see* Tim Carpenter, *Redistricting Lawsuit Hits Federal Court*, Topeka Capital-J., May 4, 2012; *see also* Tim Carpenter, *Senate Passes Another Redistricting Map*, Topeka Capital-J., May 19, 2012 ("The lawsuit was filed by a Johnson County Republican precinct committeewoman, with ties to the House Republican leadership.").

1335. Answer, *Essex*, No. 5:12-cv-4046 (D. Kan. May 16, 2012), D.E. 8; *Essex*, 874 F. Supp. 2d at 1078; *see* Tim Carpenter, *Kobach Asks a Federal Court to Settle Redistricting*, Topeka Capital-J., May 17, 2012; Steve Kraske & Brad Cooper, *Kobach Asks Federal Judges to Redraw Kansas Districts*, Kan. City Star, May 16, 2012 (also reporting, "Of the 50 states, Kansas now stands as the only one that has yet to draw new congressional boundaries.").

1336. Expedition Motion, *Essex*, No. 5:12-cv-4046 (D. Kan. May 17, 2012), D.E. 9 [hereinafter *Essex* Expedition Motion]; *Essex*, 874 F. Supp. 2d at 1078.

1337. *Essex* Expedition Motion, *supra* note 1336, at 2.

1338. Docket Sheet, *Essex*, No. 5:12-cv-4046 (D. Kan. May 3, 2012) [hereinafter *Essex* Docket Sheet].

Tim Reagan interviewed Judge Vratil for this report by telephone on July 8, 2013.

1339. *Essex* Docket Sheet, *supra* note 1338.

1340. Order, *Essex*, No. 5:12-cv-4046 (D. Kan. May 18, 2012), D.E. 13.

From May 18 through May 21, thirteen voters, including some elected representatives, filed seven motions to intervene,[1341] and the three-judge court granted intervention at a status hearing on May 21.[1342] Also on May 21, Kansas's attorney general and thirteen other voters, including elected representatives and a local party chair, filed eight additional motions to intervene,[1343] which the court granted on May 23 and 24.[1344]

On May 22, Judge Vratil issued an order for the court informing the parties that the unconstitutionality of existing districts was uncontested and that proposals for congressional districts would be considered from 9:00 a.m. to noon on May 29, for the state legislature from 1:00 to 5:00 p.m., and for the state board of education on the following morning.[1345] Because of the public interest in the case, the court used a Tenth Circuit courtroom for the proceedings, which was larger than Judge Vratil's courtroom and which could more easily accommodate three judges and the large number of litigants.[1346]

The court established a special website for public access to the case file and other information about the case.[1347] As a pilot court for cameras in the courtroom, the court also recorded the proceedings on video.[1348] Because video recording was not customary in the court of appeals, recording equipment had to be brought in for this case.[1349]

1341. Intervention Motions, *id.* (May 18–21, 2012), D.E. 16, 20, 23, 26, 37, 41, 44.

1342. Intervention Order, *id.* (May 25, 2012), D.E. 47, 2012 WL 1901284 [hereinafter *Essex* Intervention Order]; Minutes, *id.* (May 21, 2012), D.E. 47; Essex v. Kobach, 874 F. Supp. 2d 1069, 1078–79 (D. Kan. 2012) ("Most of the intervenors have unabashedly political reasons for intervening, and they seek to advance their respective political agendas by arguing for and against various maps that the legislature considered . . . ."); *see* Andy Marso, *Court Adds More Plaintiffs*, Topeka Capital-J., May 22, 2012.

1343. Intervention Motions, *Essex*, No. 5:12-cv-4046 (D. Kan. May 21, 2012), D.E. 54, 56, 59, 60, 62, 65, 68, 72.

1344. *Essex* Intervention Order, *supra* note 1342; *Essex* Docket Sheet, *supra* note 1338.

1345. Trial Order, *Essex*, No. 5:12-cv-4046 (D. Kan. May 22, 2012), D.E. 82; *see* Brad Cooper, *Judges Will Now Draw Kansas Political Districts*, Kan. City Star, May 30, 2012; Andy Marso & Aly Van Dyke, *Differing Maps Presented to Court*, Topeka Capital-J., May 30, 2012.

1346. Interview with Judge Kathryn H. Vratil, July 8, 2013.

1347. Robyn Renee Essex v. Kris W. Kobach, Kansas Secretary of State (Civil Action No. 12-4046-KHV-MBB-JWL) (Redistricting Case), www.ksd.uscourts.gov/redistricting-case/, *archived at* web.archive.org/web/20170803020523/www.ksd.uscourts.gov/redistricting-case/; *see* Andy Marso, *Redistricting Trial to Begin*, Topeka Capital-J., May 28, 2012.

1348. Essex, et al. v. Kobach et al., www.uscourts.gov/Multimedia/Cameras/DistrictofKansas/12-cv-4046.aspx.

1349. Interview with Judge Kathryn H. Vratil, July 8, 2013.

With the assistance of an analyst employed by the Kansas Legislative Research Department,[1350] the judges began the process of drawing district lines immediately after court proceedings.[1351] Hardware and software were set up in Judge Vratil's chambers, and the analyst worked with the judges in confidence.[1352]

The court announced new districting plans late at night on June 7.[1353] Traffic to the court's website nearly crashed the site.[1354]

> The Secretary of State advised us of the June 11, 2012 filing deadline that candidates for Congress, the state legislature and the Kansas Board of Education face, and we have endeavored to complete this order as expeditiously as possible to permit that deadline to remain in place.
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> . . .
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> . . . Thanks to impressive focus, industry and organization by dozens of lawyers, the Court was in a position to receive a huge volume of evidence on short notice, in a highly compressed and efficient format. . . . [N]one of the proposed plans are both constitutional and fully comport with the non-constitutional criteria that apply to redistricting plans approved or crafted in a judicial context. As a result, the Court has regretfully resorted to the painstaking task of drawing its own plans.[1355]

The court awarded both the original plaintiff and some intervening plaintiffs a total of $379,447.15 in attorney fees and expenses.[1356]

A Transitionally Unrepresented District Because of District Restructuring

NAACP—Greensboro Branch v. Guilford County Board of Elections (William L. Osteen, Jr., M.D.N.C. 1:12-cv-111)

> The state's restructuring of a county board of commissioners would result in a two-year transition period with one district unrepresented and another district with two representatives. The district judge declined to enjoin the beginning of the candidate filing period, but on further hearing provisionally enjoined the election. The court's ultimate remedy was to swap the election schedule for two districts so that an election would be held for

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1350. Essex v. Kobach, 874 F. Supp. 2d 1069, 1079 (D. Kan. 2012).

1351. Interview with Judge Kathryn H. Vratil, July 8, 2013.

1352. *Id.*

1353. *Essex*, 874 F. Supp. 2d 1069 (comprising 194 reporter pages); *see* Steve Kraske & Dave Helling, *Federal Judges Impose New Kansas Political Lines*, Kan. City Star, June 8, 2012.

1354. Interview with Judge Kathryn H. Vratil, July 8, 2013.

1355. *Essex*, 874 F. Supp. 2d at 1074, 1079.

1356. Opinion, Essex v. Kobach, No. 5:12-cv-4046 (D. Kan. June 6, 2013), D.E. 328.

> the district that would otherwise be unrepresented instead of another district, an election for which would be held two years later. The state resolved the issue of double representation by appointing one of the duplicate representatives to an at-large seat.
>
> *Topics:* Equal protection; enjoining elections.

The Greensboro branch of the NAACP and two voters filed a federal complaint in the Middle District of North Carolina on February 2, 2012, eleven days before the beginning of a filing period for candidates for Guilford County's board of commissioners, alleging that a state-mandated change in commission structure from eleven members, two at large, to nine members, one at large, would result in a two-year transition period in which districts could have no representative or multiple representatives.[1357] According to the complaint, for example, no incumbent resided in the newly drawn district 6, but an election for district 6 was not scheduled until 2014.[1358] On the other hand, two incumbents resided in district 3, which also was not scheduled for an election until 2014.[1359]

Five days after filing their complaint, the plaintiffs filed separate motions for a temporary restraining order[1360] and a preliminary injunction.[1361] Judge William L. Osteen, Jr., held a status conference on February 9 and set the case for hearing on February 17.[1362] He ruled on February 13 that the plaintiffs did not need immediate relief in advance of the February 17 hearing, because although the filing period had opened, it would not close until February 29.[1363] On February 17, he enjoined the election.[1364]

1357. Complaint, NAACP—Greensboro Branch v. Guilford Cty. Bd. of Elections, No. 1:12-cv-111 (M.D.N.C. Feb. 2, 2012), D.E. 1 [hereinafter *NAACP—Greensboro Branch* Complaint]; NAACP—Greensboro Branch v. Guilford Cty. Bd. of Elections, 858 F. Supp. 2d 516, 518 (M.D.N.C. 2012); *see* Taft Wireback, *Challenge to Redistricting Law Filed*, Greensboro News & Rec., Feb. 3, 2012, at A2.

1358. *NAACP—Greensboro Branch* Complaint, *supra* note 1357, at 6–7.

1359. *Id.*

1360. Temporary-Restraining-Order Motion, *NAACP—Greensboro Branch*, No. 1:12-cv-111 (M.D.N.C. Feb. 7, 2012), D.E. 9; *NAACP—Greensboro Branch*, 858 F. Supp. 2d at 517–18.

1361. Preliminary-Injunction Motion, *NAACP—Greensboro Branch*, No. 1:12-cv-111 (M.D.N.C. Feb. 7, 2012), D.E. 12; *see* Joe Killian, *Filing Period May Be Held Up*, Greensboro News & Rec., Feb. 8, 2012, at A1.

1362. Docket Sheet, *NAACP—Greensboro Branch*, No. 1:12-cv-111 (M.D.N.C. Feb. 2, 2012) [hereinafter *NAACP—Greensboro Branch* Docket Sheet]; *see* Joe Killian, *Judge May Rule on Delay in Filing by Next Week*, Greensboro News & Rec., Feb. 10, 2012, at A1.

1363. Order, *NAACP—Greensboro Branch*, No. 1:12-cv-111 (M.D.N.C. Feb. 13, 2012), D.E. 19; *NAACP—Greensboro Branch*, 858 F. Supp. 2d at 518; *see* Robert C. Lopez, *Judge Doesn't Halt Filing for County*, Greensboro News & Rec., Feb. 14, 2012, at A1.

Judge Osteen decided on February 23 that a 2012 election in district 6 should substitute for the 2012 election in district 7 to avoid a two-year vacancy for district 6.[1365] He explained his reasoning more fully in a published March 14 opinion.[1366] He acknowledged that he left unresolved the problem of two representatives for district 3:[1367] "[This matter is] not appropriately addressed as part of preliminary injunctive relief as there is no threat of irreparable harm in the absence of injunctive relief."[1368]

Legislative action established one of the two district 3 representatives as the at-large representative until 2014.[1369] The parties stipulated on September 18 to a dismissal of the action.[1370]

Using an Old Legislative Districting Plan

Smith v. Aichele (2:12-cv-488), Garcia v. 2011 Legislative Reapportionment Commission (2:12-cv-556), and Pileggi v. Aichele (2:12-cv-588) (R. Barclay Surrick, E.D. Pa.)

> From January 30 through February 3, 2012, three federal complaints sought to block April 24 primary legislative elections because the district lines were based on the 2000 census. On February 8, the judge denied all requests to delay the primaries. On March 17, 2014, the court of appeals affirmed a judgment against voters because the voters did not reside in districts with legislative seats up for election in 2012.
>
> *Topics:* Malapportionment; enjoining elections.

On Friday, February 3, 2012, the Republican majority leaders of both houses of Pennsylvania's legislature and another voter filed a federal complaint seeking to enjoin Pennsylvania's secretary of the commonwealth from using in April 24 primary elections legislative district lines based on

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1364. Order, *NAACP—Greensboro Branch*, No. 1:12-cv-111 (M.D.N.C. Feb. 17, 2012), D.E. 26; *NAACP—Greensboro Branch*, 858 F. Supp. 2d at 517–18; *see* Joe Killian, *Judge Freezes Filings for Now*, Greensboro News & Rec., Feb. 18, 2012, at A1.

1365. Amended Order, *NAACP—Greensboro Branch*, No. 1:12-cv-111 (M.D.N.C. Feb. 27, 2012), D.E. 37; *NAACP—Greensboro Branch* Docket Sheet, *supra* note 1362; *NAACP—Greensboro Branch*, 858 F. Supp. 2d at 517; *see* Joe Killian, *Judge OKs Commissioners Filing*, Greensboro News & Rec., Feb. 24, 2012, at A1.

1366. *NAACP—Greensboro Branch*, 858 F. Supp. 2d 516.

1367. *Id.* at 531.

1368. *Id.*

1369. *See* Morgan Josey Glover, *Bill Will Put Cashion in At-Large Seat*, Greensboro News & Rec., May 17, 2012, at A1; David Nivens, *GOP Takes Control of Guilford County Board of Commissioners*, High Point Enterprise, Dec. 3, 2012.

1370. Stipulation, *NAACP—Greensboro Branch*, No. 1:12-cv-111 (M.D.N.C. Sept. 18, 2012), D.E. 44.

the 2000 census after litigation successfully blocked a districting plan based on the 2010 census.[1371] With their complaint, the plaintiffs filed a motion for a temporary restraining order, a preliminary injunction, a permanent injunction, and a three-judge district court to hear their apportionment challenge.[1372]

The court assigned the case to Judge R. Barclay Surrick, who issued an order on the day the case was filed for hearing on the following Monday.[1373] On the day of the hearing, Democratic leaders moved to intervene in opposition to the plaintiffs.[1374] Without ruling on the intervention motion, Judge Surrick permitted the Democratic leaders to participate in the Monday hearing, over the plaintiffs' objection.[1375]

Pennsylvania's supreme court had determined on January 25 that a district plan based on the 2010 census was unconstitutional, and the court issued its opinion supporting its order on February 3.[1376] On January 30, the speaker of Pennsylvania's house of representatives filed a federal suit to block use of district lines based on the 2000 census.[1377] On February 2, the speaker filed a motion to convene a three-judge district court.[1378] Three voters filed a federal complaint against the secretary and the 2011 Legislative Reapportionment Commission to block use of 2000-census lines.[1379] On February 6, the voters moved for a temporary restraining order and a three-judge panel.[1380] Judge Surrick heard from all parties in all three actions at the February 6 hearing.[1381]

1371. Complaint, Pileggi v. Aichele, No. 2:12-cv-588 (E.D. Pa. Feb. 3, 2012), D.E. 1; Pileggi v. Aichele, 843 F. Supp. 2d 584, 587–89 (E.D. Pa. 2012).

1372. Motion, *Pileggi*, No. 2:12-cv-588 (E.D. Pa. Feb. 3, 2012), D.E. 2; *Pileggi*, 843 F. Supp. 2d at 585.

1373. Order, *Pileggi*, No. 2:12-cv-588 (E.D. Pa. Feb. 3, 2012), D.E. 10.

1374. Intervention Motion, *id.* (Feb. 6, 2012), D.E. 11; *Pileggi*, 843 F. Supp. 2d at 591.

1375. Transcript at 10–11, Garcia v. 2011 Legislative Reapportionment Comm'n, No. 2:12-cv-556 (E.D. Pa. Feb. 6, 2012, filed May 7, 2012), D.E. 17 [hereinafter *Garcia* Transcript].

1376. Holt v. 2011 Legislative Reapportionment Comm'n, 38 A.3d 711 (2012); *Pileggi*, 843 F. Supp. 2d at 588, 591.

1377. Complaint, Smith v. Aichele, No. 2:12-cv-488 (E.D. Pa. Jan. 30, 2012), D.E. 1; *Pileggi*, 843 F. Supp. 2d at 589.

1378. Motion, *Smith*, No. 2:12-cv-488 (E.D. Pa. Feb. 3, 2012), D.E. 6; *Pileggi*, 843 F. Supp. 2d at 589.

1379. Complaint, *Garcia*, No. 2:12-cv-556 (E.D. Pa. Feb. 2, 2012), D.E. 1; *Pileggi*, 843 F. Supp. 2d at 589.

1380. Motion, *Garcia*, No. 2:12-cv-556 (E.D. Pa. Feb. 6, 2012), D.E. 2; *Pileggi*, 843 F. Supp. 2d at 589.

1381. *Garcia* Transcript, *supra* note 1375, at 4.

On February 8, Judge Surrick denied all requests to delay the primary elections.[1382] He determined that the public's interest in an orderly election process and the voters' interest in full participation in the presidential nomination process outweighed the injunctive relief requested.[1383] Because the relief requested was unreasonable, the plaintiffs were not entitled to a three-judge court.[1384]

On April 8, 2013, Judge Surrick ruled for the defendants in the voters' action, concluding that "Pennsylvania has a reasonably conceived plan for periodic reapportionment."[1385] The court of appeals affirmed Judge Surrick's decision on March 17, 2014.[1386] Because the appellants "are residents of even-numbered districts and were not eligible to vote in the 2012 election," the court found that the "appellants lack standing to pursue a claim of vote dilution with respect to the 2012 senatorial election."[1387]

On May 8, 2013, Pennsylvania's supreme court approved a plan filed on April 12, 2012.[1388]

The other actions were voluntarily dismissed in March[1389] and May[1390] of 2012.

Imminent Elections for a Districting Plan Not Yet Precleared

Petteway v. Galveston (Kenneth M. Hoyt, Emilio M. Garza, and Melinda Harmon, S.D. Tex. 3:11-cv-511)

> A federal complaint sought to enjoin the use of new county-commission district lines until the new lines could be precleared pursuant to section 5 of the Voting Rights Act. The district judge assigned the case issued a temporary restraining order, but the other two judges of a three-judge district court empaneled to hear the section 5 claim determined that the injunction was unnecessary while preclearance procedures were pending. Preclearance required adjustments to the new districting plan, and the court ordered adjustments to the election calendar to accommo-

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1382. *Pileggi*, 843 F. Supp. 2d at 585, 598; Order, Pileggi v. Aichele, No. 2:12-cv-588 (E.D. Pa. Feb. 8, 2012), D.E. 25 [hereinafter Feb. 8, 2012, *Pileggi* Order], 2012 WL 401122.

1383. *Pileggi*, 843 F. Supp. 2d at 592–97.

1384. *Id.* at 597–98; Feb. 8, 2012, *Pileggi* Order, *supra* note 1382.

1385. Garcia v. 2011 Legislative Reapportionment Comm'n, 938 F. Supp. 2d 542, 551 (E.D. Pa. 2013).

1386. Garcia v. 2011 Legislative Reapportionment Comm'n, 559 F. App'x 128 (3d Cir. 2014).

1387. *Id.* at 132.

1388. Holt v. 2011 Legislative Reapportionment Comm'n, 67 A.3d 1211 (Pa. 2013).

1389. Order, Pileggi v. Aichele, No. 2:12-cv-588 (E.D. Pa. Mar. 30, 2012), D.E. 28.

1390. Order, Smith v. Aichele, No. 2:12-cv-488 (E.D. Pa. May 31, 2012), D.E. 22.

> date the late-drawn district lines. The district judge assigned the case awarded attorney fees and costs to the plaintiffs, but the court of appeals determined that they were not prevailing parties in the litigation because the injunction did not have an impact on the preclearance process.
>
> *Topics:* Section 5 preclearance; malapportionment; three-judge court; enjoining elections; attorney fees; intervention.

County incumbents filed a federal complaint on November 14, 2011, alleging that new district lines for their offices drawn after the 2010 census and to be used in 2012 elections violated the U.S. Constitution and the Voting Rights Act.[1391] In addition to a voter, the plaintiffs included two county commissioners, two justices of the peace, and three constables.[1392] With the complaint, the plaintiffs filed an application for a temporary restraining order and a preliminary injunction[1393] and an application for a three-judge district court to hear a challenge to the new districts as not precleared pursuant to section 5 of the Voting Rights Act.[1394]

The new district lines retained four precincts for the county commission and reduced the number of precincts for constables and justices of the peace from eight to five.[1395] The county's litigation position was that preclearance was pending and the new lines would not be used until they had been precleared.[1396] Preclearance was sought on October 14, and the Justice Department's response was due on December 13.[1397] The scheduled candidacy filing period for March 6 primary elections was November 28 to December 15.[1398]

1391. Complaint, Petteway v. Galveston, No. 3:11-cv-511 (S.D. Tex. Nov. 14, 2011), D.E. 1 [hereinafter *Petteway* Complaint]; Petteway v. Henry, 738 F.3d 132, 135 (5th Cir. 2013); *see* Harvey Rice, *Suit Claims Galveston County Redistricting Illegal*, Hous. Chron., Nov. 17, 2011, at 2.

1392. *Petteway* Complaint, *supra* note 1391, at 8–10.

1393. Application, *Petteway*, No. 3:11-cv-511 (S.D. Tex. Nov. 14, 2011), D.E. 2; *see* Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination and requiring that preclearance disputes be heard by a three-judge district court).

1394. Application, *Petteway*, No. 3:11-cv-511 (S.D. Tex. Nov. 14, 2011), D.E. 3.

1395. *Petteway*, 738 F.3d at 135.

1396. *Id.*

1397. *Id.*; *see* Transcript at 18, *Petteway*, No. 3:11-cv-511 (S.D. Tex. Nov. 30, 2011, filed Dec. 5, 2011), D.E. 29 [hereinafter Nov. 30, 2011, *Petteway* Transcript].

1398. Transcript at 21–25, *Petteway*, No. 3:11-cv-511 (S.D. Tex. Nov. 21, 2011, filed Sept. 25, 2012), D.E. 96; Nov. 30, 2011, *Petteway* Transcript, *supra* note 1397, at 25–26.

The court set the case for hearing before Judge Kenneth M. Hoyt on November 21.[1399] Because the preclearance process was underway, Judge Hoyt denied the application for a three-judge court,[1400] but Judge Hoyt issued an order enjoining the use of district lines before they had been precleared.[1401]

On November 22, Judge Hoyt decided that a three-judge court was necessary after all[1402] and set another hearing for November 30.[1403] The circuit's chief judge appointed Circuit Judge Emilio M. Garza[1404] and District Judge Melinda Harmon, Southern District of Texas, to join Judge Hoyt on the three-judge court.[1405] On November 23, Judge Hoyt ordered briefing on "the constitutional permissibility of permitting the current, uncleared plan to be implemented versus conducting an election under the old Commissioners' Court map."[1406]

The defendants' brief explained that if new precinct lines for justices of the peace and constables were not precleared in time, old lines could be used, because precinct boundaries were properly set more to reflect caseload than to reflect population.[1407] For the county commission, the plaintiffs proposed a districting plan for the court to adopt while preclearance of the county's plan was pending.[1408] Three other voters moved to intervene so that they could propose an alternative plan,[1409] and the court granted intervention.[1410] The court denied[1411] a motion[1412] by the intervenors to delay the litigation.

1399. Notice, *Petteway*, No. 3:11-cv-511 (S.D. Tex. Nov. 15, 2011), D.E. 4; Docket Sheet, *id.* (Nov. 14, 2011).

1400. Order, *id.* (Nov. 21, 2011), D.E. 10.

1401. Order, *id.* (Nov. 21, 2011), D.E. 11; Clarification Order, *id.* (Nov. 23, 2011), D.E. 16; *see* Harvey Rice, *Panel to Reconsider Voting Districts*, Hous. Chron., Nov. 24, 2011, at 3.

1402. Order, *Petteway*, No. 3:11-cv-511 (S.D. Tex. Nov. 22, 2011), D.E. 14.

1403. Order, *id.* (Nov. 22, 2011), D.E. 13.

1404. Judge Garza retired on January 5, 2015. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

1405. Order, *Petteway*, No. 3:11-cv-511 (S.D. Tex. Nov. 29, 2011), D.E. 19.

1406. Order, *id.* (Nov. 23, 2011), D.E. 15.

1407. Defendants' Brief at 4, *id.* (Nov. 28, 2011), D.E. 18; *see* Petteway v. Henry, 738 F.3d 132, 136 n.2 (5th Cir. 2013).

1408. Plaintiffs' Brief, *Petteway*, No. 3:11-cv-511 (S.D. Tex. Nov. 28, 2011), D.E. 17.

1409. Intervention Motion, *id.* (Nov. 30, 2011), D.E. 21.

1410. Nov. 30, 2011, *Petteway* Transcript, *supra* note 1397, at 11.

1411. *Id.* at 11, 33.

1412. Continuance Motion, *Petteway*, No. 3:11-cv-511 (S.D. Tex. Nov. 30, 2011), D.E. 22.

Judge Hoyt heard the case on November 30 and December 1, with Judges Harmon and Garza's chambers listening by telephone.[1413] On December 9, the court vacated the temporary restraining order and ruled that no remedy was necessary in advance of the December 13 deadline for preclearance response.[1414] Judge Hoyt dissented and would have adopted the plaintiffs' interim commission plan.[1415] Following a December 12 advisory by the plaintiffs that the Justice Department understood the preclearance deadline to be December 19, the court modified its order to postpone consideration of a remedy until December 19.[1416]

On December 20, the court ordered briefing by the following day on the status of the case.[1417] The plans were not precleared; on December 19, the Justice Department asked for additional information.[1418] On January 20, 2012, the court agreed to enjoin use of unprecleared plans but declined to yet adopt interim substitute plans.[1419]

The Justice Department found all of the plans retrogressive.[1420] Following a March 23, 2012, hearing on the status of the case,[1421] the court issued that day an order approving a negotiated substitute plan for the county commission and the use of the 2001 precinct lines for the constables and the justices of the peace.[1422] The court ordered adjustments to the primary-election calendar to accommodate the late adoption of the new district lines.[1423]

1413. Transcript, *id.* (Dec. 1, 2011, filed Dec. 5, 2011), D.E. 30; Nov. 30, 2011, *Petteway* Transcript, *supra* note 1397.

1414. Opinion, *Petteway*, No. 3:11-cv-511 (S.D. Tex. Dec. 9, 2011), D.E. 32, 2011 WL 6148674.

1415. *Id.* at 6–22.

1416. Amended Opinion, *id.* (Dec. 12, 2011), D.E. 34; *see* Advisory, *id.* (Dec. 12, 2011), D.E. 33.

1417. Order, *id.* (Dec. 20, 2011), D.E. 35.

1418. Ex. 1, Defendants' Brief, *id.* (Dec. 21, 2011), D.E. 36; Petteway v. Henry, 738 F.3d 132, 135 (5th Cir. 2013).

1419. Order, *Petteway*, No. 3:11-cv-511 (S.D. Tex. Jan. 20, 2012), D.E. 45; *Petteway*, 738 F.3d at 135.

1420. *Petteway*, 738 F.3d at 136; *see* Harvey Rice, *Feds Say New Map Dilutes Minority Vote*, Hous. Chron., Mar. 7, 2012, at 2.

1421. Transcript, *Petteway*, No. 3:11-cv-511 (S.D. Tex. Mar. 23, 2012, filed Sept. 15, 2012), D.E. 94 (Judge Garza, presiding).

1422. Order, *id.* (Mar. 23, 2012), D.E. 69 [hereinafter Mar. 23, 2012, *Petteway* Order]; *Petteway*, 738 F.3d at 136.

1423. Mar. 23, 2012, *Petteway* Order, *supra* note 1422.

On May 22, Judge Hoyt awarded the plaintiffs $254,790.28 in attorney fees and costs.[1424] The court of appeals, however, ruled on December 17, 2013, that the plaintiffs were not prevailing parties, because "the injunction had no effect on the implementation of the electoral map."[1425]

Court-Ordered County Precinct Lines While Preclearance Is Pending

Vasquez-Lopez v. Medina County (Orlando L. Garcia, W.D. Tex. 5:11-cv-945)

> Eighteen days before the beginning of a ballot-qualification period, a federal complaint challenged postcensus county redistricting as not precleared pursuant to section 5 of the Voting Rights Act. Thirteen days later, the district judge approved a districting plan proposed by the parties, and later the judge awarded the plaintiffs $35,546.93 in attorney fees and costs.
>
> *Topics:* Section 5 preclearance; malapportionment; attorney fees.

A federal complaint filed on November 10, 2011, in the Western District of Texas, eighteen days before the beginning of a ballot-qualification period for Medina County elections for county commissioners and justices of the peace, sought to enjoin a districting plan established after the 2010 census that had not yet received preclearance pursuant to section 5 of the Voting Rights Act.[1426] With their complaint, the plaintiffs—two voters—filed a motion for a temporary restraining order.[1427]

On the day that the complaint was filed, Judge Orlando L. Garcia granted the plaintiffs a temporary restraining order.[1428] Five days later, he ordered briefing on various issues, including, "If Medina County's proposed redistricting plans are not precleared before November 28, 2011, an

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1424. Order, *Petteway*, No. 3:11-cv-511 (S.D. Tex. May 22, 2012), D.E. 80 ($143,437.92 for the county commissioners); Order, *id.* (May 22, 2012), D.E. 79 ($111,332.36 for the other plaintiffs); *see Petteway*, 738 F.3d at 136; Order, *Petteway*, No. 3:11-cv-511 (S.D. Tex. July 10, 2012), D.E. 86 (denying reconsideration).

1425. *Petteway*, 738 F.3d 132, *cert. denied*, 573 U.S. 931 (2014).

1426. Complaint, Vasquez-Lopez v. Medina County, No. 5:11-cv-945 (W.D. Tex. Nov. 10, 2011), D.E. 2; *see* Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination).

1427. Temporary-Restraining-Order Motion, *Vasquez-Lopez*, No. 5:11-cv-945 (W.D. Tex. Nov. 10, 2011), D.E. 1.

1428. Temporary Restraining Order, *id.* (Nov. 10, 2011), D.E. 3.

interim court-ordered plan will be necessary for the 2012 elections to proceed in a timely fashion."[1429]

On November 22, the plaintiffs and the county reported that they had agreed on a proposed court-ordered plan.[1430] Judge Garcia approved the plan on the following day.[1431] On May 22, 2012, Judge Garcia awarded the plaintiffs $35,546.93 in attorney fees and costs.[1432]

Texas Redistricting in 2011

Davis v. Perry (Orlando L. Garcia, W.D. Tex. 5:11-cv-788)

> On September 22, 2011, six days after a three-judge redistricting bench trial on legislative and congressional districts in Texas, voters filed a federal complaint alleging dilution of minority voting strength in their districts. The court ordered the defendants to respond by October 3, and the case was consolidated with a collection of cases already underway. Seven years after the litigation began, the Supreme Court approved districting plans that reflected the political judgments of the state legislature as much as possible, modified by the district court only as necessary to cure legal defects.
>
> *Topics:* Malapportionment; three-judge court; case assignment; section 2 discrimination; section 5 preclearance; intervention; attorney fees; removal; pro se party.

On September 22, 2011, eight voters in four state senate districts filed in the Western District of Texas's San Antonio Division a federal complaint against state officials, alleging dilution of minority voting strength in their districts.[1433] The court assigned the case to Judge Orlando L. Garcia as related to previously filed districting challenges.[1434] On September 23, the circuit's chief judge appointed the judges presiding over Judge Garcia's related districting cases as a three-judge district court to hear the new case:

1429. Order at 2, *id.* (Nov. 15, 2011), D.E. 5.

1430. Joint Submission, *id.* (Nov. 22, 2011), D.E. 8.

1431. Order, *id.* (Nov. 23, 2011, filed Nov. 25, 2011), D.E. 9; *see* Order, *id.* (Dec. 8, 2011, filed Dec. 9, 2011), D.E. 11 (approving agreed election precincts).

1432. Order, *id.* (May 22, 2012, filed May 23, 2012), D.E. 18; *see* Fee Motion, *id.* (Dec. 21, 2011), D.E. 12.

1433. Complaint, Davis v. Perry, No. 5:11-cv-788 (W.D. Tex. Sept. 22, 2011), D.E. 1; Davis v. Abbott, 781 F.3d 207, 209–10 (5th Cir. 2015).

1434. Docket Sheet, *Davis*, No. 5:11-cv-788 (W.D. Tex. Sept. 22, 2011); *see* Abbott v. Perez, 585 U.S. ___, ___, 138 S. Ct. 2305, 2315 (2018). *See generally* Ari Berman, Give Us the Ballot 267–68, 298–99 (2015).

Judge Garcia, District Judge Xavier Rodriguez, also in San Antonio, and Circuit Judge Jerry E. Smith, whose chambers were in Houston.[1435]

On September 28, the three-judge court ordered defendants to respond to the complaint by October 3.[1436]

Cases Filed Earlier

The first of the consolidated cases was filed in San Antonio on May 9 by two voters seeking judicial intervention in the redistricting of Texas's senate, house of representatives, and state board of education in light of the 2010 census.[1437] The plaintiffs alleged that (1) instead of seeking districts with equal populations, Texas was aiming for disparities of no more than 10% and (2) Texas was improperly regarding prisoners as residents of their rural counties of incarceration, thereby diluting the voting strength of urban residents.[1438] The three-judge court was appointed on May 11.[1439] On May 31, the plaintiffs amended their complaint to include Texas's congressional districts.[1440] A second amended complaint filed on June 7 challenged only districts for Texas's house of representatives and its representation in Congress.[1441]

The second consolidated case was also filed on May 9 in San Antonio.[1442] The Mexican American Legislative Caucus (MALC) of Texas's house of representatives challenged Texas's congressional districting, the districting for Texas's legislature and state board of education, and at-large representation in Texas's railroad commission.[1443] In addition to malapportionment and discriminatory districting, MALC alleged that the census

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1435. Order, *Davis*, No. 5:11-cv-788 (W.D. Tex. Sept. 23, 2011), D.E. 4.

1436. Order, *id.* (Sept. 28, 2011), D.E. 7.

1437. Complaint, Perez v. Texas, No. 5:11-cv-360 (W.D. Tex. May 9, 2011), D.E. 1.

1438. *Id.*

1439. Order, *id.* (May 11, 2011), D.E. 4; *see* 28 U.S.C. § 2284(a) ("A district court of three judges shall be convened . . . when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.").

1440. First Amended Complaint, *Perez*, No. 5:11-cv-360 (W.D. Tex. May 31, 2011), D.E. 5.

1441. Second Amended Complaint, *id.* (June 7, 2011), D.E. 6; *see* Order, *id.* (June 17, 2011), D.E. 15 (permitting the second amended complaint); *see also* Third Amended Complaint, *id.* (July 19, 2011), D.E. 53.

1442. Complaint, Mexican Amer. Legislative Caucus v. Texas, No. 5:11-cv-361 (W.D. Tex. May 9, 2011), D.E. 1 [hereinafter *Mexican Amer. Legislative Caucus* Complaint]; *see* John W. Gonzalez, *Mexican American Legislators Claim Latinos Undercounted*, San Antonio Express-News, May 10, 2011, at 11A.

1443. *Mexican Amer. Legislative Caucus* Complaint, *supra* note 1442.

undercounted Latinos.[1444] An amended complaint omitted claims respecting Texas's senate and state board of education.[1445] The case was assigned to the same district judge and three-judge court as was the first case.[1446] The court granted intervention by the League of United Latin American Citizens (LULAC),[1447] the Texas Democratic Party,[1448] and Congressman Henry Cuellar.[1449]

A third consolidated case was filed in San Antonio on June 17: an action by the Texas Latino Redistricting Task Force and seven voters alleging malapportionment and Latino vote dilution in Texas's congressional and house-of-representatives districts.[1450]

Also on June 17, Judge Garcia filed an advisory in the three cases of his previous service in Texas's house of representatives and of his associations with a few current and former members.[1451] After a July 1 status conference, Judge Garcia consolidated the first three cases on July 6.[1452]

On July 25, the three-judge court granted[1453] motions to intervene in the consolidated actions by the Texas Legislative Black Caucus,[1454] three African American members of Congress,[1455] and the Texas NAACP with three members and voters.[1456]

A joint filing by the parties on June 29 identified four additional pending cases filed in Texas federal courts and seven in Texas state courts.[1457]

An action filed in the Eastern District on February 10 by three voters alleged the improper strengthening of Hispanic votes by including in cen-

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1444. *Id.*

1445. Amended Complaint, *Mexican Amer. Legislative Caucus*, No. 5:11-cv-361 (W.D. Tex. May 31, 2011), D.E. 4; *see* Second Amended Complaint, *Perez*, No. 5:11-cv-360 (W.D. Tex. July 19, 2011), D.E. 50.

1446. Order, *Mexican Amer. Legislative Caucus*, No. 5:11-cv-361 (W.D. Tex. May 10, 2011), D.E. 2; Docket Sheet, *id.* (May 9, 2011).

1447. Order, *id.* (July 6, 2011), D.E. 26.

1448. Order, *Perez*, No. 5:11-cv-360 (W.D. Tex. July 13, 2011), D.E. 31.

1449. Order, *id.* (July 15, 2011), D.E. 42.

1450. Complaint, Tex. Latino Redistricting Task Force v. Perry, No. 5:11-cv-490 (W.D. Tex. June 17, 2011), D.E. 1; *see* Second Amended Complaint, *id.* (July 25, 2011), D.E. 68; Amended Complaint, *id.* (June 30, 2011), D.E. 16; Order, *id.* (June 22, 2011), D.E. 6 (appointing a three-judge district court to hear the case).

1451. Advisory, *Perez*, No. 5:11-cv-360 (W.D. Tex. June 17, 2011), D.E. 14.

1452. Order, *id.* (July 6, 2011), D.E. 23.

1453. Order, *id.* (July 25, 2011), D.E. 67.

1454. Intervention Motion, *id.* (July 19, 2011), D.E. 60.

1455. Intervention Motion, *id.* (July 19, 2011), D.E. 61.

1456. Intervention Motion, *id.* (July 22, 2011), D.E. 64.

1457. Agreed Report, *id.* (June 29, 2011), D.E. 19.

sus data unauthorized immigrants who disproportionately resided among Hispanic citizens.[1458] On March 28, Judge Richard A. Schell granted MALC's motion to intervene as a defendant.[1459] At a June 23 status conference, Judge Schell discussed the plaintiffs' June 22 request for a three-judge court[1460] and agreed to request one.[1461] On July 8, he transferred the case to the earlier appointed three-judge court in the Western District.[1462] The Texas Latino Redistricting Task Force was permitted to intervene as a defendant on July 25.[1463] On July 26, however, the court granted the plaintiffs a voluntary dismissal.[1464]

On May 13, Texas removed to federal court in the Southern District of Texas an action filed by MALC in Hidalgo County's state court.[1465] On March 28, 2013, Judge Randy Crane granted the state's motion to transfer the case to the Western District.[1466] Judge Garcia remanded the case to state court, because the only federal issue was the accuracy of census methods, but MALC could not obtain relief from the state defendants respecting census procedures.[1467]

On May 30, 2011, the day that Texas's legislature adjourned a legislative session without drawing district lines for the state's increased representation in Congress, the City of Austin, Travis County, which includes Austin, and nine voters filed a federal action in the Western District's Austin Division seeking judicial oversight of congressional redistricting.[1468] An

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1458. Complaint, Teuber v. Texas, No. 4:11-cv-59 (E.D. Tex. Feb. 2, 2011), D.E. 1; *see* Second Amended Complaint, *id.* (June 22, 2011), D.E. 42; First Amended Complaint, *id.* (May 27, 2011), D.E. 33.

1459. Order, *id.* (Mar. 29, 2011), D.E. 13; *see* Intervention Motion, *id.* (Feb. 22, 2011), D.E. 3.

1460. Request, *id.* (June 22, 2011), D.E. 43; *see* Request, *id.* (June 27, 2011), D.E. 46 (corrected filing).

1461. Transcript at 13–34, *id.* (June 23, 2011, filed Sept. 1, 2011), D.E. 53; *see* Order, *id.* (July 6, 2011), D.E. 50 (appointing a three-judge district court consisting of Judges Schell, Smith, and Garcia).

1462. Order, *id.* (July 8, 2011), D.E. 52; *see* Docket Sheet, Teuber v. Texas, No. 5:11-cv-572 (W.D. Tex. July 11, 2011).

1463. Order, *Teuber*, No. 5:11-cv-572 (W.D. Tex. July 25, 2011), D.E. 65.

1464. Order, *id.* (July 26, 2011), D.E. 68.

1465. Notice of Removal, Mexican Amer. Legislative Caucus v. Texas, No. 7:11-cv-144 (S.D. Tex. May 13, 2011), D.E. 1.

1466. Order, *id.* (Mar. 28, 2013), D.E. 21; *see* Docket Sheet, Mexican Amer. Legislative Caucus v. Texas, No. 5:13-cv-261 (W.D. Tex. Apr. 1, 2013).

1467. Opinion, *Mexican Amer. Legislative Caucus*, No. 5:13-cv-261 (W.D. Tex. Dec. 18, 2013), D.E. 28.

1468. Complaint, Rodriguez v. Perry, No. 1:11-cv-451 (W.D. Tex. May 30, 2011),

amended complaint filed on July 18 challenged the congressional districts drawn in the legislature's special session.[1469] On July 6, the circuit's chief judge appointed Judge Lee Yeakel, to whom the case was originally assigned, and Judges Smith and Garcia as a three-judge court to hear the case.[1470] On July 27, Judges Smith and Garcia transferred the case to their three-judge court with Judge Rodriguez.[1471] Judge Yeakel dissented from the transfer.[1472] Judge Yeakel opined that the federal courts should follow the rule created by Texas's supreme court and regard the first case filed after the legislature adjourns following a new census as the first ripe case.[1473] Judge Yeakel also dissented from the consolidation of his congressional redistricting case with the districting cases respecting the state's representative bodies.[1474]

A pro se federal complaint filed on June 15 in the Southern District's Houston Division challenged new congressional district lines as drawn with improper political gerrymandering.[1475] On July 20, Judge Lee H. Rosenthal transferred the case to the Western District.[1476]

On June 17, Governor Rick Perry signed into law legislative redistricting of Texas's house of representatives, and on July 18 he signed into law legislative redistricting of Texas's representatives to Congress.[1477] Pursuant

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D.E. 1.

1469. Amended Complaint, *id.* (July 18, 2011), D.E. 23.

1470. Order, *id.* (July 6, 2011), D.E. 20.

Judge Yeakel retired on May 1, 2023. Federal Judicial Center Biographical Directory of Article III Federal Judges [hereinafter FJC Biographical Directory], www.fjc.gov/history/judges.

1471. Order, *Rodriguez*, No. 1:11-cv-451 (W.D. Tex. July 27, 2011), D.E. 29; *see* Docket Sheet, Rodriguez v. Perry, No. 5:11-cv-635 (W.D. Tex. May 30, 2011).

1472. Transfer Dissent, *Rodriguez*, No. 1:11-cv-451 (W.D. Tex. July 27, 2011), D.E. 30 [hereinafter *Rodriguez* Transfer Dissent], 2011 WL 3209075.

1473. *Id.* at 3–4; *see* Perry v. Del Rio, 66 S.W.3d 239 (Tex. 2001).

1474. *Rodriguez* Transfer Dissent, *supra* note 1472, at 5–6.

1475. Complaint, Morris v. Texas, No. 4:11-cv-2244 (S.D. Tex. June 15, 2011), D.E. 1; *see* Amended Complaint, *id.* (June 27, 2011), D.E. 7.

The three-judge court in the Western District denied a July 8, 2014, motion to amend the complaint. Docket Sheet, *Perez*, No. 5:11-cv-360 (W.D. Tex. May 9, 2011) [hereinafter *Perez* Docket Sheet]; *see* Motion to Amend Complaint, *id.* (July 8, 2014), D.E. 1128.

1476. Order, *Morris*, No. 4:11-cv-2244 (S.D. Tex. July 20, 2011), D.E. 24; *see* Order, Morris v. Texas, No. 5:11-cv-615 (W.D. Tex. July 26, 2011), D.E. 26 (appointing a three-judge district court).

1477. Perez v. Perry, 835 F. Supp. 2d 209, 211 (W.D. Tex. 2011); Pretrial Opinion, *Perez*, No. 5:11-cv-360 (W.D. Tex. Sept. 2, 2011), D.E. 285 [hereinafter *Perez* Pretrial Opinion], 2011 WL 9160142; *see* Texas v. United States, 831 F. Supp. 2d 244, 246 (D.D.C. 2011).

to section 5 of the Voting Rights Act,[1478] Texas sought preclearance of this redistricting, as well as redistricting for Texas's senate and its state board of education, by filing a civil action in the U.S. District Court for the District of Columbia on July 19.[1479]

A fourth federal case originally filed in San Antonio was filed by six voters on July 15 claiming that Texas's new congressional districts were "drawn to insure that population gains in minority communities from 2000 to 2010 did not afford minority voters increased electoral opportunity."[1480] This case joined the consolidation on July 21.[1481]

The Next Phase of the Litigation

On October 17, LULAC filed an action challenging Texas's senate districts,[1482] and this action joined the consolidation two days later.[1483]

In pretrial rulings on September 2, the three-judge court dismissed (1) political gerrymandering claims because their proponents had not specified a "reliable legal standard" for resolving them and (2) claims respecting the counting of prisoners as without a legal basis.[1484] The court conducted a bench trial from Tuesday, September 6, through Friday, September 16, including the intervening Saturday.[1485] On September 30, the

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1478. *See* Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination).

1479. Complaint, Texas v. United States, No. 1:11-cv-1303 (D.D.C. July 19, 2011), D.E. 1; Abbott v. Perez, 585 U.S. ___, ___, 138 S. Ct. 2305, 2315 (2018); Perry v. Perez, 565 U.S. 388, 391 (2012); Texas v. United States, 798 F.3d 1108, 1111 (D.C. Cir. 2015); Davis v. Abbott, 781 F.3d 207, 209 (5th Cir. 2015); Perez v. Abbott, 274 F. Supp. 3d 624, 632 & n.7 (W.D. Tex. 2017); Texas v. United States, 247 F. Supp. 3d 44, 47 (D.D.C. 2017); Texas v. United States, 49 F. Supp. 3d 27, 31–32 (D.D.C. 2014); Perez v. Texas, 970 F. Supp. 2d 593, 596 (W.D. Tex. 2013); Texas v. United States, 887 F. Supp. 2d 133, 138 (D.D.C. 2012); *Perez*, 835 F. Supp. 2d at 211; *Texas v. United States*, 831 F. Supp. 2d at 246–47.

1480. Complaint at 2, Quesada v. Perry, No. 5:11-cv-592 (W.D. Tex. July 15, 2011), D.E. 1; *see* Amended Complaint, *Perez*, No. 5:11-cv-360 (W.D. Tex. Aug. 2, 2011), D.E. 105; *see also* Nolan Hicks, *Democrats File New Suit*, San Antonio Express-News, July 16, 2011, at 1B.

1481. Order, *Quesada*, No. 5:11-cv-592 (W.D. Tex. July 21, 2011), D.E. 8; *see* Order, *id.* (July 20, 2011), D.E. 6 (appointing a three-judge district court).

1482. Complaint, LULAC v. Perry, No. 5:11-cv-855 (W.D. Tex. Oct. 17, 2011), D.E. 1.

1483. Order, *id.* (Oct. 19, 2011), D.E. 4.

1484. *Perez* Pretrial Opinion, *supra* note 1477, at 19–22, 24–25.

1485. Amended Interim Districting Scheduling Order, *Perez*, No. 5:11-cv-360 (W.D. Tex. Oct. 4, 2011), D.E. 391 [hereinafter *Perez* Amended Interim Districting Scheduling Order], 2011 WL 10843392; *Perez* Docket Sheet, *supra* note 1475.

court adopted a schedule for the creation of court-drawn interim districts should preclearance of the legislature's districts not be resolved; as amended, the order specified that hearings would begin on October 31.[1486]

Judge Rosemary M. Collyer drew the preclearance action in the District of Columbia and requested appointment of a three-judge court to hear the case, as required by section 5(a) of the Voting Rights Act.[1487] The circuit's chief judge appointed Circuit Judge Thomas B. Griffith and District Judge Beryl A. Howell to join Judge Collyer.[1488] The court granted seven motions to intervene.[1489] The court denied without prejudice intervention by the Texas Democratic Party, which did not take a position on the controversy but sought to protect its interests should a remedy affect election dates; the court determined that such a concern was premature.[1490]

Judge Collyer quickly determined that no party objected to the board-of-education districts, so the court granted Texas preclearance for them.[1491] So that the three-judge court in Texas would know whether it should proceed with the crafting of interim districts, the three-judge court in the District of Columbia issued a brief order on November 8, after briefing and oral argument on November 2, announcing its conclusion

> that the State of Texas used an improper standard or methodology to determine which districts afford minority voters the ability to elect their preferred candidates of choice and that there are material issues of fact in dispute that prevent this Court from entering declaratory judgment that

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1486. *Perez* Amended Interim Districting Scheduling Order, *supra* note 1485; *see* Order, *Perez*, No. 5:11-cv-360 (W.D. Tex. Sept. 30, 2011), D.E. 385 (order before amendment); *Perez* Docket Sheet, *supra* note 1475 (noting hearings on October 31 and November 3, 2011).

1487. Order, Texas v. United States, No. 1:11-cv-1303 (D.D.C. July 21, 2011), D.E. 4; Transcript at 6–7, *id.* (Sept. 21, 2011, filed Oct. 13, 2011), D.E. 71 [hereinafter Sept. 21, 2011, *Texas v. United States* Transcript]; *see* 52 U.S.C. § 10304(a).

1488. Order, *Texas v. United States*, No. 1:11-cv-1303 (D.D.C. July 27, 2011), D.E. 7.

Judge Griffith retired on September 1, 2020. FJC Biographical Directory, *supra* note 1470.

1489. Order, *Texas v. United States*, No. 1:11-cv-1303 (D.D.C. Sept. 29, 2011), D.E. 55; Order, *id.* (Sept. 8, 2011), D.E. 32; Order, *id.* (Aug. 16, 2011), D.E. 11; Texas v. United States, 798 F.3d 1108, 1111 (D.C. Cir. 2015); Texas v. United States, 49 F. Supp. 3d 27, 32 & n.2 (D.D.C. 2014); Texas v. United States, 887 F. Supp. 2d 133, 138 n.2 (D.D.C. 2012).

1490. Order, *Texas v. United States*, No. 1:11-cv-1303 (D.D.C. Oct. 7, 2011), D.E. 65.

1491. Docket Sheet, *id.* (July 19, 2011) (noting a minute order on September 22, 2011); Sept. 21, 2011, *Texas v. United States* Transcript, *supra* note 1487, at 8–15; *Texas v. United States*, 887 F. Supp. 2d at 138 n.1; *see* Texas v. United States, 831 F. Supp. 2d 244, 247 & n.3 (D.D.C. 2011).

> the three redistricting plans meet the requirements of Section 5 of the Voting Rights Act.[1492]

A complete published opinion followed on December 22.[1493]

"With the invaluable technical assistance of the staff at Texas Legislative Council,"[1494] the district judges on the Texas three-judge court announced on November 23 an interim districting plan for Texas's house of representatives[1495] and senate.[1496] Three days later, the court announced a districting plan for Texas's representation in Congress.[1497] The circuit judge, dissenting from the two house plans, would have given greater deference to enacted district lines.[1498] On December 8, the Supreme Court stayed the district court's ruling and set the matter for argument on January 9, 2012.[1499]

The Supreme Court's Rulings

On January 20, the Supreme Court vacated the district court's maps because they did not sufficiently incorporate Texas's political and policy judgments that were reflected in Texas's challenged maps.[1500] The district court should have deviated from the challenged maps only to correct

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1492. Order, *Texas v. United States*, No. 1:11-cv-1303 (D.D.C. Nov. 8, 2011), D.E. 106, 2011 WL 5402888; *see* Perry v. Perez, 565 U.S. 388, 391 (2012); *Texas v. United States*, 887 F. Supp. 2d at 139; Perez v. Abbott, 274 F. Supp. 3d 624, 633–34 (W.D. Tex. 2017); Perez v. Perry, 835 F. Supp. 2d 209, 211 (W.D. Tex. 2011); *see also* Nolan Hicks, *"Improper Standard or Methodology" Found*, San Antonio Express-News, Nov. 9, 2011, at 1B; *Trial on Redistricting Maps Is Ordered*, N.Y. Times, Nov. 9, 2011, at A21.

1493. *Texas v. United States*, 831 F. Supp. 2d 244; *see* Texas v. United States, 247 F. Supp. 3d 44, 47 (D.D.C. 2017); *Texas v. United States*, 887 F. Supp. 2d at 139.

1494. *Perez*, 835 F. Supp. 2d at 212.

1495. *Id.*, 835 F. Supp. 2d 209; Ex. A, Opinion, Perez v. Perry, No. 5:11-cv-360 (W.D. Tex. Nov. 23, 2011), D.E. 528; *see* Supplemental Opinion, *id.* (Dec. 2, 2011), D.E. 549.

1496. Order, Davis v. Perry, No. 5:11-cv-788 (W.D. Tex. Nov. 23, 2011), D.E. 89, 2011 WL 6207134.

1497. Order, *Perez*, No. 5:11-cv-360 (W.D. Tex. Nov. 26, 2011), D.E. 544 [hereinafter Nov. 26, 2011, *Perez* Order].

1498. *Perez*, 835 F. Supp. 2d at 218–27 (Judge Smith, dissenting); Nov. 26, 2011, *Perez* Order, *supra* note 1497, at 17–21 (same).

1499. Perry v. Perez, 565 U.S. 1090 (2011); Perry v. Davis, 565 U.S. 1090 (2011); Perry v. Perez, 565 U.S. 1090 (2011); Perry v. Perez, 565 U.S. 388, 392 (2012); Perez v. Texas, 970 F. Supp. 2d 593, 597 (W.D. Tex. 2013).

1500. *Perez*, 565 U.S. 388; Abbott v. Perez, 585 U.S. ___, ___, 138 S. Ct. 2305, 2316 (2018); Evenwel v. Abbott, 578 U.S. 54, 61–62 (2016); Texas v. United States, 49 F. Supp. 3d 27, 33 (D.D.C. 2014); *see* Daniel P. Tokaji, Election Law in a Nutshell 99–101 (2013); Todd J. Gillman & Gromer Jeffers, Jr., *Justices Reject Court's Remaps*, Dallas Morning News, Jan. 21, 2012, at A1; Adam Liptak, *Justices Reject Election Maps by U.S. Court*, N.Y. Times, Jan. 21, 2012, at A1.

probable constitutional or voting-rights violations.[1501] Although the court should have taken into account probable section 5 violations as well as probable violations of the claims before it, "The court should presume neither that a State's effort to preclear its plan will succeed nor that it will fail."[1502] The Texas three-judge court adopted new plans on February 28.[1503] The Supreme Court declined to stay these plans.[1504]

On August 28, the District of Columbia court "conclude[d] that Texas has failed to show that any of the redistricting plans merits preclearance."[1505]

In a case arising out of Alabama, the Supreme Court declined on June 25, 2013, to hold section 5 unconstitutional, but the Court did hold unconstitutional the criteria for which jurisdictions require section 5 preclearance.[1506] The Court vacated the denial of preclearance to Texas and re-

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1501. *Perez*, 565 U.S. at 393–97.

1502. *Id.* at 395.

1503. Perez v. Texas, 891 F. Supp. 2d 808 (W.D. Tex. 2012); Order, Davis v. Perry, No. 5:11-cv-788 (W.D. Tex. Feb. 28, 2012), D.E. 141 (Texas's senate); Order, Perez v. Perry, No. 5:11-cv-360 (W.D. Tex. Feb. 28, 2012), D.E. 682 (Texas's house of representatives); Order, *id.* (Feb. 28, 2012), D.E. 681 (U.S. House of Representatives); *Perez*, 970 F. Supp. 2d at 597; Texas v. United States, 887 F. Supp. 2d 133, 139 (D.D.C. 2012); *see* Perez v. Perry, 26 F. Supp. 3d 612, 614 (W.D. Tex. 2014); *see also Court Issues Election Maps*, Dallas Morning News, Feb. 29, 2012, at 1; Manny Fernandez, *Federal Judges Approve Final Texas Redistricting Maps*, N.Y. Times, Feb. 29, 2012, at A17; Nolan Hicks, *New Maps for Voting Are Released*, San Antonio Express-News, Feb. 29, 2012, at 1A.

1504. LULAC v. Perry, 567 U.S. 966 (2012).

1505. *Texas v. United States*, 887 F. Supp. 2d at 138; *see id.* at 178 ("We conclude that Texas has not met its burden to show that the U.S. Congressional and State House Plans will not have a retrogressive effect, and that the U.S. Congressional and State Senate Plans were not enacted with discriminatory purpose."); *Perez*, 585 U.S. at ___, 138 S. Ct. at 2316; Texas v. United States, 798 F.3d 1108, 1112 (D.C. Cir. 2015); *Texas v. United States*, 49 F. Supp. 3d at 33; Davis v. Abbott, 781 F.3d 207, 211 (5th Cir. 2015); *see also Perez*, 26 F. Supp. 3d at 614; *Perez*, 970 F. Supp. 2d at 597; Robert Barnes, *Federal Court Throws Out Texas Redistricting Plan, Citing Bias*, Wash. Post, Aug. 29, 2012, at A5; Manny Fernandez, *Federal Court Finds Texas Voting Maps Discriminatory*, N.Y. Times, Aug. 29, 2013, at A13; Gary Martin & Gary Scharrer, *Legislature's Redistricting Rule Illegal*, San Antonio Express-News, Aug. 29, 2012, at 1.

1506. Shelby County v. Holder, 570 U.S. 529 (2013); *see Perez*, 585 U.S. at ___, 138 S. Ct. at 2317; *Texas v. United States*, 798 F.3d at 1112, 1118 ("the Supreme Court did not invalidate Section 5; it only invalidated the formula used to determine which jurisdictions would be required to seek preclearance"); Perez v. Abbott, 274 F. Supp. 3d 624, 634 & n.11 (W.D. Tex. 2017); Texas v. United States, 247 F. Supp. 3d 44, 46–47 (D.D.C. 2017); *Texas v. United States*, 49 F. Supp. 3d at 33; *see also* Robert Barnes, *Court Blocks Key Part of Voting Rights Act*, Wash. Post, June 26, 2013, at A1; Adam Liptak, *Justices Void Oversight of States, Issue at Heart of Voting Rights Act*, N.Y. Times, June 26, 2013, at A1.

manded the case for further consideration in light of the change in section 5 law.[1507] On December 3, the district court dismissed the preclearance action as moot.[1508]

Attorney Fees

Later, the three-judge court determined that remaining matters, such as fee awards, could be addressed by Judge Collyer alone.[1509] She awarded intervenors who sought fees a total of $1,096,770.01 in attorney fees and costs on June 18, 2014.[1510]

> This matter presents a case study in how not to respond to a motion for attorney fees and costs. . . . [R]ather than engage the fee applicants, Plainitff Texas basically ignores the arguments supporting an award of fees and costs. In a three-page filing entitled "Advisory," Texas trumpets the Supreme Court's decision, expresses indignation at having to respond at all, and presumes that the motion for attorney fees is so frivolous that Texas need not provide further briefing in opposition unless requested. Such an opposition is insufficient in this jurisdiction. Circuit precedent and the Local Rules of this Court provide that the failure to respond to an opposing party's arguments results in waiver as to the unaddressed contentions, and the Court finds that Texas's "Advisory" presents no opposition on the applicable law. Accordingly, the Court will award the requested fees and costs.[1511]

The court of appeals affirmed the fee award on August 18, 2015.[1512] On March 30, 2017, Judge Collyer awarded the intervenors $226,894.67 in attorney fees for the appeal.[1513]

1507. Texas v. United States, 570 U.S. 928 (2013); *Texas v. United States*, 798 F.3d at 1112; *Perez*, 274 F. Supp. 3d at 634; *Texas v. United States*, 49 F. Supp. 3d at 33; *Perez*, 26 F. Supp. 3d at 615; *Perez*, 970 F. Supp. 2d at 598.

1508. Opinion, Texas v. United States, No. 1:11-cv-1303 (D.D.C. Dec. 3, 2013), D.E. 255 [hereinafter *Texas v. United States* Mootness Opinion]; *Perez*, 585 U.S. at ___, 138 S. Ct. at 2317; *Texas v. United States*, 798 F.3d at 1112; *Perez*, 274 F. Supp. 3d at 634; *Texas v. United States*, 49 F. Supp. 3d at 34.

1509. Order, *Texas v. United States*, No. 1:11-cv-1303 (D.D.C. Jan. 22, 2014), D.E. 263; *Texas v. United States*, 247 F. Supp. 3d at 47; *Texas v. United States*, 49 F. Supp. 3d at 34–35; *see Texas v. United States*, 798 F.3d at 1113; *Texas v. United States* Mootness Opinion, *supra* note 1508, at 4.

1510. *Texas v. United States*, 49 F. Supp. 3d at 44; *Texas v. United States*, 798 F.3d at 1113; *Texas v. United States*, 247 F. Supp. 3d at 46–48.

1511. *Texas v. United States*, 49 F. Supp. 3d at 31; *see* Advisory, *Texas v. United States*, No. 1:11-cv-1303 (D.D.C. Dec. 20, 2013), D.E. 259.

1512. *Texas v. United States*, 798 F.3d 1108, *cert. denied*, 577 U.S. 1119 (2016); *see id.* at 1116 ("To say that Texas 'prevailed' in this suit because a different litigant in a different suit won on different grounds that Texas specifically told the district court it would *not*

2013 District Lines

On June 26, 2013, Texas's governor signed into law new districting plans for Texas's senate, house of representatives, and representation in Congress.[1514] The senate plan was not challenged.[1515] Texas's legislature adopted the court's plan for Congress and made slight modifications to the court's plan for Texas's house.[1516]

The Justice Department advised the three-judge court in Texas on July 25 that if it found intentional voting discrimination in the cases before it, it was empowered under section 3(c) of the Voting Rights Act to retain jurisdiction over Texas's voting laws and subject them to preclearance requirements similar to those provided for in section 5.[1517] Over Judge Smith's dissent, Judges Garcia and Rodriguez granted the department's motion to intervene.[1518]

The court decided on September 6 to allow Texas to proceed with 2013 districts while the court further considered the merits of the plaintiffs' claims.[1519] In September, plaintiffs and intervenors filed eleven amended complaints.[1520] On June 17, 2014, the court unanimously determined that

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raise is, to say the least, an unnatural use of the word 'prevailing.'"); *Texas v. United States*, 247 F. Supp. 3d at 46–48; *see also* Order, *Texas v. United States*, No. 1:11-cv-1303 (D.D.C. Apr. 26, 2016), D.E. 279 (allocating the fee award among six law firms).

1513. *Texas v. United States*, 247 F. Supp. 3d 44; Order, *Texas v. United States*, No. 1:11-cv-1303 (D.D.C. Apr. 4, 2017), D.E. 290.

1514. Perez v. Perry, 26 F. Supp. 3d 612, 615; *Texas v. United States*, 798 F.3d at 1112; *Texas v. United States*, 49 F. Supp. 3d at 33; Advisory, Perez v. Texas, No. 5:11-cv-360 (W.D. Tex. June 27, 2013), D.E. 763; *see* Evenwel v. Abbott, 578 U.S. 54, 62 (2016).

1515. Perez v. Texas, 970 F. Supp. 2d 593, 596 n.1 (W.D. Tex. 2013); *see* Abbott v. Perez, 585 U.S. ___, ___, 138 S. Ct. 2305, 2316 (2018).

1516. *Perez*, 585 U.S. at ___, 138 S. Ct. at 2317; *Perez*, 970 F. Supp. 2d at 598, 606–07.

1517. Statement of Interest, *Perez*, No. 5:11-cv-360 (W.D. Tex. July 25, 2013), D.E. 827; *see* Voting Rights Act of 1965, Pub. L. No. 89-110, § 3(c), 79 Stat. 437, 437, *as amended*, 52 U.S.C. § 10302; *see also Perez*, 585 U.S. at ___, 138 S. Ct. at 2322; Marcia Coyle & Todd Ruger, *DOJ Messes with Texas Over VRA*, Nat'l L.J., July 29, 2013, at 11; Richard L. Hasen, *Holder's Texas-Size Gambit: Will It Save the Voting Rights Act?*, Nat'l L.J., Aug. 5, 2013, at 39; Sari Horwitz, *State Voting Laws to Be Challenged*, Wash. Post, July 26, 2013, at A1; Gromer Jeffers, Jr., *U.S. Challenges Texas on Election Laws*, Dallas Morning News, July 26, 2013, at A1; Adam Liptak & Charlie Savage, *U.S. Asks Court to Limit Texas on Ballot Rules*, N.Y. Times, July 26, 2013, at A1; Gary Martin, *U.S. Hits Texas on Voting Rights*, San Antonio Express-News, July 26, 2013, at 1.

1518. Opinion, *Perez*, No. 5:11-cv-360 (W.D. Tex. Sept. 24, 2013), D.E. 904; *see* Intervention Complaint, *id.* (Sept. 25, 2013).

1519. *Perez*, 970 F. Supp. 2d at 596, 606–09; *see Perez*, 585 U.S. at ___, 138 S. Ct. at 2313, 2317–18.

1520. Amended Crossclaim, *Perez*, No. 5:11-cv-360 (W.D. Tex. Sept. 18, 2013), D.E.

political-gerrymandering claims were nonjusticiable, but challenges to the 2011 plans were not moot.[1521] "[T]he State has steadfastly maintained the legality of *all* of the challenged conduct and has not announced any policy change that would preclude the Legislature from engaging in the same alleged wrongful conduct."[1522]

On January 8, 2014, the court awarded plaintiffs who challenged the senate districts $360,659.68 in attorney fees and expenses.[1523] An additional $2,718.75 was awarded on January 15.[1524] The court of appeals determined, however, on March 17, 2015, that the senate-district plaintiffs did not qualify as prevailing parties.[1525] On November 6, 2015, the three-judge court declined to enjoin the 2013 districts for 2016 elections.[1526]

One Impermissible Political Gerrymander

A new malapportionment challenge to Texas's senate districts was filed in Austin on April 21, 2014,[1527] and assigned to a three-judge court consisting of Judge Yeakel, Circuit Judge Catharina Haynes, and Eastern District Judge Michael H. Schneider.[1528] On November 5, the court held that the Equal Protection Clause did not require states to apportion their legislative

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902; Second Amended Complaint, *id.* (Sept. 18, 2013), D.E. 901; Third Amended Complaint, *id.* (Sept. 18, 2013), D.E. 900; Third Amended Complaint, *id.* (Sept. 18, 2013), D.E. 899; Fifth Amended Complaint, *id.* (Sept. 18, 2013), D.E. 898; Third Amended Complaint, *id.* (Sept. 17, 2013), D.E. 897; Second Amended Complaint, *id.* (Sept. 17, 2013), D.E. 896; Third Amended Complaint, *id.* (Sept. 15, 2013), D.E. 894; Second Amended Complaint, *id.* (Sept. 12, 2013), D.E. 893; First Amended Complaint, *id.* (Sept. 11, 2013), D.E. 892; Fourth Amended Complaint, *id.* (Sept. 9, 2013), D.E. 891.

1521. Perez v. Perry, 26 F. Supp. 3d 612 (W.D. Tex. 2014).

1522. *Id.* at 621.

The court held on June 23, 2014, that according to Fifth Circuit law, "vote dilution claims are not cognizable under the Fifteenth Amendment." Order, *Perez*, No. 5:11-cv-360 (W.D. Tex. June 23, 2014), D.E. 1108.

1523. Davis v. Perry, 991 F. Supp. 2d 809 (W.D. Tex. 2014), *rev'd*, Davis v. Abbott, 781 F.3d 207 (5th Cir. 2015).

The court determined that it was premature to resolve other fee motions. Opinion, *Perez*, No. 5:11-cv-360 (W.D. Tex. Jan. 8, 2014), D.E. 951, 2014 WL 69888.

1524. Supplemental Order, Davis v. Perry, No. 5:11-cv-788 (W.D. Tex. Jan. 15, 2014), D.E. 217, 2014 WL 172119; *Davis*, 781 F.3d at 213.

1525. *Davis*, 781 F.3d 207, *cert. denied*, 577 U.S. 1006 (2015).

1526. Opinion, *Perez*, No. 5:11-cv-360 (W.D. Tex. Nov. 6, 2015), D.E. 951, 2015 WL 6829596; *see* Abbott v. Perez, 585 U.S. ___, ___, 138 S. Ct. 2305, 2313, 2317–18 (2018).

1527. Complaint, Evenwel v. Perry, No. 1:14-cv-335 (W.D. Tex. Apr. 21, 2014), D.E. 1; Evenwel v. Abbott, 578 U.S. 54, 62 (2016).

1528. Order, *Evenwel*, No. 1:14-cv-335 (W.D. Tex. Apr. 28, 2014), D.E. 9.

Judge Schneider retired on October 1, 2016. FJC Biographical Directory, *supra* note 1470.

districts equally by both total population and voter population; equal total populations were enough.[1529] On April 4, 2016, the Supreme Court agreed.[1530]

Over Judge Smith's dissent, Judges Rodriguez and Garcia determined on March 10, 2017, that the 2011 plan for Texas's congressional districts was discriminatory in violation of section 2 of the Voting Rights Act.[1531] The court noted that "the 2013 plans are heavily derived from the 2011 plans, and Plaintiffs contend that many of the alleged violations of the [Voting Rights Act] and the Constitution initially enacted in 2011 persist in the 2013 plans, though some perhaps to a lesser degree."[1532] The court also noted that the section 3(c) question remained an open one.[1533] The court reached a similar decision on Texas's house of representatives on April 20.[1534]

In an August 15, 2017, order, the district court concluded "that the racially discriminatory intent and effects that it previously found in the 2011 plans carry over into the 2013 plans where those district lines remain unchanged."[1535] Justice Alito stayed this order on August 28 pending further

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1529. Opinion, *Evenwel*, No. 1:14-cv-335 (W.D. Tex. Nov. 5, 2014), D.E. 35, 2014 WL 5780507.

1530. *Evenwel*, 578 U.S. 54; *id.* at 64 ("As history, precedent and practice demonstrate, it is plainly permissible for jurisdictions to measure equalization by the total population of state and local legislative districts."); *see* Robert Barnes, *High Court Halts Effort to Redefine Voting Rights*, Wash. Post, Apr. 5, 2016, at A1; Adam Liptak, *Justices Reject Challenge on "One Person One Vote,"* N.Y. Times, Apr. 5, 2016, at A1; *see also* David Montgomery & Michael Wines, *District Fight May Persist in Texas After Ruling*, N.Y. Times, Apr. 5, 2016, at A14.

1531. Perez v. Abbott, 253 F. Supp. 3d 864, 879 (W.D. Tex. 2017) (amended opinion); *see* Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437, *as amended*, 52 U.S.C. § 10301; *see also Perez*, 585 U.S. at ___, 138 S. Ct. at 2317; Robert Barnes, *Gerrymandering by Tex. Lawmakers Aimed to Hurt Minorities, Judges Say*, Wash. Post, Mar. 12, 2017, at A4; Manny Fernandez, *Texas Congressional Maps Are Struck Down for Bias*, N.Y. Times, Mar. 12, 2017, at 21.

1532. *Perez*, 253 F. Supp. 3d at 874.

1533. *Id.* at 874–75.

1534. *Perez*, 585 U.S. at ___, 138 S. Ct. at 2317.

1535. Perez v. Abbott, 274 F. Supp. 3d 624, 652 (W.D. Tex. 2017) (reviewing congressional districts); *see* Perez v. Abbott, 267 F. Supp. 750 (W.D. Tex. 2017) (finding intentional discrimination in a review of state house-of-representatives districts); *see also Perez*, 585 U.S. at ___, 138 S. Ct. at 2317–18; James Barragán, *Texas Map Ordered Redone*, Dallas Morning News, Aug. 16, 2017, at A1; Sara Randazzo, *Court Says to Redraw Two Texas Districts*, Wall St. J., Aug. 16, 2017, at A2; James Barragán, *Court Orders Texas Remap*, Dallas Morning News, Aug. 25, 2017, at A1.

Supreme Court consideration.[1536] By a vote of five to four, the full Supreme Court extended the stay pending appeal.[1537]

The Supreme Court decided on June 25, 2018, that "[t]he 2013 Legislature was not obligated to show that it had 'cured' the unlawful intent that the court attributed to the 2011 Legislature."[1538] The Court approved the boundaries of all congressional and legislative districts, with the exception of one house district, which had been substantially modified from the district court's plan, and which the Supreme Court found to be "an impermissible racial gerrymander."[1539]

The district court decided on July 3 that however the racial gerrymander is remedied, "all the maps for the 2018 elections will remain the same as for 2016."[1540]

Although the Supreme Court decided in 2013 that the section 4 criteria for which jurisdictions were subject to section 5 preclearance of election changes were out of date, a jurisdiction could be adjudged subject to preclearance requirements pursuant to section 3 of the Voting Rights Act as an equitable remedy for a showing of invidious discrimination.[1541] Judges Rodriguez, Smith, and Garcia decided on July 24, 2019, that equitable considerations did not justify subjecting Texas to section 3 preclearance re-

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1536. Abbott v. Perez, 138 S. Ct. 1 (2017); *see* Allie Morris, *Redistricting Order Suspended*, San Antonio Express News, Sept. 1, 2017, at A2.

1537. Abbott v. Perez, 582 U.S. 963 (2017); *see* Robert Barnes, *Gerrymandering, Sales Tax in Supreme Court's Sights*, Wash. Post, Jan. 13, 2018, at A8; Robert Barnes, *Justices: Electoral Districts in Texas Needn't Shift Yet*, Wash. Post, Sept. 13, 2017, at A4; Adam Liptak, *Court Halts Redistricting in Texas as It Weighs Case*, N.Y. Times, Sept. 13, 2017, at A17.

The Supreme Court dismissed for want of jurisdiction precautionary appeals by some plaintiffs. Morris v. Texas, 583 U.S. 1090 (2018); Tex. Democratic Party v. Abbott, 583 U.S. 1090 (2018).

1538. *Perez*, 585 U.S. at ___, 138 S. Ct. at 2313; *see* Robert Barnes, *Supreme Court Favors Texas in Redistricting Case*, Wash. Post, June 26, 2018, at A4; Jess Bravin & Brent Kendall, *High Court Upholds Texas District Maps*, Wall St. J., June 26, 2018, at A2; Adam Liptak, *Texas Voting Map, Called Illegal, Is Upheld Because of an Error by a Lower Court*, N.Y. Times, June 26, 2018, at A20.

"The Court today goes out of its way to permit the State of Texas to use maps that the three-judge District Court unanimously found were adopted for the purpose of preserving the racial discrimination that tainted its previous maps." *Perez*, 585 U.S. at ___, 138 S. Ct. at 2335 (Justice Sotomayor, dissenting).

1539. *Perez*, 585 U.S. at ___, 138 S. Ct. at 2330, 2334–35.

1540. Order, Perez v. Perry, No. 5:11-cv-360 (W.D. Tex. July 3, 2018), D.E. 1586.

1541. 52 U.S.C. § 10302(c); *see, e.g.*, Patino v. City of Pasadena, 230 F. Supp. 3d 667, 730–31 (S.D. Tex.), *stay denied*, 677 F. App'x 950 (5th Cir. 2017), *and appeal dismissed as settled*, Order, No. 17-20030 (5th Cir. Oct. 18, 2017).

quirements.[1542] "Although the Court's findings of intentional racial discrimination in violation of the Fourteenth Amendment with regard to the 2011 plans are sufficient to trigger bail-in, and although the Court has serious concerns about the State's past conduct,"[1543] the judges predicted that the Supreme Court would not support such a remedy.[1544]

Attorney-fee litigation is pending.[1545]

Malapportioned Districts in an Election Held Soon After the Release of New Census Data

Graves v. City of Montgomery (W. Keith Watkins, M.D. Ala. 2:11-cv-557)

> Six weeks and one day before a planned August 23, 2011, election, a federal complaint alleged that city-council districts were malapportioned because they had not been redrawn to reflect the 2010 census. The district judge denied immediate relief and ultimately ruled that redistricting—which the evidence showed to be a work in progress—was not yet required.
>
> *Topics:* Malapportionment; laches.

Six weeks and one day before a planned August 23, 2011, election in Montgomery, Alabama, two voters filed a federal complaint in the Middle District of Alabama against the city, its mayor, its city clerk, and seven members of its city council, complaining that the city-council districts were malapportioned because they had not been redrawn to reflect the 2010 census.[1546] With their complaint, the plaintiffs filed a petition for a temporary restraining order and a preliminary injunction.[1547]

On the day after the complaint was filed, Judge W. Keith Watkins denied the plaintiffs a temporary restraining order.[1548] On the one hand, be-

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1542. Perez v. Abbott, 390 F. Supp. 3d 803 (W.D. Tex. 2019).

1543. *Id.* at 807.

1544. *Id.* at 821 ("the Court concludes that ordering preclearance on the current record would be inappropriate, given the recent guidance from the Supreme Court and the Fifth Circuit").

1545. *Perez* Docket Sheet, *supra* note 1475; *see* Award of Costs, *Perez*, No. 5:11-cv-360 (W.D. Tex. Oct. 29, 2021), D.E. 1720 ($1,797.52); Award of Costs, *id.* (Oct. 29, 2021), D.E. 1719 ($1,098.90); Opinion, *id.* (July 13, 2021), D.E. 1683 (determining prevailing-party status).

1546. Complaint, Graves v. City of Montgomery, No. 2:11-cv-557 (M.D. Ala. July 11, 2011), D.E. 1; Graves v. City of Montgomery, 807 F. Supp. 2d 1096, 1099, 1101–02 (M.D. Ala. 2011); *see* Jill Nolin, *Alabama Democratic Conference Wants Montgomery Municipal Elections Delayed*, Montgomery Advertiser, July 13, 2011.

1547. Petition, *Graves*, No. 2:11-cv-557 (M.D. Ala. July 11, 2011), D.E. 2; *Graves*, 807 F. Supp. 2d at 1099.

1548. Order, *Graves*, No. 2:11-cv-557 (M.D. Ala. July 12, 2011), D.E. 4 [hereinafter

cause six weeks remained until the election, immediate relief was not necessary; on the other hand, the plaintiffs could have filed their action much earlier.[1549] Also, Judge Watkins observed that it was not clear that redistricting was required so soon after the census.[1550]

On August 10, Judge Watkins dismissed the complaint for failure to state a valid claim.[1551] State law did not require the mayor to submit to the city council a reapportionment plan until six months after publication of the census data for Montgomery, so the mayor's deadline was not until August 24.[1552] Judge Watkins found the state's reapportionment schedule to comply with federal law.[1553]

Montgomery's mayor proposed a redistricting plan before the election, but the city council was not required to act on it until after the election.[1554] The election proceeded as planned.[1555]

Hasty Redistricting of a County Legislature

Boone v. Nassau County Legislature (Joanna Seybert, E.D.N.Y. 2:11-cv-2712)

> On the day before a period of collecting ballot-petition signatures for a county-legislature election, voters filed a federal complaint challenging new district lines. The district judge held preliminary-injunction hearings during the following week, but the state high court's nullification of the district lines mooted the federal case.
>
> *Topics:* Malapportionment; matters for state courts; section 2 discrimination; case assignment; getting on the ballot; class action.

Four voters filed a federal class-action complaint in the Eastern District of New York's Central Islip's courthouse on June 6, 2011, alleging that new district lines for Nassau County's legislature violated the Constitution's

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Graves Order]; *Graves*, 807 F. Supp. 2d at 1099; *see* Jill Nolin, *Judge Denies First Motion in Lawsuit to Halt Montgomery Municipal Election*, Montgomery Advertiser, July 14, 2011.

1549. *Graves* Order, *supra* note 1548, at 3.

1550. *Id.* at 4.

1551. *Graves*, 807 F. Supp. 2d 1100.

1552. *Id.* at 1104–05.

1553. *Id.* at 1108–14.

1554. *See Mayor Reveals Redistricting Proposal*, Montgomery Advertiser, Aug. 20, 2011; *Strange: New District Lines Coming, but Not in Time for Election*, Montgomery Advertiser, Aug. 2, 2011.

1555. *See* Brian Lyman, *Montgomery Council Members Look to Economic Development*, Montgomery Advertiser, Aug. 24, 2011; Jill Nolin, *Strange Easily Wins Mayor's Race*, Montgomery Advertiser, Aug. 24, 2011.

Fourteenth Amendment and section 2 of the Voting Rights Act.[1556] The plaintiffs drew the court's attention to the urgency of the action by pointing out that the period to collect ballot-petition signatures would begin on the following day.[1557]

Judge Joanna Seybert received the case file a little after 2:00 p.m. and held a hearing at 3:15.[1558] It was not clear whether ballot petitions for legislative elections would be based on old district lines or new district lines.[1559]

When they filed their complaint, the plaintiffs noted that the case was related to a 1991 action resolved by Judge Arthur D. Spatt in 1994.[1560] A September 24, 1991, complaint by eight Nassau County voters challenged the modified weighted-voting scheme for Nassau County's board of supervisors, which consisted of two representatives from Hempstead, the largest municipality, and one from each of the other four municipalities in the county.[1561] The board's 108 votes were allocated approximately according to the municipalities' populations, adjusted for the sake of each supervisor's "mathematical possibility of his casting a decisive vote on a particular matter."[1562] Denying the defendants' motion for summary judgment on April 14, 1993, Judge Spatt concluded that the scheme violated the principle of one person, one vote.[1563] On August 2, 1994, the supervisors agreed to a new districting plan that would be submitted to voters in a November referendum, so the special master appointed by Judge Spatt to draft a plan

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1556. Complaint, Boone v. Nassau Cty. Legislature, No. 2:11-cv-2712 (E.D.N.Y. June 6, 2011), D.E. 1 [hereinafter *Boone* Complaint]; *see* Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437, *as amended*, 52 U.S.C. § 10301; *see also* Dorsett v. County of Nassau, 732 F.3d 157, 159 (2d Cir. 2013).

1557. *Boone* Complaint, *supra* note 1556, at 17–18; Transcript at 12, *Boone*, No. 2:11-cv-2712 (E.D.N.Y. June 6, 2011, filed July 24, 2014), D.E. 69 [hereinafter *Boone* Transcript].

1558. *Boone* Transcript, *supra* note 1557, at 1, 12.

1559. *Id.* at 12–16.

1560. Notice of Related Case, *Boone*, No. 2:11-cv-2712 (E.D.N.Y. June 6, 2011), D.E. 6; *see* Docket Sheet, Jackson v. Nassau Cty. Bd. of Supervisors, No. 9:91-cv-3720 (E.D.N.Y. Sept. 24, 1991) [hereinafter *Jackson* Docket Sheet].

Judge Spatt died on June 12, 2020. Federal Judicial Center Biographical Directory of Article III Federal Judges [hereinafter FJC Biographical Directory], www.fjc.gov/history/judges.

1561. Jackson v. Nassau Cty. Bd. of Supervisors, 818 F. Supp. 509, 510–11 (E.D.N.Y. 1993); *Jackson* Docket Sheet, *supra* note 1560 (D.E. 1).

1562. *Jackson*, 818 F. Supp. at 524–26. The municipalities' population shares in the county were 56%, 23%, 17%, 2.6%, and 1.9%; their supervisors' votes were fifty-eight, twenty-two, fifteen, seven, and six, respectively. *Id.* at 524–25.

1563. *Id.* at 535.

ceased work.[1564] On November 8, Nassau County voters approved the transition from a six-member board of supervisors to a nineteen-member legislature.[1565]

At her June 6, 2011, hearing, Judge Seybert informed the parties,

> My chambers has conferenced with Judge Spatt's chambers with respect to the prior case, and the determination has been made that it is not a related case. Clearly the passage of time and the different issues involved do not warrant that it be related to it and that's already been gone into.[1566]

Judge Seybert conducted a preliminary-injunction hearing on June 13, 14, 15, 16, and 20, 2011, and then referred the matter to Magistrate Judge Arlene R. Lindsay.[1567]

Parallel litigation in state court mooted the federal litigation. State Supreme Court Justice Steven M. Jaeger issued a temporary restraining order against enforcement of the new districts on May 31, 2014.[1568] Appellate Division Justice Joseph Covello stayed the injunction on June 2.[1569] Justice Jaeger determined on July 21, 2011, that the legislature could not "immediately adjust the nineteen County legislative districts for the 2011 general election."[1570] The appellate division reversed this decision on August 9.[1571] On August 30, New York's court of appeals determined that according to

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1564. Jackson v. Nassau Cty. Bd. of Supervisors, 157 F.R.D. 612, 616 (E.D.N.Y. 1994).

1565. *See Federal Judge Praises Vote on Nassau Charter*, N.Y. Times, Nov. 11, 1994, at B5; *Voters Favor Plan to Create a Legislature*, N.Y. Times, Nov. 9, 1994, at B12 (reporting also, "Each new county legislator will serve part-time, be elected to two-year terms and receive a yearly salary of $39,500.").

1566. *Boone* Transcript, *supra* note 1557, at 7.

1567. Minutes, Boone v. Nassau Cty. Legislature, No. 2:11-cv-2712 (E.D.N.Y. June 13 through 16 and 20, 2011), D.E. 11, 21, 23, 25, 31; *see* Minutes, *id.* (June 20, 2011), D.E. 30; *see also* Amended Complaint, *id.* (June 23, 2011), D.E. 37.

1568. Order, Yatauro v. Mangano, No. 6898/2011 (N.Y. Sup. Ct. May 31, 2014), *filed as* Ex. K, Proposed Order to Show Cause, Yatauro v. Mangano, No. 2:11-cv-3079 (E.D.N.Y. June 30, 2011), D.E. 2 [hereinafter *Yatauro* Proposed Order to Show Cause]; *see Boone* Transcript, *supra* note 1557, at 8.

1569. Order, *Yatauro*, No. 6898/2011 (N.Y. Sup. Ct. App. Div. June 2, 2011), *filed as* Ex. L, *Yatauro* Proposed Order to Show Cause, *supra* note 1568; *see Boone* Transcript, *supra* note 1557, at 7–8.

1570. Yatauro v. Mangano, 32 Misc. 3d 838, 927 N.Y.S.2d 868 (N.Y. Sup. Ct. 2011); *see* Opinion, *Yatauro*, No. 2:11-cv-3079 (E.D.N.Y. July 1, 2011), D.E. 5, 2011 WL 2610562 (remanding the action following the county's attempted removal to federal court).

1571. Yatauro v. Mangano, 87 A.D.3d 582, 928 N.Y.S.2d 561 (N.Y. App. Div. 2011).

county law the new district lines could not go into effect until the 2013 election to afford a period of commission and public review.[1572]

Judge Seybert administratively closed her case on September 23, 2011.[1573] On March 5, 2013, Nassau County's legislature passed a new districting plan.[1574]

On November 23, 2011, an attorney who represented the plaintiffs in Judge Seybert's case filed a federal complaint against Nassau County officials alleging wrongful retaliation for the attorney's representing plaintiffs in actions against the county, including Judge Seybert's case.[1575] In particular, the complaint alleged spiteful delay by the county legislature in voting on settlements in two of the attorney's earlier cases.[1576] On October 18, 2013, the court of appeals affirmed Judge Sandra J. Feuerstein's dismissal of the retaliation action "[b]ecause we find that Plaintiffs had no right to have the settlement approved at all, much less by a certain date."[1577]

1572. Yatauro v. Mangano, 17 N.Y.3d 420, 955 N.E.2d 343, 931 N.Y.S.2d 36 (2011).

1573. Order, Boone v. Nassau Cty. Legislature, No. 2:11-cv-2712 (E.D.N.Y. Sept. 23, 2011), D.E. 65.

1574. Letter, *id.* (Mar. 15, 2013), D.E. 67.

1575. Complaint, Dorsett v. County of Nassau, No. 2:11-cv-5748 (E.D.N.Y. Nov. 23, 2011), D.E. 1; *see* Amended Complaint, *id.* (Dec. 22, 2011), D.E. 6; *see also* Notice of Related Case, *Boone*, No. 2:11-cv-2712 (E.D.N.Y. Nov. 28, 2011), D.E. 66.

1576. Dorsett v. County of Nassau, 732 F.3d 157, 159–60 (2d Cir. 2013).

1577. *Id.* at 159–60 (noting that since the action was filed one settlement was approved and the other was not), *aff'g* Opinion, *Dorsett*, No. 2:11-cv-5748 (E.D.N.Y. Nov. 23, 2011), D.E. 39, 2013 WL 272796.

A December 18, 2003, employment action against the county, Complaint, Williams v. County of Nassau, No. 2:03-cv-6337 (E.D.N.Y. Dec. 18, 2003), D.E. 1; *see* Docket Sheet, *id.* (Dec. 18, 2003) (amended complaint, D.E. 17), resulted in a settlement rejected in 2012 by the county legislature, *Dorsett*, 732 F.3d at 160, but the case was nevertheless brought to resolution in 2014 by settlement, Letter, *Williams*, No. 2:03-cv-6337 (E.D.N.Y. July 10, 2014), D.E. 225. *See* Williams v. County of Nassau, 779 F. Supp. 2d 276 (E.D.N.Y. 2011) (dismissing a co-plaintiff's claim), *aff'd*, 581 F. App'x 56 (2d Cir. 2014), *cert. denied*, 576 U.S. 1004 (2015).

A March 19, 2010, wrongful-death action against the county and its police department, Complaint, Dorsett v. County of Nassau, No. 2:10-cv-1258 (E.D.N.Y. Mar. 19, 2010), D.E. 1, resulted in a $7.7 million settlement approved in 2012 by the county legislature, Newsday LLC v. County of Nassau, 730 F.3d 156, 160 (2d Cir. 2013) (affirming a protective order for an internal-affairs report and reversing the sealing of a transcript of contempt proceedings against a member of the county legislature who divulged facts stated in the report); Dorsett v. County of Nassau, 289 F.R.D. 54, 62 (E.D.N.Y. 2012) (noting modification of the protective order to facilitate review by the county legislature of the settlement agreement); Dorsett v. County of Nassau, 800 F. Supp. 2d 453 (E.D.N.Y. 2011) (noting a July 20, 2011, statement of settlement and affirming the magistrate judge's pro-

Malapportionment for Mississippi's County Boards of Supervisors

Madison County Board of Supervisors v. Mississippi (William H. Barbour, Jr., and Louis Guirola, Jr., S.D. Miss. 3:11-cv-119), County Branches of the NAACP v. County Boards of Supervisors (Sharion Aycock, N.D. Miss. 1:11-cv-59 and 2:11-cv-40; Michael P. Mills, N.D. Miss. 1:11-cv-60, 2:11-cv-43, 3:11-cv-27, and 3:11-cv-28; W. Allen Pepper, Jr., N.D. Miss. 2:11-cv-41 and 2:11-cv-42; and Louis Guirola, Jr., S.D. Miss. 3:11-cv-121, 3:11-cv-122, 3:11-cv-123, 3:11-cv-124, 4:11-cv-33, 5:11-cv-28, 5:11-cv-29, and 5:11-cv-30), and Redd v. Westbrook (Louis Guirola, Jr., S.D. Miss. 3:11-cv-321)

> Every twenty years, the interval of time between the decennial census and elections to county boards of supervisors in Mississippi is so short that it is difficult to redistrict the county boards in time for the elections. Among the federal lawsuits filed in 2011 because of this in Mississippi's two districts, seventeen sought court intervention to enable redistricting before the election and one sought court intervention to prevent redistricting before the election. Five district judges denied immediate judicial relief. The court of appeals determined that the 2011 elections mooted the cases.
>
> *Topics:* Malapportionment; intervention; case assignment.

Four days before the March 1, 2011, qualification deadline for county board-of-supervisor candidates in Mississippi, Madison County's board of supervisors and a voter filed a federal complaint in the Southern District of Mississippi seeking an injunction postponing the deadline to allow the county time to reapportion its board districts to reflect the 2010 census.[1578] Named as defendants were the state, the county's circuit clerk and its registrar, and the county executive committees of the Republican and Democratic Parties.[1579] Three days later, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction.[1580] After a March 1 telephone conference, Judge William H. Barbour, Jr., denied the plaintiffs

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tective order), *aff'g* 762 F. Supp. 2d 500 (E.D.N.Y. 2011); *Dorsett*, 732 F.3d at 160.

Judge Feurerstein died on April 9, 2021. FJC Biographical Directory, *supra* note 1560.

1578. Complaint, Madison Cty. Bd. of Supervisors v. Mississippi, No. 3:11-cv-119 (S.D. Miss. Feb. 25, 2011), D.E. 1.

1579. *Id.*

1580. Motion, *id.* (Feb. 25, 2011), D.E. 2.

a temporary restraining order and set a preliminary-injunction hearing for April 1.[1581]

On February 28, sixteen Mississippi county branches of the NAACP filed federal board-of-supervisor malapportionment class-action complaints in the districts and divisions including their counties.[1582] Each complaint also named a voter as a plaintiff and named as defendants the county board of supervisors, the county party executive committees, the county board of election commissioners, and the circuit clerk.[1583] In thirteen of the cases, the plaintiffs filed motions for temporary restraining orders and preliminary injunctions: on February 28 in the Northern District[1584] and on March 1 in the Southern District.[1585]

1581. Order, *id.* (Mar. 1, 2011), D.E. 3; *see Madison Supervisors Reject Call for Redistricting Delay*, Jackson Clarion-Ledger, Mar. 22, 2011, at A6.

Judge Barbour died on January 8, 2021. Federal Judicial Center Biographical Directory of Article III Federal Judges [hereinafter FJC Biographical Directory], www.fjc.gov/history/judges.

1582. Complaint, Attala Cty. Branch of the NAACP v. Attala Cty. Bd. of Supervisors, No. 1:11-cv-60 (N.D. Miss. Mar. 1, 2011), D.E. 1 (docketed on March 1 instead of February 28); Complaint, Winston Cty. Branch of the NAACP v. Winston Cty. Bd. of Supervisors, No. 1:11-cv-59 (N.D. Miss. Feb. 28, 2011), D.E. 1; Complaint, Panola Cty. Branch of the NAACP v. Panola Cty. Bd. of Supervisors, No. 2:11-cv-43 (N.D. Miss. Feb. 28, 2011), D.E. 1; Complaint, Tallahatchie Cty. Branch of the NAACP v. Tallahatchie Cty. Bd. of Supervisors, No. 2:11-cv-42 (N.D. Miss. Feb. 28, 2011), D.E. 1; Complaint, Tunica Cty. Branch of the NAACP v. Tunica Cty. Bd. of Supervisors, No. 2:11-cv-41 (N.D. Miss. Feb. 28, 2011), D.E. 1; Complaint, DeSoto Cty. Branch of the NAACP v. DeSoto Cty. Bd. of Supervisors, No. 2:11-cv-40 (N.D. Miss. Feb. 28, 2011), D.E. 1; Complaint, Grenada Cty. Branch of the NAACP v. Grenada Cty. Bd. of Supervisors, No. 3:11-cv-28 (N.D. Miss. Feb. 28, 2011), D.E. 1; Complaint, Webster Cty. Branch of the NAACP v. Webster Cty. Bd. of Supervisors, No. 3:11-cv-27 (N.D. Miss. Feb. 28, 2011), D.E. 1; Complaint, Amite Cty. Branch of the NAACP v. Amite Cty. Bd. of Supervisors, No. 3:11-cv-124 (S.D. Miss. Feb. 28, 2011), D.E. 1; Complaint, Simpson Cty. Branch of the NAACP v. Simpson Cty. Bd. of Supervisors, No. 3:11-cv-123 (S.D. Miss. Feb. 28, 2011), D.E. 1; Complaint, Pike Cty. Branch of the NAACP v. Pike Cty. Bd. of Supervisors, No. 3:11-cv-122 (S.D. Miss. Feb. 28, 2011), D.E. 1; Complaint, Hazlehurst Branch of the NAACP v. Copiah Cty. Bd. of Supervisors, No. 3:11-cv-121 (S.D. Miss. Feb. 28, 2011), D.E. 1 (branch named for the county seat); Complaint, Wayne Cty. Branch of the NAACP v. Wayne Cty. Bd. of Supervisors, No. 4:11-cv-33 (S.D. Miss. Feb. 28, 2011), D.E. 1; Complaint, Adams Cty. Branch of the NAACP v. Adams Cty. Bd. of Supervisors, No. 5:11-cv-30 (N.D. Miss. Feb. 28, 2011), D.E. 1; Complaint, Claiborne Cty. Branch of the NAACP v. Claiborne Cty. Bd. of Supervisors, No. 5:11-cv-29 (N.D. Miss. Feb. 28, 2011), D.E. 1; Complaint, Vicksburg Branch of the NAACP v. Warren Cty. Bd. of Supervisors, No. 5:11-cv-28 (N.D. Miss. Feb. 28, 2011), D.E. 1 (branch named for the county seat).

1583. *Id.*

1584. Motions, Nos. 1:11-cv-59, 2:11-cv-40, 2:11-cv-41, 2:11-cv-42, 2:11-cv-43, 3:11-

In a 2010 case already pending before Judge Louis Guirola, Jr., in the Southern District, Mississippi's attorney general moved on March 1, 2011, to consolidate the new Southern District cases with the 2010 case.[1586] The 2010 case was a malapportionment action filed on December 14, in advance of the release of 2010 census figures, by Hancock County's board of supervisors.[1587] Judge Guirola consolidated the ten Southern District cases on March 23, 2011.[1588] A key purpose of consolidation was to expedite resolution of these cases so that rulings could be presented promptly to the court of appeals.[1589]

On March 2, 2011 (on March 4 for the Attala County case), Mississippi's attorney general moved to intervene to defend the state in the new actions.[1590] From March 3 through March 7, Chief District Judge Michael P. Mills[1591] and Magistrate Judges David A. Sanders,[1592] Jerry A. Davis,[1593] and

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cv-27, and 3:11-cv-28 (N.D. Miss. Feb. 28, 2011), D.E. 2.

1585. Motions, Nos. 3:11-cv-121, 3:11-cv-122, 3:11-cv-123, 4:11-cv-33, 5:11-cv-29, and 5:11-cv-30 (S.D. Miss. Mar. 1, 2011), D.E. 3.

1586. Consolidation-Motion Supplement, Hancock Cty. Bd. of Supervisors v. Ruhr, No. 1:10-cv-564 (S.D. Miss. Mar. 2, 2011), D.E. 27; Consolidation Motion, *id.* (Mar. 1, 2011), D.E. 26; *see* Notice, No. 3:11-cv-119 (S.D. Miss. Mar. 2, 2011), D.E. 6; Notice, No. 3:11-cv-121 (S.D. Miss. Mar. 2, 2011), D.E. 11; Notices, Nos. 3:11-cv-122, 3:11-cv-123, 4:11-cv-33, and 5:11-cv-29 (S.D. Miss. Mar. 2, 2011), D.E. 5; Notices, Nos. 3:11-cv-124, 5:11-cv-28, and 5:11-cv-30 (S.D. Miss. Mar. 2, 2011), D.E. 4.

Tim Reagan interviewed Judge Guirola for this report by telephone on December 2, 2013.

1587. Complaint, No. 1:10-cv-564 (S.D. Miss. Dec. 14, 2010), D.E. 1.

1588. Order, *id.* (Mar. 23, 2011), D.E. 33; *see* Emily Lane, *Attorney Wants NAACP Lawsuit Tossed*, Natchez Democrat, Mar. 25, 2011.

1589. Interview with Judge Louis Guirola, Jr., Dec. 2, 2013.

1590. Intervention Motion, No. 1:11-cv-60 (N.D. Miss. Mar. 4, 2011), D.E. 3; Intervention Motions, Nos. 1:11-cv-59, 2:11-cv-40, 2:11-cv-41, 2:11-cv-42, 3:11-cv-27, and 3:11-cv-28 (N.D. Miss. Mar. 2, 2011), D.E. 4; Intervention Motion, No. 2:11-cv-43 (N.D. Miss. Mar. 2, 2011), D.E. 5; Intervention Motion, No. 3:11-cv-121 (S.D. Miss. Mar. 2, 2011), D.E. 10; Intervention Motions, Nos. 3:11-cv-122, 3:11-cv-123, 4:11-cv-33, 5:11-cv-29 (S.D. Miss. Mar. 2, 2011), D.E. 4; Intervention Motion, Nos. 3:11-cv-124, 5:11-cv-28 (S.D. Miss. Mar. 2, 2011), D.E. 3; Intervention Motion, No. 5:11-cv-30 (S.D. Miss. Mar. 2, 2011), D.E. 5.

1591. Orders, Nos. 3:11-cv-27 and 3:11-cv-28 (N.D. Miss. Mar. 3, 2011), D.E. 7.

1592. Order, No. 2:11-cv-40 (N.D. Miss. Mar. 4, 2011), D.E. 7; Order, No. 2:11-cv-43 (N.D. Miss. Mar. 4, 2011), D.E. 8.

1593. Order, No. 1:11-cv-59 (N.D. Miss. Mar. 7, 2011), D.E. 7; Order, No. 1:11-cv-60 (N.D. Miss. Mar. 7, 2011), D.E. 5.

Judge Davis retired on July 1, 2011. *See Judge Davis Settling Down*, N.E. Miss. Daily J., June 25, 2011.

S. Allan Alexander[1594] granted the attorney general's intervention motions. Judge Guirola had granted intervention to the attorney general in the 2010 Southern District case on February 22.[1595]

The Northern District's court assigned four of its eight cases to Oxford Judge Mills: the two Oxford Division cases, one Aberdeen Division case, and one Delta Division case.[1596] On March 2, the attorney general filed a motion in one of Judge Mills's Oxford Division cases to consolidate the seven Northern District cases in which motions for temporary restraining orders had been filed.[1597]

Judge Mills's March 7 order declining to issue temporary restraining orders was docketed in his Delta Division and Oxford Division cases:

> The court sees no reason why the issues in this case can not be resolved, as part of the normal political process, in time for the 2011 Board of Supervisor elections this fall. . . . Part of the court's skepticism on this issue arises from the fact that this case is merely one of several such redistricting cases, containing very similar allegations, which were filed by different county branches of the NAACP at the same time. This raises doubts in this court's mind as to whether each of these cases truly represents a case in need of immediate injunctive relief, or whether they instead represent a more generalized effort to exercise political leverage throughout the state.[1598]

One Aberdeen Division case and one Delta Division Case were assigned to Aberdeen Judge Sharion Aycock, who declined on March 10 to issue temporary restraining orders because the plaintiffs had not shown that later-issued preliminary injunctions would not suffice.[1599]

1594. Order, No. 2:11-cv-41 (N.D. Miss. Mar. 7, 2011), D.E. 7; Order, No. 2:11-cv-42 (N.D. Miss. Mar. 7, 2011), D.E. 7.

Judge Alexander retired on September 30, 2016. Judicial Milestones, www.uscourts.gov/judicial-milestones/susie-allan-alexander.

1595. Order, No. 1:10-cv-564 (S.D. Miss. Feb. 22, 2011), D.E. 16.

1596. Docket Sheet, No. 1:11-cv-60 (N.D. Miss. Mar. 1, 2011); Docket Sheets, Nos. 2:11-cv-43, 3:11-cv-27, and 3:11-cv-28 (N.D. Miss. Feb. 28, 2011).

1597. Consolidation Motion, No. 3:11-cv-27 (N.D. Miss. Mar. 2, 2011), D.E. 5; *see* Notice, No. 1:11-cv-59 (N.D. Miss. Mar. 2, 2011), D.E. 5 (notice to Judge Aycock of consolidation motion filed with Judge Mills); Notice, No. 2:11-cv-41 (N.D. Miss. Mar. 2, 2011), D.E. 5 (notice to Judge Pepper of consolidation motion filed with Judge Mills); Notice, No. 2:11-cv-42 (N.D. Miss. Mar. 2, 2011), D.E. 5 (same).

1598. Order, No. 2:11-cv-43 (N.D. Miss. Mar. 7, 2011), D.E. 13; Order, No. 3:11-cv-27 (N.D. Miss. Mar. 7, 2011), D.E. 15; Order, No. 3:11-cv-28 (N.D. Miss. Mar. 7, 2011), D.E. 9.

1599. Orders, Nos. 1:11-cv-59 and 2:11-cv-40 (N.D. Miss. Mar. 10, 2011), D.E. 13.

Judge Guirola heard his cases on May 13.[1600] His chambers were in Gulfport, but he held the hearing in Jackson, which is the state's capital 180 miles away, for the convenience of the attorneys as part of his effort to rule quickly.[1601] The lawyers for the various counties heeded his request not to repeat arguments already made.[1602] On May 16, Judge Guirola dismissed all of the Southern District cases.[1603] It would not be improper for 2011 elections to be based on 2000 census data, because "each county's board of supervisors must have adequate time to formulate a redistricting plan and obtain preclearance from the Department of Justice before its failure to do so results in a declaration that elections held using the existing plan are unconstitutional."[1604]

Judge Guirola also identified the following standing defects: (1) the boards of supervisors for Madison and Hancock Counties did not have standing to sue other state subdivisions for Fourteenth Amendment violations, (2) voters in districts that were too small did not have standing to complain that other districts were too big, and (3) there was not enough time before the 2011 election to provide the plaintiffs with relief.[1605]

Seven Madison County voters, including potential candidates, filed a Southern District complaint on May 27, alleging that it was improper for the county to adopt a redistricting plan on May 23, more than three weeks after the close of the qualification period for the ballot.[1606] With their complaint, the plaintiffs filed a motion for a temporary restraining order.[1607] The court assigned the case to Judge Daniel P. Jordan III, but he recused himself because of his connections to defense attorneys.[1608] Judge Guirola

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1600. Transcript, No. 1:10-cv-564 (S.D. Miss. May 13, 2011, filed Sept. 11, 2013), D.E. 250; Docket Sheet, *id.* (Dec. 14, 2010).

1601. Interview with Judge Louis Guirola, Jr., Dec. 2, 2013.

1602. *Id.*

1603. Opinion, No. 1:10-cv-564 (S.D. Miss. May 16, 2011), D.E. 143 [hereinafter May 16, 2011, Guirola Opinion]; *see Existing County Maps OK'd for Elections*, Jackson Clarion-Ledger, May 18, 2011, at B1.

1604. May 16, 2011, Guirola Opinion, *supra* note 1603, at 16; *see* Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination).

1605. May 16, 2011, Guirola Opinion, *supra* note 1603.

1606. Complaint, Redd v. Westbrook, No. 3:11-cv-321 (S.D. Miss. May 27, 2011), D.E. 1 (noting Justice Department preclearance on May 24, 2011); *see* Amended Complaint, *id.* (June 1, 2011), D.E. 5.

1607. Temporary-Restraining-Order Motion, *id.* (May 27, 2011), D.E. 3.

1608. Recusal, *id.* (June 1, 2011), D.E. 4 ("[T]he undersigned's former law firm represents one of the named defendants. Aside from this general conflict, more specific con-

held a telephone conference with the parties on May 31 and scheduled a hearing for June 2, at which he denied immediate relief.[1609] The plaintiffs voluntarily dismissed their action on June 10.[1610]

On September 14, Judge W. Allen Pepper, Jr., relied on Judge Guirola's decision to dismiss the two Northern District, Delta Division, cases before him.[1611]

While Judge Guirola's decision was on appeal, the Northern District court stayed the Attala,[1612] Webster,[1613] Grenada,[1614] DeSoto,[1615] and Winston[1616] County cases. On October 14, the parties in the Panola County case stipulated dismissal.[1617] Judge Aycock granted the parties in the DeSoto County case a stipulated dismissal on May 8, 2012.[1618]

The board-of-supervisor plaintiffs did not appeal the dismissal of their two cases.[1619] On August 31, 2012, the court of appeals vacated Judge Guirola's decision, holding that the NAACP and voters in overpopulated districts had standing to seek relief from malapportionment.[1620] The court

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flicts exist with respect to the two attorneys representing that party—one is a close personal friend and the other worked in chambers last year.").

1609. Docket Sheet, *id.* (May 27, 2011).

1610. Notice, *id.* (June 10, 2011), D.E. 7.

1611. Judgment, No. 2:11-cv-41 (N.D. Miss. Sept. 14, 2011), D.E. 27; Judgment, No. 2:11-cv-42 (N.D. Miss. Sept. 14, 2011), D.E. 31.

Judge Pepper died on January 24, 2012. FJC Biographical Directory, *supra* note 1581; *see Federal Judge Pepper Dies*, Delta Democrat-Times, Jan. 25, 2012.

1612. Orders, No. 1:11-cv-60 (N.D. Miss. Jan. 10 and July 31, 2012), D.E. 27, 28.

1613. Minutes, No. 3:11-cv-27 (N.D. Miss. Nov. 29, 2011), D.E. 50.

Judge Mills vacated a consent decree upon notice that the attorney general did not consent to it. Order, *id.* (June 3, 2011), D.E. 39; *see* Consent Decree, *id.* (June 2, 2011), D.E. 38.

1614. Order, No. 3:11-cv-28 (N.D. Miss. Dec. 12, 2011), D.E. 23.

1615. Orders, No. 2:11-cv-40 (N.D. Miss. Dec. 13, 2011, and May 8, 2012), D.E. 35, 36.

1616. Orders, No. 1:11-cv-59 (N.D. Miss. Jan. 5 and July 31, 2012), D.E. 26, 29.

1617. Stipulation, No. 2:11-cv-43 (N.D. Miss. Oct. 14, 2011), D.E. 49.

1618. Order, No. 2:11-cv-40 (N.D. Miss. May 8, 2012), D.E. 36.

1619. Hancock Cty. Bd. of Supervisors v. Ruhr, 487 F. App'x 189, 193 n.1 (5th Cir. 2012).

The Justice Department precleared new district lines for Madison County on May 25, 2011. *See Madison Supervisors Using New Districts for Election*, Jackson Clarion-Ledger, May 25, 2011, at B1. Judge Guirola denied a motion by the Madison County Republican Executive Committee for an order requiring Madison County to use the old district lines. Docket Sheet, No. 1:10-cv-564 (S.D. Miss. Dec. 14, 2010) (text order, May 23, 2011); *see* Clarification Motion, *id.* (May 19, 2011), D.E. 144; *see also Madison Co. Can Use New Districts for Primaries*, Jackson Clarion-Ledger, June 3, 2011.

1620. *Hancock Cty. Bd. of Supervisors*, 487 F. App'x at 196–99.

remanded the case for a determination of whether the passing of the 2011 election had mooted the cases.[1621]

On August 20, 2013, Judge Guirola held that "when the qualifying deadline passed, and the elections were held, plaintiffs' claims seeking to enjoin those events became moot."[1622] The court of appeals agreed on May 16, 2014.[1623] Judge Mills, therefore, dismissed the Northern District cases on July 16.[1624]

Constitutionality of a Dual-Majority Requirement

Tigrett v. Cooper (S. Thomas Anderson, W.D. Tenn. 2:10-cv-2724)

> A federal complaint alleged vote dilution in a dual-majority requirement for a 2010 referendum on the consolidation of city and county governments. An agreed preliminary injunction enjoined certification of the forthcoming referendum results and required referendum votes in the county to be counted separately for voters within and outside the city. Although the referendum failed, the district judge determined that the case was not moot. In 2014, the judge granted summary judgment against the plaintiffs. Disagreeing on the mootness question, the court of appeals dismissed the appeal.
>
> *Topics:* Ballot measure; equal protection; section 2 discrimination; enjoining certification; ballot segregation; intervention.

Approximately four weeks before the 2010 general election, eight Memphis voters filed a federal complaint in the Western District of Tennessee alleging vote dilution for Memphis voters and African American voters in the dual-majority requirements for a referendum on the consolidation of city and county governments into a metropolitan government.[1625]

1621. *Id.* at 199–201.

1622. Opinion, No. 1:10-cv-564 (S.D. Miss. Aug. 20, 2013), D.E. 246, 2013 WL 4483376.

1623. Hancock Cty. Bd. of Supervisors v. Ruhr, 568 F. App'x 295 (5th Cir. 2014).

1624. Opinion, No. 1:11-cv-59 (N.D. Miss. July 16, 2014), D.E. 54, 2014 WL 3545762; *see* Order, No. 1:11-cv-59 (N.D. Miss. Jan. 4, 2013), D.E. 41 (Winston, noting reassignment following Judge Aycock's recusal); Docket Sheet, No. 1:11-cv-60 (N.D. Miss. Mar. 1, 2011) (Attala); Docket Sheet, No. 2:11-cv-42 (N.D. Miss. Feb. 28, 2011) (Tallahatchie, noting reassignment on October 5, 2012, because of Judge Pepper's January 24 death); Docket Sheet, No. 3:11-cv-27 (N.D. Miss. Feb. 28, 2011) (Webster); Docket Sheet, No. 3:11-cv-28 (N.D. Miss. Feb. 28, 2011) (Grenada).

1625. Complaint, Tigrett v. Cooper, No. 2:10-cv-2724 (W.D. Tenn. Oct. 7, 2010), D.E. 1; Tigrett v. Cooper, 855 F. Supp. 2d 733, 737 (W.D. Tenn. 2012).

Tennessee provided for a county and a city within it to consolidate governments with approval of a majority of the city's voters and a majority of the county voters outside the city.[1626]

> About 73% of the entire population of Shelby County resides in Memphis, and the remaining 27% of the population of Shelby County resides outside Memphis. Thus, the votes of non-city residents are weighted in a ratio of 2.5 to 1 to the votes of City residents. Moreover, African–Americans make up approximately 66% of the population of Memphis and 52% of the population of all of Shelby County. African Americans make up approximately 44% of Shelby County's non-city population.[1627]

Attempts to form a Memphis metropolitan government failed in 1962 and 1973.[1628] Memphis, on August 26, 2009, and Shelby County, on September 15, voted to establish a Memphis and Shelby County Metropolitan Government Charter Commission to write and propose a charter for consolidated government, and the commission adopted a proposed charter on August 9, 2010.[1629]

The plaintiffs filed a motion for a preliminary injunction on October 14, 2010, one week after they filed their complaint,[1630] and Judge S. Thomas Anderson issued an agreed preliminary injunction on October 20.[1631] The order enjoined certification of the forthcoming referendum results and required referendum votes in the county to be counted separately for voters within and outside Memphis.[1632]

Although the referendum failed,[1633] Judge Anderson ruled on February 17, 2011, that "there is a reasonable expectation that this controversy will recur in the future," so the case was not moot.[1634] On March 2, 2012, Judge Anderson granted limited intervention to several suburban municipalities,

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1626. *Tigrett*, 855 F. Supp. 2d at 737–38; *see* Richard Locker, *Att. General Backs "Dual Majorities,"* Memphis Commercial Appeal, Apr. 20, 2010, at B1.

1627. *Tigrett*, 855 F. Supp. 2d at 738.

1628. *Id.*

1629. *Id.*

1630. Preliminary-Injunction Motion, *Tigrett*, No. 2:10-cv-2724 (W.D. Tenn. Oct. 14, 2010), D.E. 15.

1631. Preliminary Injunction, *id.* (Oct. 20, 2010), D.E. 27.

1632. *Id.*; *Tigrett*, 855 F. Supp. 2d at 737.

1633. *See* Clay Bailey, *Suburbs' Rejection of Merger "Loud and Clear,"* Memphis Commercial Appeal, Nov. 3, 2010, at A1.

1634. Order at 8, *Tigrett*, No. 2:10-cv-2724 (W.D. Tenn. Feb. 17, 2011), D.E. 38, 2011 WL 673939; *Tigrett*, 855 F. Supp. 2d at 737.

within Shelby County but outside of Memphis: intervention with respect to the residency-based vote-dilution Equal Protection claim.[1635]

Also on March 2, 2012, Judge Anderson denied in part the defendants' motion to dismiss the action.[1636] Because the complaint sought prospective relief from an ongoing violation of federal law, the action was not barred by the Eleventh Amendment.[1637] The complaint included valid claims for both Equal Protection and Voting Rights Act relief.[1638] The vote dilution claims, however, could not proceed on a Fifteenth Amendment theory of denial of the franchise on the basis of race.[1639]

Judge Anderson issued summary judgment against the plaintiffs on March 17, 2014, finding that "allowing the residents in the county to vote separately from the residents of the city is justified, given that consolidation would result in a fundamental alteration in the county's status as a branch of government."[1640] On the Voting Rights Act claim, Judge Anderson found that majority voters in Shelby County have never defeated the minority's choice in a referendum.[1641]

On December 30, 2014, the court of appeals overturned Judge Anderson's ruling on mootness.[1642] "[T]here is no indication that the governing bodies of the City of Memphis or Shelby County intend to consolidate through the formation of another commission in the near future. In the past century, only three consolidation elections have taken place in the City of Memphis and Shelby County."[1643]

Section 5 Preclearance for Acquisition of Property

City of College Park v. City of Atlanta (Julie E. Carnes, N.D. Ga. 1:08-cv-1464)

> The City of College Park and one of its residents filed a federal complaint against the City of Atlanta in the Northern District of Georgia on April 18, 2008, claiming that Atlanta was violating section 5 of the Voting Rights Act by acquiring an apartment

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1635. Order at 12, *Tigrett*, No. 2:10-cv-2724 (W.D. Tenn. Mar. 2, 2012), D.E. 81, 2012 WL 691906; *see* Amos Maki, *Judge Lets Suburbs Intervene in Merger*, Memphis Commercial Appeal, Mar. 3, 2012, at B4.

1636. *Tigrett*, 855 F. Supp. 2d 733.

1637. *Id.* at 743–47.

1638. *Id.* at 749–64.

1639. *Id.* at 747–49.

1640. Tigrett v. Cooper, 7 F. Supp. 3d 792 (W.D. Tenn. 2014).

1641. *Id.* at 804.

1642. Tigrett v. Cooper, 595 F. App'x 554 (6th Cir. 2014).

1643. *Id.* at 557.

building in College Park to clear the land of structures and people for benefit of the airport without first obtaining preclearance for the change in College Park's electorate. On the day that the complaint was filed, the district judge issued a temporary restraining order enjoining the property acquisition, but the property had already been acquired earlier in the day, so the judge vacated the order. The parties agreed to a settlement.

Topics: Section 5 preclearance; three-judge court.

The City of College Park and one of its residents filed a federal complaint against the City of Atlanta in the Northern District of Georgia on April 18, 2008, claiming that Atlanta was violating section 5 of the Voting Rights Act by acquiring an apartment building in College Park to clear the land of structures and people for benefit of the airport without first obtaining preclearance for the change in College Park's electorate.[1644] With their complaint, the plaintiffs filed a motion for a temporary restraining order[1645] and a request for a three-judge district court.[1646]

That day, Judge Julie E. Carnes spoke by telephone with attorneys for College Park and Atlanta and then granted a temporary restraining order enjoining the property acquisition.[1647] After the order was issued, Atlanta informed the court that the property had already been acquired that day, so Judge Carnes vacated her order on the day that it was issued.[1648] At a status conference in open court on April 21, Atlanta agreed to refrain from razing the property for six weeks.[1649] That gave the plaintiffs two weeks to

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1644. Complaint, City of College Park v. City of Atlanta, No. 1:08-cv-1464 (N.D. Ga. April 18, 2008), D.E. 1; *see* Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination and requiring that preclearance disputes be heard by a three-judge district court).

On June 25, 2013, the Supreme Court declined to hold section 5 unconstitutional, but the Court did hold unconstitutional the criteria for which jurisdictions require section 5 preclearance. Shelby County v. Holder, 570 U.S. 529 (2013).

1645. Temporary-Restraining-Order Motion, *City of College Park*, No. 1:08-cv-1464 (N.D. Ga. Apr. 18, 2008), D.E. 3.

1646. Request, *id.* (Apr. 18, 2008), D.E. 4.

1647. Temporary Restraining Order, *id.* (Apr. 18, 2008), D.E. 5; Transcript at 2–3, *id.* (Apr. 21, 2008, filed June 13, 2008), D.E. 31 [hereinafter *City of College Park* Transcript].

Judge Carnes was elevated to the court of appeals on July 31, 2014. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

1648. Order, *City of College Park*, No. 1:08-cv-1464 (N.D. Ga. Apr. 18, 2008), D.E. 6; *see City of College Park* Transcript, *supra* note 1647, at 3 ("the money was transferred by wire at about 3:15 Friday afternoon").

1649. Minutes, *City of College Park*, No. 1:08-cv-1464 (N.D. Ga. Apr. 21, 2008), D.E. 8;

file a more detailed pleading and the defendants thirty days after that to respond.[1650]

On March 31, 2009, after several months of discovery, Judge Carnes determined that a three-judge court need not be empaneled for two reasons: (1) Atlanta had no additional plans to acquire College Park property, and (2) section 5 of the Voting Rights Act did not apply to acquisitions of property.[1651]

The parties agreed to a settlement while the case was on appeal.[1652] On June 9, 2010, Judge Carnes certified that she would approve the settlement if the case were remanded back to her.[1653] The court of appeals responded by remanding the case on July 27.[1654] On August 2, 2010, Judge Carnes approved a settlement specifying greater cooperation between Atlanta and College Park when Atlanta wished to acquire College Park property.[1655]

At-Large Election to Districts in Memphis

Operation Rainbow-Push v. Shelby County Election Commission (Jon P. McCalla, W.D. Tenn. 2:06-cv-2451)

> A municipality removed a state-court action challenging an election to a commission because the members were to be selected from districts but elected at large. Observing the potential impact on candidates for other offices in the election, the district judge denied the plaintiffs immediate relief.
>
> *Topics:* Enjoining elections; section 2 discrimination; equal protection; intervention; removal.

On July 21, 2006, Memphis, its city council, and the county election commission removed an action filed on July 18 in the county chancery court seeking to void an election to Memphis's charter commission because the members were to be selected from districts but elected at large.[1656] Because

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City of College Park Transcript, *supra* note 1647, at 49–50.

1650. *City of College Park* Transcript, *supra* note 1647, at 48–49.

1651. Opinion, *City of College Park*, No. 1:08-cv-1464 (N.D. Ga. Mar. 31, 2009), D.E. 48.

1652. Joint Motion, *id.* (May 25, 2010), D.E. 60.

1653. Order, *id.* (June 9, 2010), D.E. 61.

1654. Order, City of College Park v. City of Atlanta, No. 09-12255 (11th Cir. July 27, 2010), *filed as* Order, *City of College Park*, No. 1:08-cv-1464 (N.D. Ga. July 27, 2010), D.E. 62.

1655. Consent Order, *City of College Park*, No. 1:08-cv-1464 (N.D. Ga. Aug. 2, 2010), D.E. 664.

1656. Notice of Removal, Operation Rainbow-Push, Inc. v. Shelby Cty. Election Comm'n, No. 2:06-cv-2451 (W.D. Tenn. July 21, 2006), D.E. 1; *see* Petition for Writ of Mandamus and Action for Declaratory Judgment, Operation Rainbow-Push, Inc. v. Shel-

the election was scheduled for August 3, the plaintiffs—two Memphis residents and an organization—moved on July 24 for an emergency hearing.[1657]

Judge Jon P. McCalla held a hearing on July 24 and ordered additional briefing by July 28, following the plaintiffs' amending their complaint.[1658] Judge McCalla allowed another party to intervene in opposition to the plaintiffs.[1659]

Noting that "enjoining the election for Charter Commission would effectively enjoin the entire election, and would require all of the candidates, including those for County Mayor, Sheriff, Attorney General, United States Senate and House of Representatives, to continue their campaigns until the election was allowed to proceed," Judge McCalla denied the plaintiffs immediate relief.[1660] "Plaintiffs have put forward no evidence to demonstrate that the White majority votes sufficiently as a bloc to defeat the black minority's preferred candidate."[1661]

On December 22, Judge McCalla dismissed the action because the plaintiffs had not responded to pending dismissal motions.[1662]

Emergency Evaluation of Gerrymandering

Kidd v. Cox (Beverly B. Martin, N.D. Ga. 1:06-cv-997)

> As the qualifying period for filing candidacy papers closed, a possible candidate and three voters filed a constitutional challenge to state legislative district lines. The plaintiffs sought an emergency hearing by a three-judge district court. The three-judge court extended the deadline and heard the case. The court ruled against

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by Cty. Election Comm'n, No. CH-06-1403 (Tenn. Chancery Ct. Shelby Cty. 13th Dist. July 18, 2006), *attached as* Ex. 2, Notice of Removal, *supra*; *see also* Lawrence Buser, *Rainbow-Push Sues Over Charter Election*, Memphis Commercial Appeal, July 20, 2006, at B4.

1657. Motion, *Operation Rainbow-Push, Inc.*, No. 2:06-cv-2451 (W.D. Tenn. July 24, 2006), D.E. 2.

"Voters were able to vote in advance from July 14 through July 28, 2006." Opinion at 2, *id.* (Aug. 1, 2006), D.E. 15 [hereinafter *Operation Rainbow-Push, Inc.* Opinion], 2006 WL 2435081.

1658. Order, *id.* (July 25, 2006), D.E. 4 [hereinafter July 25, 2006, *Operation Rainbow-Push, Inc.* Order]; *see* Amended Complaint, *id.* (July 25, 2006), D.E. 5.

1659. July 25, 2006, *Operation Rainbow-Push, Inc.* Order, *supra* note 1658; *see* Intervenor's Motion to Dismiss, *Operation Rainbow-Push, Inc.*, No. 2:06-cv-2451 (W.D. Tenn. July 27, 2006), D.E. 6.

1660. *Operation Rainbow-Push, Inc.* Opinion, *supra* note 1657.

1661. *Id.* at 9.

1662. Order, *Operation Rainbow-Push, Inc.*, No. 2:06-cv-2451 (W.D. Tenn. Dec. 22, 2006), D.E. 21; *see* Order to Show Cause, *id.* (Dec. 8, 2006), D.E. 20.

the plaintiffs, finding the population deviations to be within constitutional limits.

Topics: Malapportionment; section 5 preclearance; three-judge court.

On April 20, 2006, a few days before the weeklong qualifying period for filing candidacy papers for election to Georgia's legislature, a member of the assembly and possible candidate for the senate filed a constitutional challenge, with three voters as the other plaintiffs, to new state-senate district lines for three districts, including the district in which the candidate intended to run.[1663] The plaintiffs filed their complaint as a motion to intervene in a 2003 redistricting challenge that had closed in 2004.[1664]

Five days later, the plaintiffs adopted the alternative strategy of initiating a new case.[1665] With their complaint, they filed a motion for an emergency hearing by a three-judge district court, noting that the new district lines were only precleared on April 20.[1666]

The court assigned the case to Judge Beverly B. Martin.[1667] She had not yet had a three-judge case,[1668] so she conferred with the circuit's Chief Judge J.L. Edmondson.[1669] They both agreed that a three-judge court probably was required.[1670] Judge Martin ordered a response from the state filed by 3:00 p.m. on April 27.[1671]

1663. Intervention Motion, Larios v. Cox, No. 1:03-cv-693 (N.D. Ga. Apr. 20, 2006), D.E. 278; *see* Tom Baxter, *Athens' New State Senate Lines OK'd*, Atlanta J.-Const., Apr. 21, 2006, at D3 (reporting that the candidate was the primary target of 2006 redistricting).

1664. Cox v. Larios, 542 U.S. 947 (summarily affirming a district-court judgment that the redistricting plan violated equal protection), *aff'g* 300 F. Supp. 2d 1320 (N.D. Ga. 2004).

1665. Complaint, Kidd v. Cox, No. 1:06-cv-997 (N.D. Ga. Apr. 25, 2006), D.E. 1; *see* Withdrawal of Motion, *Larios*, No. 1:03-cv-693 (N.D. Ga. Apr. 20, 2006), D.E. 279.

1666. Motion for Emergency Hearing, *Kidd*, No. 1:06-cv-997 (N.D. Ga. Apr. 25, 2006), D.E. 2.

1667. Docket Sheet, *id.* (Apr. 20, 2006).

Judge Martin joined the Northern District of Georgia's bench on August 3, 2000, and she was elevated to the court of appeals on January 28, 2010. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges. Tim Reagan interviewed Judge Martin for this report by telephone on October 26, 2012. She retired on September 30, 2021. *Id.*

1668. Transcript at 3, *Kidd*, No. 1:06-cv-997 (N.D. Ga. Apr. 27, 2006, filed Apr. 27, 2006), D.E. 15 [hereinafter *Kidd* Transcript].

1669. Interview with Judge Beverly B. Martin, Oct. 26, 2012.

1670. Designation of Three-Judge Court, *Kidd*, No. 1:06-cv-997 (N.D. Ga. Apr. 26, 2006), D.E. 5; Order, *id.* (Apr. 26, 2006), D.E. 4.

1671. Order, *id.* (Apr. 26, 2006), D.E. 6.

On the case's third day, Judge Martin held a telephone conference with the parties, and the state informed her that the absolute deadline for certification of candidates for the July 18 primary election was May 5.[1672] April 28 was the deadline to qualify with the individual parties.[1673] So that it would have additional time to consider the case, the three-judge court extended the qualification deadline to May 5.[1674] At the end of the day, the three-judge court also held a thirty-five-minute telephone conference with the parties.[1675]

The three-judge court held another teleconference on May 1[1676] and a hearing on May 2.[1677] District Judge Orinda D. Evans was in the same building as Judge Martin; Circuit Judge Susan H. Black came in from Jacksonville, Florida, for the hearing.[1678]

After the hearing, the court ruled against the plaintiffs.[1679] A forty-six-page opinion followed two weeks later.[1680] The court held that the populations of the three senate districts at issue deviated from the average district population by 0.51% to 0.89%, and these deviations were not unconstitutional for state legislative districts.[1681] Nor were the plaintiffs able to establish a claim of unconstitutional political gerrymandering.[1682]

The plaintiffs filed a notice of appeal,[1683] but it does not appear that an appeal was ever docketed with the Supreme Court.

Redistricting an Incumbent Out of His District

Jenkins v. Ray (Clay D. Land, M.D. Ga. 4:06-cv-43)

After school-board redistricting had received preclearance pursuant to section 5 of the Voting Rights Act, it was discovered that

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1672. Minutes, *id.* (Apr. 27, 2006), D.E. 10; *Kidd* Transcript, *supra* note 1668, at 38.

1673. *Kidd* Transcript, *supra* note 1668, at 4.

1674. Order, *Kidd*, No. 1:06-cv-997 (N.D. Ga. Apr. 27, 2006), D.E. 14; *see* Nancy Badertscher & Sonji Jacobs, *Qualifying Ends for Most Offices Up for Election*, Atlanta J.-Const., Apr. 29, 2006, at E3.

1675. Minutes, *Kidd*, No. 1:06-cv-997 (N.D. Ga. Apr. 27, 2006), D.E. 19.

1676. Minutes, *id.* (May 1, 2006), D.E. 28.

1677. Minutes, *id.* (May 2, 2006), D.E. 34.

1678. Interview with Judge Beverly B. Martin, Oct. 26, 2012.

1679. Order, *Kidd*, No. 1:06-cv-997 (N.D. Ga. May 2, 2006), D.E. 35; *see* Nancy Badertscher, *Judges Back GOP Redistrict of Athens Seat*, Atlanta J.-Const., May 3, 2006, at B2.

1680. Opinion, *Kidd*, No. 1:06-cv-997 (N.D. Ga. May 16, 2006), D.E. 36, 2006 WL 1341302.

1681. *Id.* at 16–31.

1682. *Id.* at 32–45.

1683. Notice of Appeal, *id.* (May 30, 2006), D.E. 38.

> the district line ran through the school-board chair's property and his dwelling was no longer in the district he represented. Three months before a school-board election, six voters filed a federal complaint challenging the preclearance. The assigned judge issued a temporary restraining order suspending the ballot-qualification deadline, and a three-judge district court held an evidentiary hearing at the end of the next month. The three-judge court determined that redistricting the incumbent out of his district required preclearance, so election officials allowed him to continue to represent and vote in his original district.
>
> *Topics:* Section 5 preclearance; three-judge court; getting on the ballot; enforcing orders; provisional ballots.

On April 17, 2006, three months before the next election, six voters in Randolph County, Georgia, filed a federal action in the Middle District of Georgia complaining that the incumbent chair of the school board had been redistricted into another district although section 5 preclearance of the redistricting had been obtained on representation that neither he nor any other incumbent would change districts.[1684] The plaintiffs sought a temporary restraining order, a preliminary injunction, and a three-judge district court to hear their claim that Georgia had failed to properly preclear the new school-board districts as required by section 5 of the Voting Rights Act.[1685]

The court assigned the case to Judge Clay D. Land, who requested a three-judge court on the following day.[1686] The circuit's chief judge empaneled a three-judge court on April 24.[1687] It was the practice of the district for the clerk's office to screen cases that might require three-judge

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1684. Complaint, Jenkins v. Ray, No. 4:06-cv-43 (M.D. Ga. Apr. 17, 2006), D.E. 1; Cook v. Randolph County, 573 F.3d 1143, 1146–47 (11th Cir. 2009); *see* Harry Franklin, *Randolph School Board Member to Stay in District*, Columbus Ledger-Enquirer, June 8, 2006 (reporting that two of the plaintiffs were the superintendent of schools and his wife).

1685. Motions, *Jenkins*, No. 4:06-cv-43 (M.D. Ga. Apr. 17, 2006), D.E. 9, 10; *see* Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination and requiring that preclearance disputes be heard by a three-judge district court).

On June 25, 2013, the Supreme Court declined to hold section 5 unconstitutional, but the Court did hold unconstitutional the criteria for which jurisdictions require section 5 preclearance. Shelby County v. Holder, 570 U.S. 529 (2013).

1686. Letter, *Jenkins*, No. 4:06-cv-43 (M.D. Ga. Apr. 19, 2006), D.E. 11.

Tim Reagan interviewed Judge Land for this report by telephone on October 11, 2012.

1687. Order, *Jenkins*, No. 4:06-cv-43 (M.D. Ga. Apr. 24, 2006), D.E. 21.

courts and alert judges of their review as soon as the case was filed.[1688] Judge Land reviewed the case and agreed with the clerk's office that a three-judge court was required.[1689]

After a hearing on April 21,[1690] Judge Land issued a temporary restraining order declaring that the qualification period for the ballot, which was to begin on April 24, would remain open beyond the previously set closing date of April 28 until further order of the court.[1691]

The three-judge court held an evidentiary hearing on May 31.[1692] On June 5, the court ruled that the assignment of the African American incumbent to a different district required preclearance.[1693] The redistricting followed the 2000 census.[1694] After redistricting, the incumbent's property was partly in one district, a predominantly African American district, and partly in another, a predominantly White district, and his dwelling was not in the district he represented.[1695] For the 2002 election, in response to a challenge by a competing candidate, the incumbent was allowed to continue representing his original district.[1696] For the 2006 election, election officials decided that they had made a mistake in 2002.[1697] The three-judge court decided that assigning the incumbent to a different district required section 5 preclearance.[1698]

Election officials permitted the incumbent to vote in and represent his original district, and he was reelected.[1699] Because preclearance was still pending, the incumbent had to cast a provisional ballot, and he was not issued a permanent voting card showing his registration in the original

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1688. Interview with Judge Clay D. Land, Oct. 11, 2012.

1689. *Id.*

1690. Minutes, *Jenkins*, No. 4:06-cv-43 (M.D. Ga. Apr. 21, 2006), D.E. 17.

1691. Order, *id.* (Apr. 21, 2006), D.E. 18.

1692. Minutes, *id.* (May 31, 2006), D.E. 41.

1693. Order, *id.* (June 5, 2006), D.E. 44 [hereinafter June 5, 2006, *Jenkins* Order], 2006 WL 1582426; *see* Cook v. Randolph County, 573 F.3d 1143, 1145, 1147 (11th Cir. 2009); *see also* Franklin, *supra* note 1684.

1694. *Cook*, 573 F.3d at 1145; June 5, 2006, *Jenkins* Order, *supra* note 1693, at 1.

1695. *Cook*, 573 F.3d at 1145; June 5, 2006, *Jenkins* Order, *supra* note 1693, at 1–2.

1696. *Cook*, 573 F.3d at 1145–46; June 5, 2006, *Jenkins* Order, *supra* note 1693, at 2; Jordan v. Cook, 277 Ga. 155, 587 S.E.2d 52 (Ga. 2003).

1697. June 5, 2006, *Jenkins* Order, *supra* note 1693, at 2.

1698. *Id.* at 3–5.

1699. Order at 3–5, Jenkins v. Ray, No. 4:06-cv-43 (M.D. Ga. May 24, 2007), D.E. 57, 2007 WL 1544741.

district.[1700] On May 24, 2007, the three-judge court denied a motion for contempt.[1701]

On September 12, 2006, the Justice Department decided not to preclear the assignment of the incumbent to a different district, and so he remained a voter and representative in his original district.[1702]

Meanwhile, a removed action by the incumbent was pending before Judge Land.[1703] On April 17, 2006, the incumbent filed an action in state court seeking his assignment to his original district.[1704] On November 30, the defendants removed the action to federal court in the Middle District,[1705] which assigned the case to Judge Land.[1706] He denied the plaintiff's motion to remand on February 2, 2007.[1707] On January 4, 2008, Judge Land determined that the incumbent's prayers for injunctive relief were moot and his claims for damages were without merit.[1708] The court of appeals affirmed the decision on July 7, 2009.[1709]

Enjoining an Election for New District Lines

Morman v. City of Baconton (W. Louis Sands, M.D. Ga. 1:03-cv-161)

> The federal district court enjoined an election for city council because the district lines had recently received preclearance pursuant to section 5 of the Voting Rights Act and a state judge had refused to allow a delay to await preclearance of the new lines. The matter was heard on the afternoon before the scheduled November election. The election was held instead at the time of the

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1700. *Id.*

1701. *Id.* at 5–6.

1702. Cook v. Randolph County, 573 F.3d 1143, 1145, 1147 (11th Cir. 2009); Summary Judgment at 5, Cook v. Randolph County, No. 4:06-cv-138 (M.D. Ga. Jan. 4, 2008), D.E. 101 [hereinafter *Cook* Summary Judgment].

1703. Docket Sheet, *Cook*, No. 4:06-cv-138 (M.D. Ga. Nov. 30, 2006) [hereinafter *Cook* Docket Sheet].

1704. Complaint, Cook v. Randolph County, No. 2006-cv-54 (Ga. Sup. Ct. Randolph Cty. Apr. 17, 2006), *filed as* Ex. 2, Amended Notice of Removal, *Cook*, No. 4:06-cv-138 (M.D. Ga. Dec. 1, 2006), D.E. 5 (electronic filing of removal documents); *Cook*, 573 F.3d at 1146.

1705. Notice of Removal, *Cook*, No. 4:06-cv-138 (M.D. Ga. Nov. 30, 2006), D.E. 1; *Cook*, 573 F.3d at 1148.

1706. *Cook* Docket Sheet, *supra* note 1703.

1707. Order, *Cook*, No. 4:06-cv-138 (M.D. Ga. Feb. 2, 2007), D.E. 60; *Cook*, 573 F.3d at 1148.

1708. *Cook* Summary Judgment, *supra* note 1702 (finding qualified immunity for the individual defendants, municipal immunity for the municipal defendants, and insufficient evidence for conspiracy claims); *Cook*, 573 F.3d at 1148–49.

1709. *Cook*, 573 F.3d 1143.

presidential primary elections the following March. The matter of attorney fees was settled out of court.

Topics: Malapportionment; enjoining elections; section 5 preclearance; three-judge court; attorney fees.

Four days before the 2003 general election, three voters in Baconton, Georgia, filed in the Middle District of Georgia a federal complaint against Baconton and its officials, seeking an injunction against elections to the city council based on out-of-date district lines.[1710] According to the complaint, new district lines based on the 2000 census were precleared pursuant to section 5 of the Voting Rights Act[1711] on October 24, but a state judge refused to allow Baconton to delay its city-council elections so that precleared district lines could be used.[1712] With their complaint, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction[1713] and a request for the appointment of a three-judge district court to hear their section 5 claim.[1714]

On the day before the election, Judge W. Louis Sands set the matter for hearing at 3:30 that afternoon.[1715] The evidence showed that of the three seats up for election, only one was contested, and the incumbent's challenger for that seat resided in the seat's district only according to the old district lines.[1716] On the day of hearing, Judge Sands enjoined the election for the city-council seats.[1717]

On November 13, the city submitted a plan for a special election to be held at the time of the March 2, 2004, presidential primary elections.[1718] Judge Sands approved the city's proposal.[1719] Later, Judge Sands ordered

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1710. Complaint, Morman v. City of Baconton, No. 1:03-cv-161 (M.D. Ga. Oct. 31, 2003), D.E. 1 [hereinafter *Morman* Complaint].

1711. Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination and requiring that preclearance disputes be heard by a three-judge district court).

On June 25, 2013, the Supreme Court declined to hold section 5 unconstitutional, but the Court did hold unconstitutional the criteria for which jurisdictions require section 5 preclearance. Shelby County v. Holder, 570 U.S. 529 (2013).

1712. *Morman* Complaint, *supra* note 1710, at 2, 4–7.

1713. Motion, *Morman*, No. 1:03-cv-161 (M.D. Ga. Oct. 31, 2003), D.E. 3.

1714. Request, *id.* (Oct. 31, 2003), D.E. 2.

1715. Order, *id.* (Nov. 3, 2003), D.E. 8; *see* Minutes, *id.* (Nov. 3, 2003), D.E. 9.

1716. Injunction at 2, *id.* (Nov. 3, 2003), D.E. 11.

1717. *Id.* at 3.

1718. Proposed Plan, *id.* (Nov. 13, 2003), D.E. 12.

1719. Order, *id.* (Jan. 15, 2004), D.E. 16.

that candidates be able to qualify on February 17 for the election if they could show that they attempted to qualify on January 30 when the city clerk's office was improperly closed.[1720]

The city reported election results to the court,[1721] and Judge Sands closed the case.[1722] The matter of attorney fees was resolved by the parties out of court.[1723]

Malapportioned City Commission Districts

Wright v. City of Albany (W. Louis Sands, M.D. Ga. 1:03-cv-148)

> The district court enjoined the November 2003 election for Albany, Georgia's board of commissioners on a September 24 federal complaint that the commission districts were malapportioned. District lines reflecting the 2000 census had not yet received preclearance pursuant to section 5 of the Voting Rights Act. The judge permitted a mayoral candidate, elected at large, to intervene in an unsuccessful attempt to protect the mayoral election's going forward as planned. With the assistance of the state legislature's reapportionment services office, the judge drew district lines and set an election for February 10, 2004. On the day of the election, the judge kept the polls open until 9:00 p.m. because of problems at some polls. The plaintiffs recovered $35,647.75 in attorney fees and expenses.
>
> *Topics:* Malapportionment; enjoining elections; section 5 preclearance; intervention; polling hours; attorney fees.

On September 24, 2003, five voters filed a federal complaint in the Middle District of Georgia seeking to enjoin the November 4 elections to the City of Albany's board of commissioners because the commission districts were malapportioned.[1724] Five days later, the plaintiffs filed a motion for a preliminary injunction.[1725]

On October 3, Judge W. Louis Sands set the matter for hearing on October 6.[1726] On October 6, a mayoral candidate sought to intervene as a

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1720. Order, *id.* (Feb. 13, 2004), D.E. 23.

1721. Report, *id.* (Mar. 12, 2004), D.E. 25.

1722. Order, *id.* (Apr. 20, 2005), D.E. 26.

1723. Dismissal, *id.* (June 24, 2005), D.E. 32.

1724. Complaint, Wright v. City of Albany, No. 1:03-cv-148 (M.D. Ga. Sept. 24, 2003), D.E. 1.

1725. Preliminary-Injunction Motion, *id.* (Sept. 29, 2003), D.E. 2.

1726. Order, *id.* (Oct. 3, 2003), D.E. 3.

plaintiff to protect his interest in the mayoral election's going forward.[1727] Judge Sands granted intervention.[1728]

Judge Sands held hearings on October 6 and 9.[1729] On October 9, the parties stipulated that redistricting after the 2000 census had been denied section 5 preclearance by the Justice Department on September 23, 2002, and the department posed questions on August 25, 2003, regarding a revised districting plan.[1730]

On October 16, Judge Sands enjoined the upcoming election until proper district lines could be drawn.[1731] He did not grant an exception for the position of mayor, because the mayor was also a voting member of the malapportioned commission.[1732]

On December 24, Judge Sands approved a new districting plan drawn up, at the plaintiffs' request, by the director of the legislative reapportionment services office for Georgia's general assembly, adjusted to ensure that both of an incumbent's residences were in the incumbent's district.[1733] Judge Sands ordered that a special election for the mayor and the three expired commission seats be held on February 10, 2004.[1734]

In response to an election-day motion for relief from election problems at some polls,[1735] Judge Sands held a 12:30 p.m. hearing[1736] and ordered one polling place to remain open until 9:00 p.m.[1737] The intervenor who was a candidate for mayor won his election.[1738]

1727. Intervention Motion, *id.* (Oct. 6, 2003), D.E. 4.

1728. Minutes, *id.* (Oct. 9, 2003), D.E. 28.

1729. *Id.*

1730. Stipulation, *id.* (Oct. 9, 2003), D.E. 27; *see* Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination).

On June 25, 2013, the Supreme Court declined to hold section 5 unconstitutional, but the Court did hold unconstitutional the criteria for which jurisdictions require section 5 preclearance. Shelby County v. Holder, 570 U.S. 529 (2013).

1731. Injunction, *Wright*, No. 1:03-cv-148 (M.D. Ga. Oct. 16, 2003), D.E. 26.

1732. *Id.* at 6–9.

1733. Wright v. City of Albany, 306 F. Supp. 2d 1228 (M.D. Ga. 2003).

1734. *Id.* at 1240.

1735. Emergency Motion, *Wright*, No. 1:03-cv-148 (M.D. Ga. Feb. 10, 2004), D.E. 68.

1736. Order, *id.* (Feb. 10, 2004), D.E. 69.

1737. Order, *id.* (Feb. 12, 2004), D.E. 73; Minutes, *id.* (Feb. 10, 2004), D.E. 70.

1738. *See* Bill Torpy, *Albany Elects First Black Mayor*, Atlanta J.-Const., Feb. 13, 2004, at D1.

On August 19, Judge Sands awarded the plaintiffs $35,647.75 in attorney fees and expenses.[1739]

New School-Board Elections to Accommodate the Decennial Census

Cox v. Donaldson (George Howard, Jr., E.D. Ark. 5:02-cv-319)

> Three school-board members filed a federal complaint on September 3, 2002, to enjoin a September 17 school-board election. Five school-board directors served staggered five-year terms, and the opening of all seats to new elections was intended to accommodate the 2000 census data. On the day after the election, the district judge issued an agreed order temporarily enjoining certification of the election. The following May, the parties agreed that the election would be certified only for the position with the expired term.
>
> *Topics:* Enjoining elections; enjoining certification.

On September 3, 2002, three school-board members filed a federal complaint in the Eastern District of Arkansas against Chicot County's clerk and its board of election commissioners to enjoin a September 17 school-board election.[1740] The complaint alleged "an intent to eliminate African American presence on the Lakeside School Board" by vacating all positions—five directors serving five-year terms staggered so that one term expired each year—and holding new elections.[1741] With their complaint, the plaintiffs filed a motion for a preliminary injunction.[1742]

On the day after the election, Judge George Howard, Jr., issued an agreed order enjoining certification of the election results pending further orders of the court.[1743] On the next day, the defendants explained in response to the injunction motion that the election was called to accommodate decennial redistricting.[1744]

1739. Order, *Wright*, No. 1:03-cv-148 (M.D. Ga. Aug. 19, 2004), D.E. 78; *see* Receipt, *id.* (Sept. 28, 2004), D.E. 80.

1740. Complaint, Cox v. Donaldson, No. 5:02-cv-319 (E.D. Ark. Sept. 3, 2002), D.E. 1.

1741. *Id.* at 2–4.

1742. Preliminary-Injunction Motion, *id.* (Sept. 3, 2002), D.E. 2.

1743. Order, *id.* (Sept. 18, 2002), D.E. 5.

Judge Howard died on April 21, 2007. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

1744. Response, *Cox*, No. 5:02-cv-319 (E.D. Ark. Sept. 19, 2002), D.E. 7.

On May 21, 2003, Judge Howard granted a stipulated motion to dismiss the case, reciting the parties' agreement that the election would be certified for only one of the board positions.[1745]

Communities of Interest in Congressional Districts

Kansas v. Thornburgh (Julie A. Robinson, Deanell Reece Tacha, and J. Thomas Marten, D. Kan. 5:02-cv-4087)

> Two months before primary elections, a state's attorney general filed a federal complaint challenging congressional district lines. Approximately one month later, a three-judge district court ruled that intervening plaintiffs had not shown an unconstitutional splitting of communities of interest. The attorney general was dismissed for lack of standing.
>
> *Topics:* Malapportionment; intervention; three-judge court.

On June 5, 2002, Kansas's attorney general filed a federal complaint in the District of Kansas against Kansas's secretary of state challenging the congressional district boundaries drawn following the 2000 census.[1746] Judge Julie A. Robinson conducted a scheduling hearing on June 10, and a three-judge district court was appointed on June 11 to hear the case, adding Circuit Judge Deanell Reece Tacha and District of Kansas Judge J. Thomas Marten.[1747]

The case was heard on July 3.[1748] The court had extended election deadlines to accommodate the court's consideration of the case, including

1745. Order, *id.* (May 21, 2003), D.E. 16.

1746. Docket Sheet, Kansas v. Thornburgh, No. 5:02-cv-4087 (D. Kan. June 5, 2002) [hereinafter *Thornburgh* Docket Sheet] (D.E. 1); Graham v. Thornburgh, 207 F. Supp. 2d 1280, 1282 (D. Kan. 2002); *see* Joshua Akers, *Stovall Files Lawsuit Over Revised Congressional Districts*, Wichita Eagle, June 6, 2002, at 3B.

1747. *Thornburgh* Docket Sheet, *supra* note 1746 (D.E. 5, 6); *Graham*, 207 F. Supp. 2d at 1282.

Judge Tacha retired on June 1, 2011, and Judge Marten retired on May 1, 2021. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

1748. *Thornburgh* Docket Sheet, *supra* note 1746 (D.E. 40, 43); *Graham*, 207 F. Supp. 2d at 1282–83; *see* Steve Painter, *House Districts Debated in Court*, Wichita Eagle, July 3, 2002, at 1B.

an extension until July 9 to file a congressional candidacy.[1749] The court granted motions to intervene by voters and American Indian tribes.[1750]

Ruling on July 3, just over one month before an August 6 primary election, the court overruled the charge that the district boundaries improperly split up communities of interest.[1751] The attorney general, suing on behalf of the state, was dismissed as a party for lack of standing, but her office was permitted to represent some of the intervening plaintiffs.[1752]

Redistricting Elbert County

Brown v. Elbert County (Hugh Lawson, M.D. Ga. 3:02-cv-45)

> In May 2002, voters filed an action in federal court to have the district lines for two county boards redrawn to reflect the 2000 census. The district judge appointed the state reapportionment office to assist him in ordering new district lines and awarded the plaintiffs attorney fees.
>
> *Topics:* Malapportionment; attorney fees.

Four voters filed a federal action in the Middle District of Georgia on May 17, 2002, complaining that the district lines for the boards of commissioners and education in Elbert County had not been redrawn to reflect the results of the 2000 census.[1753] The plaintiffs sought a temporary restraining order, among other relief.[1754]

Judge Hugh Lawson held a hearing on May 31, and the parties agreed to his appointing the director of Georgia's reapportionment office as an expert to assist the court in drawing new district lines.[1755] On June 4, Judge

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1749. *Thornburgh* Docket Sheet, *supra* note 1746 (D.E. 22); *Graham*, 207 F. Supp. 2d at 1282–83; *see Candidates Now Have Longer to File*, Wichita Eagle, June 16, 2002, at 6B; Josh Funk, *10 Local House Races Will Have Primary Contests*, Wichita Eagle, June 25, 2002, at 1B.

1750. *Thornburgh* Docket Sheet, *supra* note 1746 (D.E. 16); *Graham*, 207 F. Supp. 2d at 1282.

1751. *Graham*, 207 F. Supp. 2d at 1285–97; *see Judges: House Districts OK*, Wichita Eagle, July 4, 2002, at 1B.

1752. *Graham*, 207 F. Supp. 2d at 1283–85.

1753. Complaint, Brown v. Elbert County, No. 3:02-cv-45 (M.D. Ga. May 17, 2002), D.E. 1.

1754. Docket Sheet, *id.* (May 17, 2002).

1755. Redistricting Order, *id.* (June 4, 2002), D.E. 15 [hereinafter *Brown* Redistricting Order]; Consent Order, *id.* (May 31, 2002), D.E. 14; Minutes, *id.* (May 31, 2002), D.E. 13.

Lawson adopted new district lines.[1756] The parties agreed to an award to the plaintiffs of $8,000 in attorney fees and expenses.[1757]

Postponement of a City Council Election for Preclearance of New Districts

LULAC Council #682 v. City of Seguin (Orlando L. Garcia, W.D. Tex. 5:02-cv-369)

> A federal judge enjoined a May 4 city-council election, because a previous districting plan had become malapportioned and a new plan had not yet received preclearance. The election was held on September 14.
>
> *Topics:* Enjoining elections; section 5 preclearance; malapportionment; three-judge court; attorney fees; early voting.

On April 12, 2002, the day that a voting-rights group filed a federal complaint in the Western District of Texas, Judge Orlando L. Garcia ordered briefing for an April 15 hearing on the legal implications of a planned May 4 city-council election for which districts had become malapportioned, but a new districting plan had not yet received preclearance pursuant to section 5 of the Voting Rights Act.[1758]

Following the hearing, held two days before early voting was to begin, Judge Garcia enjoined the election and set the case for hearing again on April 24.[1759] The circuit's chief judge named Circuit Judge Emilio M. Garza and Western District of Texas Judge Edward C. Prado to join Judge Garcia as a three-judge district court to hear section 5 claims.[1760] On April 30, the

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1756. Redistricting Opinion, *id.* (June 12, 2002), D.E. 19; *Brown* Redistricting Order, *supra* note 1755.

1757. Consent Order, *Brown*, No. 3:02-cv-45 (M.D. Ga. July 18, 2002), D.E. 21.

1758. Order, LULAC Council #682 v. City of Seguin, No. 5:02-cv-369 (W.D. Tex. Apr. 12, 2002), D.E. 3; *see* Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (2015) (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination and requiring that preclearance disputes be heard by a three-judge district court).

On June 25, 2013, the Supreme Court declined to hold section 5 unconstitutional, but the Court did hold unconstitutional the criteria for which jurisdictions require section 5 preclearance. Shelby County v. Holder, 570 U.S. 529(2013).

1759. Order, *LULAC Council #682*, No. 5:02-cv-369 (W.D. Tex. Apr. 16, 2002), D.E. 6; *see* Sonja Garza, *Judge Postpones Seguin Election*, San Antonio Express-News, Apr. 16, 2002, at 1B; *see also* Roger Croteau, *Seguin Accepts Delayed Election*, San Antonio Express-News, Apr. 17, 2002, at 7B.

1760. Order, *LULAC Council #682*, No. 5:02-cv-369 (W.D. Tex. Apr. 16, 2002), D.E. 7.

Judge Garza retired on January 5, 2015; Judge Prado was elevated to the court of appeals on May 5, 2003, and he retired on April 2, 2018. Federal Judicial Center Biograph-

three-judge court converted the temporary restraining order into a preliminary injunction.[1761]

Following May 17 preclearance of new districts, the three-judge court issued an order on June 26 approving settlement of the case by holding the election on September 14.[1762] The parties agreed to an award of $10,000 in attorney fees and costs.[1763]

School-District Election Enjoined for Lack of Preclearance

Reyna v. East Central ISD (Orlando L. Garcia, W.D. Tex. 5:02-cv-257)

> Six days before a candidate filing deadline for school-district trustees, a federal complaint sought an injunction of the election because newly drawn district lines had been denied preclearance by the Justice Department. The district judge issued a temporary restraining order against the election, and then a three-judge district court issued a stipulated preliminary injunction. An election was held several months later with precleared district lines. The court awarded the plaintiffs $30,862.50 in attorney fees.
>
> *Topics:* Enjoining elections; section 5 preclearance; three-judge court; attorney fees.

Six days before the March 20, 2002, candidate filing deadline for trustees of the East Central Independent School District, which included parts of San Antonio and nearby areas of Bexar County, three voters filed a federal complaint in the Western District of Texas to enjoin the May 7 election because the Justice Department had denied preclearance pursuant to section 5 of the Voting Rights Act of newly drawn district lines.[1764] The department "expressed concerns about the reduction in the number of districts, which would result in a retrogression of minority voting strength."[1765]

Judge Orlando L. Garcia issued a temporary restraining order against the election on March 15, the day after the complaint was filed.[1766] "Al-

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ical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

1761. Order, *LULAC Council #682*, No. 5:02-cv-369 (W.D. Tex. Apr. 30, 2002), D.E. 9.

1762. Order, *id.* (June 26, 2002), D.E. 13.

1763. *Id.* at 4.

1764. Docket Sheet, Reyna v. East Central ISD, No. 5:02-cv-257 (W.D. Tex. Mar. 14, 2002) (D.E. 1); Fee Opinion at 1–2, *id.* (June 24, 2003, filed July 7, 2003), D.E. 24 [hereinafter *Reyna* Fee Opinion]; *see* Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination and requiring that preclearance disputes be heard by a three-judge district court).

1765. *Reyna* Fee Opinion, *supra* note 1764, at 1.

1766. Temporary Restraining Order, *Reyna*, No. 5:02-cv-257 (W.D. Tex. Mar. 15,

though legal counsel for Defendants has been notified that Plaintiffs are seeking temporary injunctive relief, the motion is being granted without a hearing because the filing deadline for the election is within three (3) business days and time is of the essence."[1767]

Pursuant to section 5, the circuit's chief judge appointed Circuit Judge Will L. Garwood and Western District of Texas Judge Edward C. Prado to join Judge Garcia as a three-judge district court to hear the section 5 claim.[1768] On March 29, the parties submitted a joint motion for a preliminary injunction, which the three-judge court granted that day.[1769]

On July 24, the Justice Department precleared a revised districting plan, "which included one additional minority district."[1770] An election was held on November 5, and Judge Garcia dismissed the complaint on December 6.[1771] On June 24, 2003, Judge Garcia awarded the plaintiffs $30,862.50 in attorney fees.[1772] The school district voluntarily dismissed its appeal of the fee award.[1773]

Remedying Malapportionment in Place for Decades

Diamond v. Town of Manalapan (Patricia A. Seitz, S.D. Fla. 9:02-cv-80065)

> A few weeks before a town-commission election, four voters filed a federal complaint alleging malapportionment of commission districts because four commissioners represented eighty-nine residents on one side of town and two commissioners represented 232 residents on the other side of town. The district judge denied the plaintiffs a preliminary injunction, which would disrupt a scheme that had been in place for decades, but ordered a constitutionally valid plan be in place within approximately six months. Following conversion of the commission to at-large

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2002), D.E. 3.

1767. *Id.* at 2.

1768. Order, *id.* (Mar. 18, 2002), D.E. 4.

Judge Garwood died on July 14, 2011; Judge Prado was elevated to the court of appeals on May 5, 2003, and he retired on April 2, 2018. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

1769. Order, *Reyna*, No. 5:02-cv-257 (W.D. Tex. Mar. 29, 2002), D.E. 7.

1770. *Reyna* Fee Opinion, *supra* note 1764, at 2; Dismissal Order, *Reyna*, No. 5:02-cv-257 (W.D. Tex. Dec. 6, 2002), D.E. 15 [hereinafter *Reyna* Dismissal Order].

1771. *Reyna* Fee Opinion, *supra* note 1764, at 2; *Reyna* Dismissal Order, *supra* note 1770.

1772. *Reyna* Fee Opinion, *supra* note 1764.

1773. Order, Reyna v. East Central Independent School District, No. 03-50849 (5th Cir. Aug. 14, 2003), *filed as* Order, *Reyna*, No. 5:02-cv-257 (W.D. Tex. Aug. 25, 2003), D.E. 30.

elections with at least two commissioners from each side of town, the judge granted a voluntary dismissal of the suit.

Topics: Malapportionment; intervention; attorney fees.

Four voters filed a federal complaint in the Southern District of Florida on January 28, 2002, challenging "the Town of Manalapan's refusal to reapportion its town commission districts. Four commission members currently represent eighty-nine residents on the ocean side . . . and two commission members represent 232 residents on the island side . . . ."[1774] Four days later, the plaintiffs filed a preliminary injunction seeking at-large elections as an interim remedy for malapportionment, including for the commission election scheduled for March 5.[1775] Judge Patricia A. Seitz set the case for hearing on February 6.[1776] At the first hearing, she set an evidentiary hearing for February 20.[1777] The hearing, which lasted two days, was later moved to begin on February 21.[1778]

On February 8, residents supporting separate incorporation of the ocean side moved to intervene in opposition to the plaintiffs,[1779] and Judge Seitz granted the motion on February 14.[1780]

On February 22, Judge Seitz found that residents of the island side were clearly underrepresented, but "because the Town Commission has commenced a process to address the reapportionment of the Town's election districts, the Court must defer to the Town Commission to address this highly political task."[1781] "Moreover, the use of the current electoral system for approximately forty years suggests that it has not been grossly onerous and thus, also weighs against Plaintiffs' claim of irreparable injury."[1782] "If, however, the Town does not continue its good faith effort to reapportion the current electoral districts, and the de-annexation proposal is brought for a vote before an unfairly constituted Town Commission, the

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1774. Complaint, Diamond v. Town of Manalapan, No. 9:02-cv-80065 (S.D. Fla. Jan. 25, 2002, filed Jan. 28, 2002), D.E. 1; *see* Tim O'Meilia, *ACLU Jumps Into Manalapan Power Battle*, Palm Beach Post, Jan. 26, 2002, at 1B; *Voting Rights Fight Divides Residents*, Ft. Lauderdale Sun-Sentinel, Jan. 26, 2002, at 3B.

1775. Preliminary-Injunction Motion, *Diamond*, No. 9:02-cv-80065 (S.D. Fla. Jan. 29, 2002, filed Jan. 30, 2002), D.E. 5.

1776. Order, *id.* (Feb. 1, 2002, filed Feb. 4, 2002), D.E. 11.

1777. Minutes, *id.* (Feb. 6, 2002, filed Feb. 8, 2002), D.E. 14.

1778. Order, *id.* (Feb. 14, 2002, filed Feb. 15, 2002), D.E. 30; Transcripts, *id.* (Feb. 21–22, 2002, filed Mar. 18, 2002), D.E. 49, 50.

1779. Intervention Motion, *id.* (Feb. 8, 2002, filed Feb. 11, 2002), D.E. 15.

1780. Intervention Opinion, *id.* (Feb. 14, 2002, filed Feb. 15, 2002), D.E. 23.

1781. Injunction Opinion at 7, *id.* (Feb. 22, 2002, filed Feb. 25, 2002), D.E. 42.

1782. *Id.* at 8.

Court will then consider further requests for injunctive relief."[1783] Setting a deadline, Judge Seitz ordered, "the Town of Manalapan shall propose and adopt a constitutionally permissible apportionment plan and if necessary, hold a special election, no later than September 3, 2002."[1784]

On June 11, voters expanded the town commission to seven seats, all elected at large, with two seats requiring residency on the ocean side and two seats requiring residency on the island side.[1785] Following the town's correction of its malapportionment, Judge Seitz granted a joint motion to dismiss the case on August 21.[1786] According to a news report, "The town agreed to pay $110,000 to the American Civil Liberties Union, considered a catalyst in the lawsuit to change the way the commissioners are elected."[1787]

Elimination of a Constable Precinct

Rodriguez v. Bexar County (H.F. Garcia and William Wayne Justice, W.D. Tex. 5:01-cv-1049)

> A district judge issued a temporary injunction against the redistricting of precincts for justices of the peace and constables, eliminating one of the five precincts, without preclearance pursuant to section 5 of the Voting Rights Act. After the county obtained preclearance, the judge found Hispanic vote dilution in violation of section 2 of the Voting Rights Act, but the court of appeals reversed the nullification of an election to the new precincts.
>
> *Topics:* Section 5 preclearance; section 2 discrimination; enjoining elections; three-judge court; case assignment.

On November 21, 2001, two days after a complaint and motion were filed, Western District of Texas Judge H.F. Garcia issued a temporary restraining order against Bexar County's elimination of a precinct for justices of the peace and constables because the county, which includes San Antonio,

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1783. *Id.* at 10.

1784. *Id.* (emphasis omitted); *see* Tim O'Meilia, *Split Town Given Six Months to Rebalance*, Palm Beach Post, Feb. 23, 2002, at 1C (reporting also, "The ruling leaves unsettled the question of whether seasonal residents can be counted as part of the population in determining voting districts.").

1785. *See* Tim O'Meilia, *Manalapan Elections Altered*, Palm Beach Post, June 12, 2002, at 5B; Tim O'Meilia, *Manalapan to Vote, Then Point to Healing Wounds*, Palm Beach Post, July 7, 2002, at 4C.

1786. Dismissal, *Diamond*, No. 9:02-cv-80065 (S.D. Fla. Aug. 21, 2002, filed Aug. 23, 2002), D.E. 83.

1787. Tim O'Meilia & Scott McCabe, *Manalapan Settles Voting Suit*, Palm Beach Post, Aug. 8, 2002, at 3B.

had not received preclearance for the change pursuant to section 5 of the Voting Rights Act.[1788] On the same day, Judge Garcia transferred the case to Judge William Wayne Justice.[1789] Judge Garcia died on January 16, 2002.[1790]

On December 19, 2001, Judge Justice denied a motion to dismiss for lack of standing the admittedly otherwise meritorious section 5 claim.[1791] That same day, the circuit's chief judge named Circuit Judge Fortunato P. Benavides and District Judge Edward C. Prado to join Judge Justice as a three-judge district court to hear the section 5 claims.[1792] Section 5 claims became moot, however, when preclearance was granted on May 15, 2002.[1793] The three-judge court was designated again on September 23 following the filing of amended complaints.[1794]

As 2002 elections approached, Judge Justice denied the plaintiffs a temporary restraining order on October 2, finding no showing that claims could not be remedied after a trial on the merits.[1795] On April 14, 2003, the

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1788. Temporary Restraining Order, Rodriguez v. Bexar County, No. 5:01-cv-1049 (W.D. Tex. Nov. 21, 2001), D.E. 3; *see* Docket Sheet, *id.* (Nov. 19, 2001) [hereinafter *Rodriguez* Docket Sheet] (D.E. 1, 2); Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination and requiring that preclearance disputes be heard by a three-judge district court); *see also* Tom Bower, *JP Redistricting Takes Court Hit*, San Antonio Express-News, Nov. 22, 2001, at 3B.

"The major changes effected by the 2001 redistricting plan were the reduction of the number of precincts from five to four, and the elimination of one constable position." Rodriguez v. Bexar County, 385 F.3d 853, 858 (5th Cir. 2004).

1789. Order, *Rodriguez*, No. 5:01-cv-1049 (W.D. Tex. Nov. 21, 2001), D.E. 4.

Judge Justice died on October 13, 2009. Federal Judicial Center Biographical Directory of Article III Federal Judges [hereinafter FJC Biographical Directory], www.fjc.gov/history/judges.

1790. FJC Biographical Directory, *supra* note 1789.

1791. Order, *Rodriguez*, No. 5:01-cv-1049 (W.D. Tex. Dec. 19, 2001), D.E. 17.

1792. Order, *id.* (Dec. 19, 2001), D.E. 18.

Judge Prado was elevated to the court of appeals on May 5, 2003, and he retired on April 2, 2018; Judge Benavides died on May 5, 2023. FJC Biographical Directory, *supra* note 1789.

1793. Order, *Rodriguez*, No. 5:01-cv-1049 (W.D. Tex. July 19, 2002), D.E. 54; *see Rodriguez*, 385 F.3d at 859; *see also* Tom Bower, *Redistricting Plans OK'd*, San Antonio Express-News, May 18, 2002, at 2B.

1794. Order, *Rodriguez*, No. 5:01-cv-1049 (W.D. Tex. Sept. 23, 2002), D.E. 86; *see Rodriguez* Docket Sheet, *supra* note 1788 (Fourth Amended Complaint, D.E. 55; Fifth Amended Complaint, D.E. 61).

1795. Order, *Rodriguez*, No. 5:01-cv-1049 (W.D. Tex. Oct. 2, 2002), D.E. 94; *see* Order, *id.* (Oct. 7, 2002), D.E. 97 (denying reconsideration).

three-judge court concluded that the county's nullification of old-plan primary elections in 2002 following preclearance of the new plan did not invalidate later general-election results.[1796]

In an opinion signed on August 15, 2003, Judge Justice found that the 2001 redistricting violated the proscription against Hispanic vote dilution in section 2 of the Voting Rights Act.[1797] On September 26, Judge Justice nullified the 2002 election results and ordered the county to reinstate the fifth justice-of-the-peace-and-constable precinct.[1798]

On October 6, the court of appeals granted the county a stay of Judge Justice's remedy,[1799] and it reversed the section 2 ruling on September 17, 2004.[1800]

Redistricting New Jersey in 2001

Page v. Bartels (Dickinson R. Debevoise, D.N.J. 2:01-cv-1733)

> In an election year for New Jersey, a federal complaint challenged district lines for the state legislature that were adopted on the previous day. On the day that the complaint was filed, the judge signed a proposed order to show cause why the new districts should not be enjoined. At a hearing four days later, the judge determined that there was no likelihood that the plaintiffs would prevail on the merits. The court of appeals ruled one week later that the district court should have empaneled a three-judge district court to hear the case. The three-judge court granted summary judgment to the defendants.
>
> *Topics:* Malapportionment; three-judge court.

On April 12, 2001, in an election year for New Jersey, a federal complaint in the District of New Jersey challenged district lines for New Jersey's legislature that were adopted on the previous day.[1801] On the day that the

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1796. Opinion, *id.* (Apr. 14, 2003), D.E. 168, *aff'd*, 540 U.S. 1099 (2004).

1797. Opinion, *id.* (Aug. 19, 2003), D.E. 187, *rev'd*, 385 F.3d 853; *see* Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437, *as amended*, 52 U.S.C. § 10301; *see also* Tom Bower, *JP Remap Ruled Illegal*, San Antonio Express-News, Aug. 22, 2003, at 1B.

1798. Opinion, *Rodriguez*, No. 5:01-cv-1049 (W.D. Tex. Sept. 26, 2003), D.E. 203, *rev'd*, 385 F.3d 853; *see* Tom Bower, *Judge Voids Election of Constables, JPs*, San Antonio Express-News, Sept. 27, 2003, at 1A.

1799. Order, Rodriguez v. Bexar County, No. 03-51119 (5th Cir. Oct. 6, 2003), *filed as* Order, *Rodriguez*, No. 5:01-cv-1049 (W.D. Tex. Oct. 6, 2003), D.E. 212; *see* Maro Robbins, *Bexar County Precinct Tiff Put on Hold*, San Antonio Express-News, Oct. 7, 2003, at 1B.

1800. *Rodriguez*, 385 F.3d 853; *see* Guillermo Contreras, *Appeals Court Clears Bexar of Bias Charge*, San Antonio Express-News, Sept. 21, 2004, at 1A.

1801. Page v. Bartels, 248 F.3d 175, 180, 183 (3d Cir. 2001); Page v. Bartels, 144 F. Supp. 2d 346, 349 (D.N.J. 2001); *see* David Kinney, *Representation of Minorities the Major*

complaint was filed, Judge Dickinson R. Debevoise signed a proposed order to show cause why the new districts should not be enjoined.[1802] At an April 16 hearing on cause, Judge Debevoise ruled from the bench that an injunction was not warranted because there was no likelihood that the plaintiffs would prevail on the merits.[1803]

On the following day, the plaintiffs appealed,[1804] and the appeal was heard on April 23 by Chief Circuit Judge Edward R. Becker and Circuit Judges Leonard I. Garth and Morton I. Greenberg.[1805] On the day of the hearing, the court of appeals decided that because the complaint included a constitutional challenge to legislative districts, Judge Debevoise should have requested a three-judge district court to hear the claims before deciding upon preliminary injunctive relief.[1806]

Judge Debevoise immediately requested that Chief Judge Becker appoint a three-judge court, and Judge Becker appointed Judge Garth, Judge Debevoise, and District Judge Harold A. Ackerman.[1807] After a two-day trial on April 30 and May 1, the three-judge court awarded the defendants

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Question for Court, Newark Star-Ledger, Apr. 13, 2001, at 22.

1802. *Page*, 248 F.3d at 181, 183; *Page*, 144 F. Supp. 2d at 350; *see* Thomas Barlas, *Judge Halts Implementation of New Districts After GOP Protest*, Atlantic City Press, Apr. 13, 2001, at C1; *GOP Suing Over Voting District Map*, Asbury Park Press, Apr. 13, 2001, at A1; Herb Jackson, *Judge Puts Legislative Map on Hold*, Bergen Cty. Record, Apr. 13, 2001; David Kinney, *Judge Enters Redistricting Fight*, Newark Star-Ledger, Apr. 13, 2001, at 1; Iver Peterson, *Trenton Redistricting Map Blocked Over Claim of Bias*, N.Y. Times, Apr. 30, 2001, at B5.

Judge Debevoise died on August 14, 2015. Federal Judicial Center Biographical Directory of Article III Federal Judges [hereinafter FJC Biographical Directory], www.fjc.gov/history/judges.

1803. *Page*, 248 F.3d at 181, 183–84; *Page*, 144 F. Supp. 2d at 350; *see* Herb Jackson, *Judge, Rebuffing GOP, Clears Legislative Map*, Bergen Cty. Record, Apr. 17, 2001; *Judge Upholds Plan That Breaks Up Black and Hispanic Districts*, N.Y. Times, Apr. 17, 2001, at B2.

1804. Docket Sheet, Page v. Bartels, No. 2:01-cv-1733, (D.N.J. Apr. 12, 2001) [hereinafter D.N.J. *Page* Docket Sheet].

1805. Docket Sheet, Page v. Bartels, No. 01-1943 (3d Cir. Apr. 17, 2001).

Judge Becker died on May 19, 2006; Judge Garth died on September 22, 2016; and Judge Greenberg died on January 28, 2021. FJC Biographical Directory, *supra* note 1802.

1806. *Page*, 248 F.3d 175; *see* Adam Clymer, *Court Orders Fast Review of Trenton Redistricting*, N.Y. Times, Apr. 24, 2001, at B5.

1807. *Page*, 144 F. Supp. 2d at 352.

Judge Ackerman died on December 2, 2009. FJC Biographical Directory, *supra* note 1802.

summary judgment on May 2.[1808] The court issued a published opinion on May 7.[1809]

Voting Rights for Annexed Territory

Marascalco v. Grenada (Rhesa Barksdale, Neal B. Biggers, Jr., and Glen Davidson, N.D. Miss. 3:00-cv-61)

> Ten days before a municipal election, residents of recently annexed territory filed a federal complaint seeking to halt the election in which they would not be able to vote because the Justice Department denied preclearance to the annexation. A three-judge district court heard the case six days later and denied immediate relief. The court doubted its jurisdiction over the matter and expressed concern about the filing of the complaint nearly two months after the denial of preclearance.
>
> *Topics:* Enjoining elections; equal protection; three-judge court; section 5 preclearance; laches.

Ten days before a May 1, 2000, election in Grenada, Mississippi, residents of recently annexed territory filed a federal complaint in the Northern District of Mississippi, seeking to halt the election in which they would not be able to vote.[1810] The Justice Department had denied preclearance to the annexation.[1811] The plaintiffs claimed that although they were unable to vote, they nevertheless were subject to taxation and regulation by Grenada.[1812]

A three-judge district court heard the case on April 7: Circuit Judge Rhesa Barksdale and District Judges Neal B. Biggers, Jr., and Glen Davidson.[1813] After a ten-minute recess, Judge Barksdale announced that the court would deny the plaintiffs a preliminary injunction.[1814] The court doubted its jurisdiction over the matter and the merits of the case, and the

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1808. D.N.J. *Page* Docket Sheet, *supra* note 1804; *see* Robert Hanley, *Judges Uphold New Districts in New Jersey*, N.Y. Times, May 3, 2001, at B1.

1809. *Page*, 144 F. Supp. 2d 175.

1810. Docket Sheet, Marascalco v. Grenada, No. 3:00-cv-61 (N.D. Miss. Apr. 21, 2000) [hereinafter *Marascalco* Docket Sheet]; Transcript at 3–8, *id.* (Apr. 27, 2000, filed Sept. 9, 2000), D.E. 14 [hereinafter *Marascalco* Transcript].

1811. *Marascalco* Transcript, *supra* note 1810, at 21.

1812. *Id.* at 6–7.

1813. *Marascalco* Transcript, *supra* note 1810; *Marascalco* Docket Sheet, *supra* note 1810.

Jude Biggers died on October 15, 2023. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

1814. *Marascalco* Transcript, *supra* note 1810, at 124; *see Marascalco* Docket Sheet, *supra* note 1810 (D.E. 9).

court expressed concern about the plaintiffs' filing the complaint so long after the Justice Department's March 3 denial of preclearance.[1815]

The case was dismissed on the parties' stipulation on August 2.[1816]

1815. *Marascalco* Transcript, *supra* note 1810, at 124–26.
1816. *Marascalco* Docket Sheet, *supra* note 1810.

5. Filling Vacancies

Elected officials usually serve out their terms. Vacancies arise mid-term often enough that usually there are clear procedures for filling them. Occasionally, however, litigation can arise, and time is often of the essence when filling vacancies.

Litigation in one case ensued because of statutory conflicts over who had authority to replace a county commissioner, and the case was in federal court because of a then-existing requirement that election changes in covered jurisdictions receive federal preclearance.[1817] In another case, the complaint alleged that a town council delayed the creation of a new judicial position authorized by the state legislature by six days so that party nominees would not have to be selected by primary elections.[1818] In another case described here, voters challenged the removal of an elected chief justice for violation of a federal order; the federal court concluded that voters did not have a right to keep elected officials in office for their whole terms.[1819]

The first case described below was an effort to enjoin procedures for filling a congressional vacancy improperly, brought by an organization pro se.[1820] The district judge could find no evidence that the organization existed and could find no merit in the complaint.[1821]

Unsuccessful Pro Se Challenge to a Special Election

Progressive Southern Christian Leadership Conference v. Georgia Secretary of State (Mark H. Cohen, N.D. Ga. 1:20-cv-3877)

A pro se motion to enjoin an imminent special election was unsuccessful for failure to show any entitlement to relief.

Topics: Pro se party; enjoining elections.

1817. *See* "Validity of a Local Special Election," *infra* page 250.

1818. *See* "Establishing a New Position Too Late for a Primary Election," *infra* page 253.

1819. *See* "Removal of an Elected Official as a Violation of Voting Rights," *infra* page 254.

1820. *See* "Unsuccessful Pro Se Challenge to a Special Election," *infra* page 249.

1821. Opinion, Progressive S. Christian Leadership Conference v. Sec'y of State, No. 1:20-cv-3877 (N.D. Ga. Sept. 23, 2020), D.E. 8.

An organization and its founder filed a pro se motion in the Northern District of Georgia on Friday, September 18, 2020, for an emergency injunction against a writ of special election and a party's selection of a candidate to replace recently deceased U.S. Representative John Lewis.[1822] On Wednesday, Judge Mark H. Cohen issued a seven-page denial of immediate relief.[1823] He cautioned the plaintiffs that organizations cannot proceed pro se, and he noted that he could not find a record for the organization among Georgia's business records.[1824] Judge Cohen observed that the filing had not shown sufficient reasons for not providing notice to the defendants,[1825] and the plaintiffs had not shown justification for relief.[1826]

On January 7, 2021, 111 days after the complaint was filed, Judge Cohen issued an order that the plaintiffs show cause within two weeks why the action should not be dismissed for failure to serve the defendants within ninety days of the action's filing.[1827] Judge Cohen dismissed the action on January 26.[1828]

Validity of a Local Special Election

Powell v. Alabama (L. Scott Coogler, N.D. Ala. 2:08-cv-1345)

> The federal case involved a dispute about whether a county-commission vacancy had been filled by gubernatorial appointment or by special election, both of which had occurred. The case included the question of whether the procedure for filling the vacancy required section 5 preclearance. As the next general election drew near, the plaintiff voluntarily dismissed the action because the governor's appointee failed to qualify for the ballot.
>
> *Topics:* Section 5 preclearance; three-judge court.

On July 29, 2008, Doris Powell, an Alabama voter in Jefferson County's commission district 1, filed a federal action in the Northern District of Alabama concerning who had been named district 1's commissioner after the previous commissioner was elected mayor of Birmingham in October 2007.[1829] Alabama's supreme court had determined on June 30 that the

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1822. Complaint, Progressive S. Christian Leadership Conference v. Sec'y of State, No. 1:20-cv-3877 (N.D. Ga. Sept. 18, 2020), D.E. 1, 2.

1823. Opinion, *id.* (Sept. 23, 2020), D.E. 8.

1824. *Id.* at 1–2 n.1.

1825. *Id.* at 6.

1826. *Id.* at 5–7.

1827. Order, *id.* (Jan. 7, 2021), D.E. 11.

1828. Order, *id.* (Jan. 26, 2021), D.E. 12.

1829. Complaint, Powell v. Alabama, No. 2:08-cv-1345 (N.D. Ala. July 29, 2008), D.E. 1 [hereinafter *Powell* Complaint]; *see* Eric Velasco, *Lawsuit Seeks to Block Vote to Fill Dis-*

governor's November 21, 2007, appointee, was the commissioner.[1830] The federal plaintiff wanted the winner of a February 5, 2008, special election, held the same day as the federal primary elections, to be the commissioner.[1831]

Alabama's supreme court reasoned that Act No. 784, the statute enacted in 1977 to permit Jefferson County to fill commission vacancies by special election, was invalid.[1832] A more general statute, section 11-3-1(b), specified gubernatorial appointment until the next general election.[1833] The general statute was amended in 2004 to apply "[u]nless a local law authorizes a special election."[1834] Alabama's supreme court, however, had determined in 2005 that the amendment allowed for only subsequently enacted local laws.[1835] In addition, a 2007 amendment repealing any local laws in conflict with the general law further invalidated Act No. 784.[1836]

On May 27, 2008, the U.S. Supreme Court had determined that a 1985 statute providing for special elections to replace vacancies in another county—on Mobile County's commission—was never in force or effect, because Alabama's supreme court had determined that the 2004 authorization of such statutes was prospective only.[1837]

Powell's action in the Northern District was preceded by an action filed on November 16, 2007, in the Middle District.[1838] In possible conflict with how the Supreme Court would later decide the issue, a three-judge Middle District court held on January 22, 2008, that a gubernatorial appointment in light of a statute calling for a special election required preclearance under section 5 of the Voting Rights Act.[1839] In the Northern

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trict 1 Seat, Birmingham News, July 30, 2008, at 1B.

1830. Working v. Jefferson Cty. Election Comm'n, 2 So. 3d 827 (Ala. 2008); *see* Barnett Wright, *Court Says Bowman Gets Commission Seat*, Birmingham News, July 1, 2008, at 1A.

1831. *Powell* Complaint, *supra* note 1829.

1832. *Working*, 2 So. 2d at 838–42.

1833. *Id.* at 829 n.2, 838–41.

1834. *Id.* at 829 n.2, 839.

1835. Riley v. Kennedy, 928 So. 2d 1013 (Ala. 2008); *Working*, 2 So. 2d at 839–40.

1836. *Working*, 2 So. 2d at 840–41.

1837. Riley v. Kennedy, 553 U.S. 406, 411, 420–22 (2008); *see* Mary Orndorff, *Riley Upheld in Mobile Case*, Birmingham News, May 28, 2008, at 1B.

1838. Complaint, Plump v. Riley, No. 2:07-cv-1014 (M.D. Ala. Nov. 16, 2007), D.E. 1; *see* Dan Murtaugh, *Riley Appointment Faces Challenge*, Mobile Register, Nov. 22, 2007, at A4; Barnett Wright, *Riley Picks Ex-General to Replace Langford*, Birmingham News, Nov. 22, 2007, at 1A.

1839. Opinion, *Plump*, No. 2:07-cv-1014 (M.D. Ala. Jan. 22), D.E. 28, *appeal dismissed*, 555 U.S. 801 (2008), *and vacated on settlement*, Order, *Plump*, No. 2:07-cv-1014

District action, Powell claimed that the invalidation of Act No. 784 was not operable because the invalidation had not received section 5 preclearance.[1840]

The Northern District's court first assigned its case to Judge James H. Hancock, but he exercised his senior-judge privilege and recused himself.[1841] The court reassigned the case to Judge L. Scott Coogler minutes later.[1842]

Two days after she filed the complaint, the plaintiff moved for a Rule 16 status conference to expedite the case.[1843] On the day after that, Judge Coogler set a status hearing for five days later.[1844] Judge Coogler granted the plaintiff's motion for the empaneling of a three-judge district court,[1845] and the circuit's chief judge appointed the court on August 15, 2008.[1846]

On August 27, the three-judge court denied Alabama's motion to dismiss the case.[1847] At the three-judge court's direction, Judge Coogler conducted a status conference on September 3.[1848] The plaintiff voluntarily dismissed the action on September 5 because the winner of the special election was the only candidate on the ballot for the November 4, 2008, general election.[1849] The governor's choice failed to obtain enough signatures to qualify.[1850]

(M.D. Ala. Oct. 28, 2009), D.E. 78; *see* Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination and requiring that preclearance disputes be heard by a three-judge district court); *see also* Val Walton & Erin Stock, *Riley's Selection Needed OK, Judges Say*, Birmingham News, Jan. 23, 2008, at 1A.

1840. *Powell* Complaint, *supra* note 1829.

1841. Recusal Order, Powell v. Alabama, No. 2:08-cv-1345 (N.D. Ala. July 31, 2008), D.E. 4; Transcript at 3, *id.* (Sept. 3, 2008, filed Sept. 3, 2008), D.E. 37 [hereinafter *Powell* Transcript]; Interview with Judge L. Scott Coogler, Apr. 27, 2012.

Judge Hancock died on July 24, 2020. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

1842. Docket Sheet, *Powell*, No. 2:08-cv-1345 (N.D. Ala. July 29, 2008); *see* Eric Velasco, *Speed on Commission Seat Lawsuit Requested*, Birmingham News, Aug. 1, 2008, at 2C.

Tim Reagan interviewed Judge Coogler for this report by telephone on April 27, 2012.

1843. Rule 16 Motion, *Powell*, No. 2:08-cv-1345 (N.D. Ala. July 31, 2008), D.E. 5; *see* Velasco, *supra* note 1842.

1844. Order, *Powell*, No. 2:08-cv-1345 (N.D. Ala. Aug. 1, 2008), D.E. 6 (noting that the hearing would be held in a courtroom with a court reporter).

1845. *See* Joseph D. Bryant, *Federal Panel to Hear District 1 Lawsuit*, Birmingham News, Aug. 7, 2008, at 4B.

1846. Order, *Powell*, No. 2:08-cv-1345 (N.D. Ala. Aug. 15, 2008), D.E. 15.

1847. Order, *id.* (Aug. 27, 2008), D.E. 35.

1848. *Powell* Transcript, *supra* note 1841, at 3.

1849. Motion to Dismiss, *Powell*, No. 2:08-cv-1345 (N.D. Ala. Sept. 5, 2008), D.E. 39;

Because events mooted the plaintiff's concerns, the three-judge court never had to assemble in person, but they did meet by telephone.[1851]

The action in the Middle District was settled on October 29, 2009.[1852]

Establishing a New Position Too Late for a Primary Election

Shapiro v. Berger (Colleen McMahon, S.D.N.Y. 7:04-cv-5895)

> A prospective candidate for a new judicial position filed a federal complaint alleging that the position was purposely established too late for a primary election. The district judge denied the candidate a preliminary injunction, concluding that the complaint stated no valid federal constitutional claim.
>
> *Topics:* Primary election; getting on the ballot; party procedures; matters for state courts.

A prospective candidate for Greenburgh town justice in the November 2, 2004, general election and three supporters of his candidacy filed a federal complaint in the Southern District of New York on July 29 alleging state and federal constitutional improprieties in the town council's delay in creation of a newly authorized judicial position so that party nominees could not be chosen by primary election.[1853]

Judge Colleen McMahon heard the case on August 5 and denied the plaintiffs relief later that day.[1854] The new position was authorized by legislation signed by the governor on June 30.[1855] For candidates to participate in the September 14 primary election, the town would have to create the authorized position by July 8, but the town did not create the position until July 14.[1856] Because there is no federal constitutional right to a primary election, however, the plaintiffs were without a valid federal claim.[1857]

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see Order, *id.* (Sept. 5, 2008), D.E. 41 (granting the motion to dismiss); *see* Eric Velasco, *Lawsuit Over Election Dropped*, Birmingham News, Sept. 6, 2008, at 1D.

1850. *See* Erin Stock, *Bowman Is Ruled Ineligible for Ballot*, Birmingham News, Aug. 30, 2008, at 1D.

1851. Interview with Judge L. Scott Coogler, Apr. 27, 2012.

1852. Final Judgment, Plump v. Riley, No. 2:07-cv-1014 (M.D. Ala. Oct. 30, 2009), D.E. 80; Stipulation, *id.* (Oct. 29, 2009), D.E. 79.

1853. Complaint, Shapiro v. Berger, No. 7:04-cv-5895 (S.D.N.Y. July 29, 2004), D.E. 1; Shapiro v. Berger, 328 F. Supp. 2d 496, 497–501 (S.D.N.Y. 2004); *see* Joseph Ax, *Hastings Lawyer Claims Greenburgh, Democrats Conspired in Decision*, Westchester Cty. J. News, Aug. 5, 2004, at 1B.

1854. *Shapiro*, 328 F. Supp. 2d 496; *see* Joseph Ax, *U.S. Judge Challenges Lawyer for Candidate*, Westchester Cty. J. News, Aug. 6, 2004, at 3B; Bill Hughes, *Suit Seeking Primary for Judgeship Is Tossed*, Westchester Cty. J. News, Aug. 7, 2004, at 8B.

1855. *Shapiro*, 328 F. Supp. 2d at 498; *see* Ax, *supra* note 1853.

1856. *Shapiro*, 328 F. Supp. 2d at 498–500; *see* Hannan Adely, *No Primary Frustrates*

On August 23, the plaintiffs sought reconsideration by letter.[1858] Reviewing the letter upon returning from vacation, Judge McMahon denied the request.[1859] Observing "that if a motion to dismiss this action had been made when the preliminary injunction papers were filed and responded to, I would have granted it,"[1860] Judge McMahon dismissed the case sua sponte.[1861] An appeal was dismissed for lack of prosecution.[1862]

Removal of an Elected Official as a Violation of Voting Rights

Kuhn v. Thompson (Mark E. Fuller, M.D. Ala. 2:03-cv-1136)

> A 2003 complaint challenged the disciplinary removal of Alabama's chief justice for his violating a federal order to remove a Ten Commandments monument from the court building's rotunda. The district judge denied the plaintiffs immediate injunctive relief and granted the defendants' motion to dismiss the complaint. (1) The defendants were entitled to *Younger v. Harris* abstention because the chief justice's appeal to Alabama's supreme court was still pending. (2) The defendants were entitled to judicial immunity. (3) The plaintiffs failed to state a valid claim because the right to elect the chief justice did not include a right to keep him in office for his whole term.
>
> *Topics:* Matters for state courts; 42 U.S.C. § 1983; enforcing orders.

On Thursday, November 20, 2003, five voters filed a federal complaint in the Middle District of Alabama against the nine members of the Alabama Court of the Judiciary, challenging removal of the state's elected chief justice by the defendants, an appointed body, as a violation of voting rights.[1863] With their complaint, the plaintiffs filed motions for a temporary restraining order and a preliminary injunction.[1864]

Candidate for Town Judge, Westchester Cty. J. News, July 8, 2004, at 3B.

1857. *Shapiro*, 328 F. Supp. 2d at 502–05.

1858. Letter, *Shapiro*, No. 7:04-cv-5895 (S.D.N.Y. Aug. 23, 2004, filed Sept. 14, 2004), D.E. 24.

1859. Letter, *id.* (Sept. 13, 2004, filed Sept. 14, 2004), D.E. 23.

1860. *Id.*

1861. Judgment, *id.* (Sept. 15, 2004), D.E. 27.

1862. Docket Sheet, Shapiro v. Weinstein, No. 04-5522 (2d Cir. Oct. 18, 2004).

1863. Complaint, Kuhn v. Thompson, No. 2:03-cv-1136 (M.D. Ala. Nov. 20, 2003), D.E. 1; Kuhn v. Thompson, 304 F. Supp. 2d 1313, 1317, 1320 & nn.1–2 (M.D. Ala. 2004); *see Moore's Ouster Challenged*, Montgomery Advertiser, Nov. 21, 2003, at C1.

1864. Temporary-Restraining-Order Motion, *Kuhn*, No. 2:03-cv-1136 (M.D. Ala. Nov. 20, 2003), D.E. 5; Preliminary-Injunction Motion, *id.* (Nov. 20, 2003), D.E. 3; *Kuhn*,

The chief justice was removed from office because he violated an order by District Judge Myron H. Thompson by refusing to remove from the rotunda of Alabama's Judicial Building a granite Ten Commandments monument, the installation of which fulfilled a campaign promise.[1865]

After a telephonic hearing on the day after the complaint was filed, Judge Mark E. Fuller denied the plaintiffs a temporary restraining order.[1866] On January 23, 2004, Judge Fuller granted the defendants' motion to dismiss the complaint.[1867]

Because the chief justice's appeal to Alabama's supreme court seeking reversal of his removal was still pending, the defendants were entitled to the federal court's abstention pursuant to *Younger v. Harris*.[1868] The defendants were also entitled to judicial immunity from the plaintiffs' claims under 42 U.S.C. § 1983, because "in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable."[1869]

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304 F. Supp. 2d at 1320–21.

1865. *Kuhn*, 304 F. Supp. 2d at 1318–20; *see* Glassroth v. Moore, 278 F. Supp. 2d 1272 (M.D. Ala. 2003) (August 18, 2003, denial of a motion to stay the injunction); Glassroth v. Moore, 275 F. Supp. 2d 1347 (M.D. Ala. 2003) (dissolving the injunction stay and ordering removal of the monument within fifteen days); Glassroth v. Moore, 335 F.3d 1282 (11th Cir. 2003) (affirming a finding of an Establishment Clause violation); Glassroth v. Moore, 242 F. Supp. 2d 1068 (M.D. Ala. 2002) (staying the injunction pending appeal); Glassroth v. Moore, 242 F. Supp. 2d 1067 (ordering removal of the monument); Glassroth v. Moore, 229 F. Supp. 2d 1290 (M.D. Ala. 2002) (finding an Establishment Clause violation); *see also* Glassroth v. Moore, 229 F. Supp. 2d 1283 (M.D. Ala. 2002) (denying a motion for recusal of the district-court judge because the judge was more accommodating of the plaintiffs than of the chief justice in scheduling proceedings); McGinley v. Houston, 361 F.3d 1328 (11th Cir. 2004) (affirming the dismissal of an action challenging the removal of the monument as establishing nontheistic beliefs); *Alabama Judge Is Removed*, Wash. Post, Nov. 14, 2003, at A3; Jeffrey Gettleman, *Alabama Panel Ousts Judge Over Ten Commandments*, N.Y. Times, Nov. 14, 2003, at A16; *Moore Pledges to Continue Crusade*, Montgomery Advertiser, Nov. 14, 2003, at A9.

1866. Order, *Kuhn*, No. 2:03-cv-1136 (M.D. Ala. Nov. 21, 2003), D.E. 11; Minutes, *id.* (Nov. 21, 2003), D.E. 13; *Kuhn*, 304 F. Supp. 2d at 1321.

Judge Fuller resigned on August 1, 2015. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

1867. *Kuhn*, 304 F. Supp. 2d 1313; Docket Sheet, *Kuhn*, No. 2:03-cv-1136 (M.D. Ala. Nov. 20, 2003).

1868. *Kuhn*, 304 F. Supp. 2d at 1323–28; *see* Younger v. Harris, 401 U.S. 37 (1971).

1869. *Kuhn*, 304 F. Supp. 2d at 1321–23; 42 U.S.C. § 1983.

Judge Fuller also ruled that the plaintiffs failed to state a valid claim.[1870] The voters' right to elect the chief justice did not include a right to keep him in office for his whole term.[1871] Nor did the plaintiffs allege intentional discrimination or some other valid equal-protection claim.[1872]

The ousted chief justice's state-court appeal was unsuccessful,[1873] and he was replaced on June 23, 2004.[1874] In November 2012, he was again elected chief justice,[1875] but Alabama's Court of the Judiciary suspended him for the remainder of his term in September 2016 for instructing probate judges to defy federal-court rulings on same-sex marriage.[1876]

1870. *Kuhn*, 304 F. Supp. 2d at 1328–37.

1871. *Id.* at 1329–31, 1333–37.

1872. *Id.* at 1331–33.

1873. *See* Ariel Hart, *Alabama Justice's Ouster Upheld in Ten Commandments Case*, N.Y. Times, May 1, 2004, at A9; *Moore Loses Bid to Regain Job*, Montgomery Advertiser, May 1, 2004, at A1.

1874. *See Nabers State's New Chief Justice*, Montgomery Advertiser, June 23, 2004, at A1.

1875. *See Moore Wins Old Job Back*, Montgomery Advertiser, Nov. 7, 2012, at A1.

1876. *See* Brian Lyman, *Court Rules Alabama Chief Justice Roy Moore Violated Ethical Rules in Issuing His Same-Sex Marriage Order*, Montgomery Advertiser, Oct. 1, 2016, at A8; Campbell Robertson, *Chief Justice in Alabama Is Suspended a Second Time*, N.Y. Times, Oct. 1, 2016, at A9; *see also* Brian Lyman, *Court to Hear Moore Appeal*, Montgomery Advertiser, Oct. 27, 2016, at A7 ("The Alabama Supreme Court will recuse itself from suspended Chief Justice Roy Moore's appeal of his ethics convictions, and defer to a special court to hear the appeal.").

6. Getting on the Ballot

The composition of the ballot can trigger a substantial amount of litigation. This project's case studies have been collected in subject chapters, and the subject with the greatest number of case studies, by a wide margin, is getting on the ballot. So we organized the case studies in this chapter into five subchapters:

A. Qualifications for Office, page 259

B. Candidacy Requirements, page 281

C. Minor-Party, Independent, and Write-In Candidates, page 392

D. Party Designations, page 467

E. No Relief from State-Court Loss, page 493

Some suits are brought by prospective candidates, some suits are brought by voters supporting them, and some suits are brought by a combination of candidates and supporters. In one case, the federal judge denied voters relief because the judge thought that they were "merely acting as the pawns of the candidate to give him a second bite at the apple in federal court."[1877]

If the contents of a ballot are in dispute at the time that ballots would ordinarily be printed, election officials may have to choose between a delay in printing or a possible reprinting. In one case, the judge declined to order a delay in printing, but he cautioned officials that they might have to reprint ballots depending upon how the judge subsequently ruled.[1878]

Litigation over ballot qualification frequently follows failure to qualify because of insufficient ballot-petition signatures or missed deadlines. The court is often asked to evaluate the constitutionality of the requirements,

1877. Opinion at 15, Bert v. N.Y. City Bd. of Elections, No. 1:06-cv-4789 (E.D.N.Y. Sept. 7, 2006), D.E. 7, 2006 WL 2583741, *as reported in* "Unsuccessful Federal Actions to Achieve Different Results from Unsuccessful State-Court Efforts to Get on a Ballot," *infra* page 355.

1878. Transcript at 82–83, Schintzius v. Showalter, No. 3:16-cv-741 (E.D. Va. Sept. 8, 2016, filed Sept. 13, 2016), D.E. 31, *as reported in* "Discrepancies Between the Residence Address and the Registration Address of a Ballot-Petition Signer," *infra* page 323.

and it is not unusual for courts to grant relief. One judge cautioned, however, that a deadline is not unconstitutional just because it is illogical.[1879]

1879. Opinion, De La Fuente v. Kemp, No. 1:16-cv-2937 (N.D. Ga. Aug. 30, 2016), D.E. 21; Transcript at 32, *id.* (Aug. 26, 2016, filed Sept. 21, 2016), D.E. 28 (noting that the general assembly has "a right to be dumb; they just don't have a right to do something that's unconstitutional"), *as reported in* "A Minor Candidate's Suits to Be on Presidential-Election Ballots," *infra* page 412.

A. Qualifications for Office

If election authorities determine that a prospective candidate is not qualified for the office that the prospective candidate seeks, a court may be asked to review the candidate's disqualification. Sometimes courts are asked to do the disqualifying themselves.[1880]

A common qualification in dispute is residency.[1881] The issue may be whether a residence is within district lines,[1882] or the issue may be when the candidate became a resident.[1883] If party membership is part of the qualification formula, then an issue may arise over when party membership changed.[1884]

Age may be a qualification, and litigation resulted in Ohio because a new minimum age of twenty-three unexpectedly disqualified a prospective candidate who did well in a mayoral election when nineteen.[1885] The plaintiff was expected to be old enough at the time of the next election, but a vacancy was created early because of the mayor's resignation. The federal court denied the plaintiff relief.[1886]

Suits have arisen because of alleged strategic changes in qualification rules or status to disadvantage specific prospective candidates. In 2001, the court found that an act by Georgia's legislature forbidding members of a specific city commission from serving as a member of a hospital authority board was an unconstitutional bill of attainder against the plaintiff.[1887] A

1880. *See, e.g.*, "Residency of Opposing Candidates," *infra* page 264 (failure to prove that candidates did not live at their voter-registration addresses); "Serving in the Army Reserves While Running for Office," *infra* page 273 (no private right of action to disqualify a military reserve officer called to active duty); "Seeking Two Nominations at the Same Time," *infra* page 277 (a successful action to enjoin a candidate from running in two elections at the same time).

1881. *See, e.g.*, "Residency of Opposing Candidates," *infra* page 264; "Preclearance of a Last-Minute Ballot Disqualification," *infra* page 275.

1882. *See, e.g.*, "Whether City Limits Include a Candidate's Residence," *infra* page 265; "Pro Se Effort to Enjoin a Mayoral Election," *infra* page 269.

1883. *See, e.g.*, "Pro Se Effort to Enjoin a Mayoral Election," *infra* page 269.

1884. *See, e.g.*, "Party Quota for a Board of Elections," *infra* page 271.

1885. *See* "Challenging an Age Restriction for the Office of Mayor," *infra* page 266.

1886. McClafferty v. Portage Cty. Bd. of Elections, 661 F. Supp. 2d 826 (N.D. Ohio 2009).

1887. Caudell v. City of Toccoa, 153 F. Supp. 2d 1371, 1379–80 (N.D. Ga. 2001), *as reported in* "Unlawful Bill of Attainder," *infra* page 278.

2005 action in New Jersey, which ultimately settled, accused a sheriff of transferring a potential rival to a post that prohibited political activity.[1888]

In a 2000 case about election to Louisiana's supreme court, the federal court declined to overturn a state-court conclusion that someone removed from the office for misconduct could not run in the special election to fill the resulting vacancy.[1889]

A 2014 dispute in the Virgin Islands illustrated complex interactions among local law, federal law, a local trial court, a local supreme court, and a federal court.[1890] Federal law disqualified persons convicted of moral-turpitude crimes from serving in the Virgin Islands' legislature. Serving two terms after being convicted for failure to file tax returns, a legislator was disqualified when the Virgin Islands' supreme court reversed a trial-court decision that the crime was not one of moral turpitude. The federal court ruled that a subsequent pardon restored the legislator's qualification, but the Virgin Islands' supreme court criticized the federal court's interference. The federal judge ultimately concluded that it was a matter of Virgin Islands law whether the candidate could and did cure her candidacy application following the pardon.[1891]

Litigation in 2008 alleging that Barack Obama was not a natural-born citizen was unsuccessful.[1892]

Ineligibility to Serve in the Legislature Because of Moral Turpitude

Payne v. Fawkes (1:14-cv-53), Hansen v. Fawkes (1:14-cv-55), Bryan v. Fawkes (1:14-cv-66), and O'Reilly v. Board of Elections (1:14-cv-107) (Wilma A. Lewis, D.V.I.)

> Following a pardon, a federal complaint sought to restore a legislature candidate to the ballot after her removal for moral turpitude because of a misdemeanor tax conviction. The federal court restored the candidate to the ballot, but the Virgin Islands' supreme court ruled against the federal court on matters of Virgin

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1888. *See* "Deputy Sheriff's Run for Sheriff and the Hatch Act," *infra* page 270.

1889. Opinion, Jefferson v. La. Supreme Ct., No. 3:00-cv-2200 (W.D. La. Oct. 5, 2000, filed Oct. 6, 2000), D.E. 6, *as reported in* "Eligibility of a Removed Judge to Run for His Own Vacated Seat," *infra* page 279.

1890. *See* "Ineligibility to Serve in the Legislature Because of Moral Turpitude," *infra* page 260.

1891. Opinion, Payne v. Fawkes, No. 1:14-cv-53 (D.V.I. Nov. 3, 2014), D.E. 40, 2014 WL 5548505.

1892. *See* "Barack Obama's Citizenship," *infra* page 267.

Islands law. The federal court remanded two subsequent related lawsuits removed from the Virgin Islands' superior court.

Topics: Getting on the ballot; matters for state courts; removal; write-in candidate; recounts.

Five voters filed a federal complaint in the District of the Virgin Islands on September 7, 2014, challenging the disqualification for criminal conviction of an incumbent Virgin Islands senator's candidacy for reelection.[1893] On September 8, Judge Wilma A. Lewis scheduled a hearing for September 10 on the plaintiffs' request for a temporary restraining order.[1894] Also on September 8, the senator filed her own federal complaint.[1895] Judge Lewis set the second case for hearing at the same time as the first case.[1896] At the hearing, Judge Lewis decided to consolidate the cases.[1897]

The senator was convicted in federal court on December 10, 2008, of misdemeanor failure to file tax returns for 2002 through 2004.[1898] She was reelected in 2010 and 2012.[1899] On May 19, 2014, the chair of St. Croix's board of elections challenged the senator's eligibility to serve as a violation of federal proscriptions on Virgin Islands legislators who have been convicted of crimes involving moral turpitude.[1900] A superior-court judge ruled that the senator's crimes did not involve moral turpitude, but the Virgin Islands' supreme court, on August 28, 2014, determined that they did.[1901] On September 3, the senator was pardoned by the Virgin Islands' governor.[1902]

1893. Complaint, Payne v. Fawkes, No. 1:14-cv-53 (D.V.I. Sept. 7, 2014), D.E. 1.

1894. Order, *id.* (Sept. 8, 2014), D.E. 7.

1895. Complaint, Hansen v. Fawkes, No. 1:14-cv-55 (D.V.I. Sept. 8, 2014), D.E. 1.

1896. Order, *id.* (Sept. 8, 2014), D.E. 2.

1897. Transcript at 5, *Payne*, No. 1:14-cv-53 (D.V.I. Sept. 10, 2014, filed Dec. 15, 2014), D.E. 41; Order, *id.* (Sept. 11, 2014), D.E. 18.

1898. Jury Verdict, People v. Hansen, No. 3:07-cr-23 (D.V.I. Dec. 10, 2008), D.E. 170; *see* Judgment, *id.* (June 10, 2009), D.E. 202 (imposing three consecutive suspended sentences of one year each, plus probation).

1899. Opinion at 3, Bryan v. Fawkes, No. 2014-46 (V.I. Aug. 28, 2014) [hereinafter V.I. Aug. 28, 2014, *Bryan* Opinion], 2014 WL 4244046.

1900. Petition, Bryan v. Fawkes, No. 2014-cv-144 (V.I. Super. Ct. May 19, 2014), *included as* Ex. 1, Stay Motion, *Payne*, No. 1:14-cv-53 (D.V.I. Oct. 1, 2014), D.E. 30; V.I. Aug. 28, 2014, *Bryan* Opinion, *supra* note 1899; *see* 48 U.S.C. § 1572(b) (2015).

1901. V.I. Aug. 28, 2014, Opinion, *supra* note 1899; *see* Bill Kossler, *Supreme Court Orders Hansen Removed from Ballot*, St. Croix Source, Aug. 29, 2014.

1902. Opinion at 2, 5, *Payne*, No. 1:14-cv-53 (D.V.I. Sept. 12, 2014), D.E. 21 [hereinafter Sept. 12, 2014, *Payne* D.V.I. Opinion], 2014 WL 4499559; *see* John Baur, *Governor's Pardon of Hansen Opens Path to Ballot*, St. Croix Source, Sept. 3, 2014.

On September 12, 2014, Judge Lewis issued a temporary restraining order, to remain in effect until September 26, ordering the inclusion of the senator on the November 4 ballot.[1903] Judge Lewis concluded that the pardon restored the senator's eligibility to run for her office.[1904] On September 24, Judge Lewis converted her temporary restraining order to a permanent injunction.[1905]

On October 1, Judge Lewis remanded an action removed by the senator to federal court that was filed in the superior court by the elections-board chair seeking to enforce the striking of the senator from the ballot through a contempt sanction.[1906] On October 6, Judge Lewis declined to issue an order on the plaintiffs' behalf directly interfering in superior-court proceedings.[1907]

On October 24, the Virgin Islands' supreme court ordered the senator stricken from the ballot,[1908] scolding Judge Lewis: "Despite being expressly informed . . . that the same issues were being considered by this Court as part of the same proceeding that had resulted in issuance of the August 28, 2014 opinion, the District Court issued a temporary restraining order . . . ."[1909]

> [W]e conclude that the District Court lacked subject matter jurisdiction to interfere with an *in rem* proceeding that remained actively litigated in the Virgin Islands court system, and that even if it possessed *in personam* jurisdiction, conflicts between Virgin Islands courts and the District

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1903. Temporary Restraining Order, *Payne*, No. 1:14-cv-53 (D.V.I. Sept. 12, 2014), D.E. 20; *see* Bill Kossler, *Breaking: Court Orders Hansen Back on Ballot*, St. Croix Source, Sept. 11, 2014.

1904. Sept. 12, 2014, D.V.I. *Payne* Opinion, *supra* note 1902.

1905. Opinion, *Payne*, No. 1:14-cv-53 (D.V.I. Sept. 24, 2014), D.E. 27, 2014 WL 4747320; Order, *id.* (Sept. 24, 2014), D.E. 26; *see* Susan Ellis, *Lewis Order Keeps Hansen on Ballot*, St. Croix Source, Sept. 25, 2014.

1906. Opinion, Bryan v. Fawkes, No. 1:14-cv-66 (D.V.I. Oct. 1, 2014), D.E. 8; Order, *id.* (Oct. 1, 2014), D.E. 7; *see* Notice of Removal, *id.* (Sept. 23, 2014), D.E. 1; *see also* Bill Kossler, *Hansen's Ballot Placement Still Open Question*, St. Croix Source, Oct. 2, 2014.

1907. Opinion, *Payne*, No. 1:14-cv-53 (D.V.I. Oct. 6, 2014), D.E. 34, 2014 WL 4979449; Order, *id.* (Oct. 6, 2014), D.E. 33.

1908. Opinion, Bryan v. Fawkes, No. 2014-66 (V.I. Oct. 24, 2014) [hereinafter Oct. 24, 2014, V.I. *Bryan* Opinion], 2014 WL 5409110; *see* Bill Kossler, *V.I. Supreme Court Orders Chucky Off the Ballot*, St. Croix Source, Oct. 24, 2014; *see also Fawkes Suspends Early Voting on St. Croix*, St. Croix Source, Oct. 26, 2014 (reporting that some early voting was suspended in the Virgin Islands as a result of the supreme court's ruling).

1909. Oct. 24, 2014, V.I. *Bryan* Opinion, *supra* note 1908, at 4.

> Court on issues of Virgin Islands law must necessarily be resolved in favor of the local courts.[1910]

The Virgin Islands' supreme court noted further that the U.S. District Court for the District of the Virgin Islands is not an article III court: "the Supremacy Clause is wholly irrelevant to this case because all courts involved are Article IV courts."[1911]

In an October 31 order and a November 3 opinion, Judge Lewis clarified that her decision that the governor's pardon cured the federal law impediment to the senator's serving in the legislature, but the Virgin Islands' supreme court remained the superior authority on whether the senator was able under Virgin Islands law to cure her ballot application papers between the time of the pardon and the time of the election.[1912]

The senator's name was not included on the election-day ballot.[1913] Running as a write-in candidate, she did not receive enough votes for reelection as one of seven senators from St. Croix.[1914] On December 8, the candidate who came in seventh filed a complaint in the superior court challenging the write-in candidate's seeking a recount, and the write-in candidate removed the action to federal court on December 15.[1915] On December 23, Judge Lewis remanded the action back to superior court, pursuant to *Railroad Commission v. Pullman Co.*,[1916] because of the many unsettled local law questions concerning recounts requested by a write-in candidate.[1917]

1910. *Id.* at 15.

1911. *Id.* at 16–17.

1912. Opinion, *Payne*, No. 1:14-cv-53 (D.V.I. Nov. 3, 2014), D.E. 40, 2014 WL 5548505; Order, *id.* (Oct. 31, 2014), D.E. 39.

1913. *See Ballots for Tuesday's Election Released*, St. Croix Source, Nov. 2, 2014.

1914. *See* Official Territory Wide Report, www.vivote.gov/sites/default/files/officialresults/Territory%20wide.HTM, *archived at* web.archive.org/web/20210508065647/www.vivote.gov/sites/default/files/officialresults/Territory%20wide.HTM; Complaint, O'Reilly v. Bd. of Elections, No. SX-2014-cv-461 (V.I. Super. Ct. Dec. 8, 2014), *attached to* Notice of Removal, O'Reilly v. Bd. of Elections, No. 1:14-cv-107 (D.V.I. Dec. 15, 2014), D.E. 1 [hereinafter *O'Reilly* Notice of Removal].

1915. *O'Reilly* Notice of Removal, *supra* note 1914; *see* Susan Ellis, *St. Croix Elections Board Agrees to Recount*, St. Croix Source, Nov. 26, 2014.

1916. 312 U.S. 496 (1941) (holding that if resolution of an uncertain state-law matter might moot a federal constitutional question, "In the absence of any showing that . . . methods for securing a definitive ruling in the state courts cannot be pursued with full protection of the constitutional claim, the district court should exercise its wise discretion by staying its hands.").

1917. Opinion, *O'Reilly*, No. 1:14-cv-107 (D.V.I. Dec. 23, 2014), D.E. 4; Order, *id.* (Dec. 23, 2014), D.E. 3.

Residency of Opposing Candidates

McCormick v. Wayne County Election Commission (Arthur J. Tarnow, E.D. Mich. 2:14-cv-12016)

> Two and one-half months before a primary election for a county commission, a candidate filed a pro se federal complaint seeking exclusion from the ballot of two other candidates for failure to actually live in the district. At an evidentiary hearing, during which the plaintiff was represented by counsel, the plaintiff was not able to establish fraudulent residency, so the court denied her a preliminary injunction.
>
> *Topics:* Getting on the ballot; registration challenges; primary election; pro se party; intervention.

Two and one-half months before an August 5, 2014, primary election, a candidate for Wayne County's commission filed a pro se federal complaint in the Eastern District of Michigan seeking exclusion from the ballot of two other candidates, including the incumbent, for providing fraudulent voter-registration addresses[1918] Although Judge Arthur J. Tarnow granted the plaintiff a fee waiver,[1919] he declined her request to appoint counsel.[1920] Three days after filing the complaint, the plaintiff moved for a temporary restraining order against the printing of the ballots.[1921]

Five days later, the incumbent sought intervention,[1922] which Judge Tarnow ultimately granted.[1923] Judge Tarnow held a hearing that day, May 28, and continued the hearing until June 3.[1924] He determined that the only substantive issues immediately time sensitive were the residencies of the two candidates opposing the plaintiff.[1925] On the day before the continued

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1918. Complaint, McCormick v. Wayne Cty. Election Comm'n, No. 2:14-cv-12016 (E.D. Mich. May 20, 2014), D.E. 1; *see* Amendment, *id.* (May 22, 2014), D.E. 9; *see also Opponent Challenges Leland's Residency in West-Side Detroit*, Detroit Free Press, Apr. 29, 2014, at A4.

1919. Order, *McCormick*, No. 2:14-cv-12016 (E.D. Mich. May 21, 2014), D.E. 5.

1920. Order, *id.* (May 22, 2014), D.E. 10.

Tim Reagan interviewed Judge Tarnow for this report by telephone on May 4, 2015. Judge Tarnow died on January 21, 2022. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

1921. Motion, *McCormick*, No. 2:14-cv-12016 (E.D. Mich. May 23, 2014), D.E. 15.

1922. Intervention Motion, *id.* (May 28, 2014), D.E. 24.

1923. Injunction Denial at 5, *id.* (June 5, 2014), D.E. 32 [hereinafter *McCormick* Injunction Denial], 2014 WL 2533168.

1924. Docket Sheet, *id.* (May 20, 2014).

1925. Order Narrowing Scope, *id.* (May 30, 2014), D.E. 26; *see* Order, *id.* (June 2, 2014), D.E. 28 (quashing a subpoena for records irrelevant to the time period relating to the plaintiff's claims).

hearing, Judge Tarnow overruled the defendants' challenge to the court's jurisdiction:

> Michigan law provides that candidates for Wayne County Commissioner must reside in the district they are running to represent for thirty days prior to seeking office and throughout the term of their office. If Defendant Wayne County Election Commission is refusing to enforce that law, it is violating Plaintiff's federal due process rights.[1926]

At the evidentiary hearing, the plaintiff was represented by counsel,[1927] and the plaintiff's pro se status otherwise did not present the court with difficulties.[1928] Because the plaintiff was unable to show that her opposing candidates did not live at their voter-registration addresses,[1929] Judge Tarnow denied the plaintiff a temporary restraining order.[1930]

After the election, Judge Tarnow dismissed the action.[1931]

Whether City Limits Include a Candidate's Residence

Naramore v. Posey (L. Scott Coogler, N.D. Ala. 6:12-cv-2584)

> A would-be candidate for mayor filed a federal complaint challenging his disqualification for residing in unincorporated territory. An interlocutory consent order resolved the immediate issue in the plaintiff's favor after three telephone conferences with the judge and the parties.
>
> *Topic:* Getting on the ballot.

On July 30, 2012, a would-be candidate for mayor of Jasper, Alabama, in an August 28 election, filed a federal complaint in the Northern District of Alabama alleging wrongful disqualification of his candidacy on the grounds that his residence was in unincorporated territory.[1932] With his

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1926. Opinion at 3, *id.* (June 2, 2014), D.E. 30, 2014 WL 2452955.

1927. Transcript at 1, *id.* (June 3, 2014, filed June 9, 2014), D.E. 36 [hereinafter *McCormick* Transcript].

1928. Interview with Judge Arthur J. Tarnow, May 4, 2015.

1929. *McCormick* Transcript, *supra* note 1927, at 83–85.

1930. *McCormick* Injunction Denial, *supra* note 1923; *see* Order, *McCormick*, No. 2:14-cv-12016 (E.D. Mich. June 13, 2014), D.E. 38 (denying reconsideration); *see also* Tresa Baldas, *Wayne Commissioner Leland to Stay on August Primary Ballot, Judge Rules*, Detroit Free Press, June 3, 2014.

In election litigation initiated before an election, Judge Tarnow kept in mind that voters would have a chance to weigh in on controversial issues. Interview with Judge Arthur J. Tarnow, May 4, 2015.

1931. Order, *McCormick*, No. 2:14-cv-12016 (E.D. Mich. Nov. 5, 2014), D.E. 41.

1932. Complaint, Naramore v. Posey, No. 6:12-cv-2584 (N.D. Ala. July 30, 2012), D.E. 1; *see* Daniel Gaddy, *Naramore Files Suit Against City Officials*, Jasper Daily Mountain Eagle, Aug. 1, 2012.

complaint, the plaintiff filed a motion for an emergency hearing on his request for a preliminary injunction.[1933]

Judge L. Scott Coogler held a telephone conference with the parties on August 1[1934] and sought evidence on whether the plaintiff's residence was within annexed territory of Jasper.[1935]

Following additional telephone conferences on August 2 and 7,[1936] the plaintiff's candidacy was resolved in the plaintiff's favor by an interlocutory consent order issued on August 16.[1937] That same day, however, the plaintiff filed a motion for an immediate evidentiary hearing, alleging bad faith on the part of the defendants in complying with the consent order.[1938] Judge Coogler held another telephone conference on August 17.[1939]

On August 28, the incumbent mayor received 1,975 votes, or 57%.[1940] The plaintiff received 170 votes.[1941]

Judge Coogler dismissed the case as settled on November 18, 2013.[1942]

Challenging an Age Restriction for the Office of Mayor

McClafferty v. Portage County Board of Elections (Sara Lioi, N.D. Ohio 5:09-cv-2210)

> A twenty-one-year-old prospective candidate for mayor challenged a requirement that a mayor be at least twenty-three years of age, which was established after the plaintiff performed well in a mayoral election at the age of nineteen. Observing that the next election arose before the plaintiff turned twenty-three only because of a resignation, the district court denied the plaintiff immediate relief.
>
> *Topics:* Getting on the ballot; ballot language.

On September 24, 2009, a twenty-one-year-old prospective candidate for mayor of Streetsboro, seeking to fill a vacancy arising from a resignation, filed a federal complaint in the Northern District of Ohio against the city

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1933. Motion, *Naramore*, No. 6:12-cv-2584 (N.D. Ala. July 30, 2012), D.E. 2.

1934. Docket Sheet, *id.* (July 30, 2012) [hereinafter *Naramore* Docket Sheet].

1935. *See* Plaintiff's Brief, *id.* (Aug. 2, 2012), D.E. 4.

1936. *Naramore* Docket Sheet, *supra* note 1934.

1937. Consent Order, *Naramore*, No. 6:12-cv-2584 (N.D. Ala. Aug. 16, 2012), D.E. 5.

1938. Motion, *id.* (Aug. 16, 2012), D.E. 6.

1939. *Naramore* Docket Sheet, *supra* note 1934.

1940. *See* James Phillips, *Posey Wins Third Term as Jasper Mayor*, Jasper Daily Mountain Eagle, Aug. 29, 2012.

1941. *See id.*

1942. Order, *Naramore*, No. 6:12-cv-2584 (N.D. Ala. Nov. 18, 2013), D.E. 165; *see* Stipulation, *id.* (Nov. 14, 2013), D.E. 15; Order, *id.* (Sept. 25, 2013), D.E. 14 (dismissing the action without prejudice on advice that a settlement was being finalized).

and Portage County's board of elections challenging a requirement adopted in 2007 that legislative and executive officers in Streetsboro be at least twenty-three years of age, a requirement adopted after the plaintiff came within one vote of the eventual winner in a primary election for mayor.[1943] With his complaint, the plaintiff filed a motion for a temporary restraining order and a preliminary injunction.[1944]

Judge Sara Lioi conducted a telephone conference with the parties on the day that the complaint was filed and set the case for hearing five days later.[1945] On September 30, Judge Lioi denied the plaintiff immediate relief, noting that when the age restriction was adopted the next mayoral election was expected to be in 2011, when the plaintiff would have been old enough to be elected mayor.[1946]

Barack Obama's Citizenship

Berg v. Obama (R. Barclay Surrick, E.D. Pa. 2:08-cv-4083)

> A few days before the 2008 Democratic national convention, an attorney filed a pro se complaint seeking to have Barack Obama declared ineligible to be President, alleging that he was not a natural-born citizen. The judge denied immediate relief at an ex parte proceeding where the plaintiff could not confirm service of the complaint on the defendants. Over the next eight weeks, the court received three pro se motions to intervene: one to support the plaintiff, one to challenge John McCain's citizenship, and one to know the facts of the case. The judge dismissed the action for lack of standing, and the court of appeals affirmed the dismissal.
>
> *Topics:* Pro se party; getting on the ballot; intervention; Electoral College.

A few days before the 2008 Democratic national convention, an attorney in Lafayette Hill, Pennsylvania—in Montgomery County, the county

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1943. Complaint, McClafferty v. Portage Cty. Bd. of Elections, No. 5:09-cv-2210 (N.D. Ohio Sept. 24, 2009), D.E. 1; McClafferty v. Portage Cty. Bd. of Elections, 661 F. Supp. 2d 826, 829 (N.D. Ohio 2009); *see Streetsboro Amendment Challenged*, Cleveland Plain Dealer, Sept. 26, 2009, at B5; *Troubled Streetsboro Mayor Resigns*, Cleveland Plain Dealer, May 2, 2009, at B3.

1944. Motion, *McClafferty*, No. 5:09-cv-2210 (N.D. Ohio Sept. 24, 2009), D.E. 2; *McClafferty*, 661 F. Supp. 2d at 829.

1945. Order, *McClafferty*, No. 5:09-cv-2210 (N.D. Ohio Sept. 25, 2009), D.E. 5 (specifying issues for the hearing); Docket Sheet, *id.* (Sept. 24, 2009) [hereinafter *McClafferty* Docket Sheet]; *McClafferty*, 661 F. Supp. 2d at 829; *see McClafferty* Docket Sheet, *supra* (order eliminating the temporary-restraining-order portion of the pending motion); Withdrawal Motion, *McClafferty*, No. 5:09-cv-2210 (N.D. Ohio Sept. 24, 2009), D.E. 4.

1946. *McClafferty*, 661 F. Supp. 2d 826.

northwest of Philadelphia County—filed a pro se federal action in the Eastern District of Pennsylvania to have Barack Obama declared ineligible to be President because he was not a natural-born citizen.[1947] The plaintiff filed with his complaint a motion for a temporary restraining order against Obama's candidacy and nomination.[1948]

The court assigned the case to Judge R. Barclay Surrick, who held a hearing the next day.[1949] "Defendants were not represented at the hearing. Plaintiff advised the Court that he had faxed a copy of the Complaint and Motion for Temporary Restraining Order as well as notice of the hearing to Defendants, but that he could not confirm that they had been received by Defendants."[1950] Judge Surrick denied immediate injunctive relief.[1951]

Over the next eight weeks, the court received three pro se motions to intervene.[1952] On September 18, a person listing San Diego, California, as a mailing address sought to intervene to argue that Republican nominee John McCain was not a natural-born citizen either, because he was born in the Panama Canal Zone.[1953] A forensic psychologist in Columbus, Georgia, moved on October 7 to support the original plaintiff's complaint.[1954] On

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1947. Complaint, Berg v. Obama, No. 2:08-cv-4083 (E.D. Pa. Aug. 21, 2008), D.E. 1; Berg v. Obama, 586 F.3d 234, 237 (3d Cir. 2009); Berg v. Obama, 574 F. Supp. 2d 509, 512 (E.D. Pa. 2008); *see* Kevin Amerman, *Federal Lawsuit Alleges Obama Isn't Citizen of U.S.*, Allentown Morning Call, Aug. 28, 2008, at A4; Kevin Amerman, *Obama, DNC Fight Local Man's Lawsuit*, Allentown Morning Call, Oct. 18, 2008, at A3 [hereinafter *Obama, DNC Fight*] (listing court proceedings); Daniel P. Tokaji, *The Justiciability of Eligibility: May Courts Decide Who Can Be President?*, 107 Mich. L. Rev. First Impressions 31, 32 (2008); *see also* James Janega, *Suit Disputing Obama Status at High Court*, Chicago Trib., Dec. 4, 2008, at 12 (describing this case as the most famous case questioning Obama's citizenship).

1948. Temporary-Restraining-Order Motion, *Berg*, No. 2:08-cv-4083 (E.D. Pa. Aug. 21, 2008), D.E. 2; *Berg*, 574 F. Supp. 2d at 512.

1949. Docket Sheet, *Berg*, No. 2:08-cv-4083 (E.D. Pa. Aug. 21, 2008); *Berg*, 574 F. Supp. 2d at 512.

1950. *Berg*, 574 F. Supp. 2d at 512 n.1.

1951. Order, *Berg*, No. 2:08-cv-4083 (E.D. Pa. Aug. 22, 2008), D.E. 4; *Berg*, 574 F. Supp. 2d at 512; *see* Amerman, *Obama, DNC Fight*, *supra* note 1947.

1952. *See* Amerman, *Obama, DNC Fight*, *supra* note 1947.

1953. Intervention Motion, *Berg*, No. 2:08-cv-4083 (E.D. Pa. Sept. 18, 2008), D.E. 11; *see* Amerman, *Obama, DNC Fight*, *supra* note 1947.

1954. Intervention Motion, *Berg*, No. 2:08-cv-4083 (E.D. Pa. Oct. 7, 2008), D.E. 16.

The psychologist also filed a motion under her own name to appear as Jane Doe and asking that the motion be sealed. Doe Motion, *id.* (Oct. 7, 2008), D.E. 17. Later she filed a request for judicial notice under her own name. Request for Judicial Notice, *id.* (Oct. 20, 2008), D.E. 23. The docket sheet does not show any action on her anonymity or sealing requests.

October 15, the court received with a Brigham Young University Law School fax cover sheet a motion to intervene to know the facts of the case.[1955]

Judge Surrick dismissed the action on October 24; the plaintiff did not have standing on the core claim, and his amended complaint included no other valid cause of action.[1956] Judge Surrick dismissed all remaining pending motions as moot.[1957]

On October 30, the plaintiff appealed and sought a stay of the presidential election.[1958] The court of appeals denied the stay on the following day.[1959] On December 9, the appellate court denied the plaintiff's motion to enjoin votes for Obama in the Electoral College.[1960] On November 12, 2009, the court affirmed Judge Surrick's dismissal.[1961] The court had denied mandamus relief to the pro se plaintiff challenging McCain's citizenship on December 22, 2008.[1962]

Pro Se Effort to Enjoin a Mayoral Election

Brown v. Glynn County Board of Elections and Voter Registration (Anthony A. Alaimo, S.D. Ga. 2:05-cv-218)

> Late on the Friday afternoon before the 2005 general election, a would-be candidate for mayor filed a pro se complaint in federal court seeking to reschedule a mayoral election so that she could be included on the ballot; she had been disqualified for not being a resident long enough. The district judge had already left for the weekend, but he heard the case on Monday afternoon. He denied the plaintiff a new election but ordered the county to preserve and tally all write-in ballots. The plaintiff did not prevail in the election.

1955. Intervention Motion, *id.* (Oct. 15, 2008), D.E. 19.

1956. *Berg*, 574 F. Supp. 2d 509; Berg v. Obama, 586 F.3d 234, 237–38 (3d Cir. 2009); *see* Amended Complaint, *Berg*, No. 2:08-cv-4083 (E.D. Pa. Aug. 22, 2008), D.E. 14; *see also* Michael Hinkelman, *Judge Rejects Montco Lawyer's Bid to Have Obama Removed from Ballot*, Phila. Daily News, Oct. 25, 2008, at 3.

1957. Order, *Berg*, No. 2:08-cv-4083 (E.D. Pa. Aug. 22, 2008), D.E. 29.

Judge Surrick issued a similar order on July 24, 2009, Order, *id.* (July 24, 2009), D.E. 34, which disposed of an additional pro se motion to intervene, Intervention Motion, *id.* (Oct. 30, 2008), D.E. 32.

1958. Docket Sheet, Berg v. Obama, No. 08-4340 (3d Cir. Oct. 30, 2008).

1959. Order, *id.* (Oct. 31, 2008), *cert. denied*, 555 U.S. 1126 (2009); *Berg*, 586 F.3d at 238.

1960. Order, *Berg*, No. 08-4340 (3d Cir. Dec. 9, 2008); *Berg*, 586 F.3d at 238.

1961. *Berg*, 586 F.3d 234.

1962. *In re* Mitchell, 304 F. App'x 113 (3d Cir. 2008).

Topics: Getting on the ballot; enjoining elections; pro se party; write-in candidate.

At approximately 5:00 p.m. on Friday, November 4, 2005, a would-be candidate for mayor of Brunswick filed a pro se federal complaint in the Southern District of Georgia seeking a rescheduled mayoral election with herself on the ballot.[1963] She also styled her complaint as a motion for a temporary restraining order and a notice of removal of a state-court case in which the court had ruled against her.[1964] The state court had affirmed a ruling by the county's board of elections that she had not been a resident of Brunswick for long enough to be mayor.[1965]

Judge Anthony A. Alaimo had already left for the weekend when the complaint arrived.[1966] On Monday afternoon, he heard the case and denied the plaintiff a new election.[1967] He granted her an order requiring the county to preserve and tally all write-in ballots.[1968]

The plaintiff did not prevail in the election.[1969] Judge Alaimo approved a voluntary dismissal of the case on April 18, 2006.[1970]

Deputy Sheriff's Run for Sheriff and the Hatch Act

Caldwell v. United States Office of Special Counsel (Freda L. Wolfson, D.N.J. 1:05-cv-5126)

A deputy sheriff filed a federal complaint seeking relief and clarification of his right to run for sheriff as a Republican nominee after the Democratic incumbent transferred him to a department receiving federal funds so that his candidacy might violate the Hatch Act. The district judge held telephone conferences with

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1963. Complaint, Brown v. Glynn Cty. Bd. of Elections & Voter Registration, No. 2:05-cv-218 (S.D. Ga. Nov. 4, 2005), D.E. 1 [hereinafter *Brown* Complaint]; Injunction Order at 1, *id.* (Nov. 8, 2005), D.E. 7 [hereinafter *Brown* Injunction Order].

1964. *Brown* Complaint, *supra* note 1963.

1965. Complaint Attachments, *Brown*, No. 2:05-cv-218 (S.D. Ga. Nov. 4, 2005), D.E. 1.

1966. *Brown* Injunction Order, *supra* note 1963, at 1; Transcript at 2, *Brown*, No. 2:05-cv-218 (S.D. Ga. Nov. 7, 2005, filed Nov. 17, 2005), D.E. 8 [hereinafter *Brown* Transcript].

Judge Alaimo died on December 30, 2009. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

1967. *Brown* Injunction Order, *supra* note 1963, at 2; *Brown* Transcript, *supra* note 1966; Minutes, *Brown*, No. 2:05-cv-218 (S.D. Ga. Nov. 7, 2005), D.E. 6.

1968. *Brown* Injunction Order, *supra* note 1963, at 2–3; *Brown* Transcript, *supra* note 1966, at 3–4; *see* Saeed Ahmed, *Ex-Black Panther Wins Ruling on Write-In Votes*, Atlanta J.-Const., Nov. 8, 2005, at B5.

1969. *See Across Georgia*, Augusta Chron., Nov. 20, 2005, at B3.

1970. Dismissal, *Brown*, No. 2:05-cv-218 (S.D. Ga. Apr. 18, 2006), D.E. 17.

the parties one and two days later. At a hearing five days after the complaint was filed, the parties announced a confidential settlement.

Topics: Getting on the ballot; case assignment.

A deputy sheriff in Atlantic County, New Jersey, filed a federal complaint in the District of New Jersey on October 26, 2005, seeking relief and clarification of his right to run for sheriff as a Republican nominee after the Democratic incumbent transferred him to a department receiving federal funds so that his candidacy might violate the Hatch Act.[1971] With his complaint, the plaintiff filed a motion for a preliminary injunction.[1972]

The original complaint named the U.S. Office of Special Counsel as the defendant;[1973] an amended complaint filed two days later added the sheriff as a defendant.[1974]

On the day that the complaint was filed, Judge Jerome B. Simandle set the matter for hearing before Judge Freda L. Wolfson on October 31.[1975] Judge Wolfson held telephone conferences with the parties on October 27 and 28.[1976] At the October 31 hearing, the plaintiff and the county announced a confidential settlement, the terms of which were not presented to Judge Wolfson.[1977]

Party Quota for a Board of Elections

Golden v. Virgin Islands (Raymond L. Finch, D.V.I. 1:05-cv-5)

An election-board incumbent came in fourth as a write-in candidate in a general election for four seats on the board. She filed a federal complaint challenging an attorney-general opinion that

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1971. Complaint, Caldwell v. U.S. Office of Special Counsel, No. 1:05-cv-5126 (D.N.J. Oct. 26, 2005), D.E. 1 [hereinafter *Caldwell* Complaint]; *see* 5 U.S.C. §§ 1501–1508; *see also* Thomas Barlas, *Dems Say Republican Sheriff Candidate Isn't Allowed to Run*, Press of Atlantic City, Oct. 14, 2005, at C5.

1972. Preliminary-Injunction Motion, *Caldwell*, No. 1:05-cv-5126 (D.N.J. Oct. 26, 2005), D.E. 2.

1973. *Caldwell* Complaint, *supra* note 1971.

1974. Amended Complaint, *Caldwell*, No. 1:05-cv-5126 (D.N.J. Oct. 28, 2005), D.E. 4; *see* Transcript at 2, *id.* (Oct. 31, 2005, filed Feb. 7, 2006), D.E. 9 [hereinafter *Caldwell* Transcript].

1975. Order, *id.* (Oct. 26, 2005), D.E. 3.

Judge Simandle died on July 19, 2019, and Judge Wolfson retired on February 1, 2023. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

1976. Docket Sheet, *Caldwell*, No. 1:05-cv-5126 (D.N.J. Oct. 26, 2005).

1977. Stipulated Dismissal, *id.* (Oct. 31, 2005), D.E. 8; *Caldwell* Transcript, *supra* note 1974, at 5; Minutes, *Caldwell*, No. 1:05-cv-5126 (D.N.J. Oct. 31, 2005), D.E. 7.

> she could not avoid a maximum quota of four members of the same party on the board by changing her party affiliation after the election. The court denied the plaintiff a preliminary injunction.
>
> *Topics:* Enjoining certification; write-in candidate; laches; primary election.

An incumbent member of St. Croix's board of elections, who was initially declared victorious in the 2004 general election but was subsequently declared ineligible for reelection because of her party affiliation, filed a federal complaint in the District of the Virgin Islands on January 11, 2005, to overturn the Virgin Islands attorney general's ruling on her case.[1978]

One of two boards of elections in the Virgin Islands, the St. Croix board had seven members, and four seats were up for election in 2004.[1979] No more than four members could be members of the same political party.[1980] The plaintiff was an incumbent who was defeated in a Democratic primary election.[1981] Running as a write-in candidate in the general election, she came in fourth, which would have entitled her to a seat except for four other seats already occupied by Democrats.[1982] The attorney general opined that her changing to an independent after the election did not satisfy the party-quota rule.[1983]

Following a hearing on January 20, the court issued a temporary restraining order on January 26 enjoining the plaintiff's decertification.[1984] Following a second hearing on February 23,[1985] Judge Raymond L. Finch denied the plaintiff a preliminary injunction on March 1.[1986]

1978. Docket Sheet, Golden v. Virgin Islands, No. 1:05-cv-5 (Jan. 11, 2005) [hereinafter *Golden* Docket Sheet] (D.E. 1); Golden v. Virgin Islands, No. 1:05-cv-5, 2005 WL 6106401, at *1 (D.V.I. Mar. 1, 2005); *see* Don Buchanan, *Golden Sues Board of Elections for Seat*, St. Croix Source, Jan. 13, 2005.

1979. *Golden*, 2005 WL 6106401, at *1.

1980. *Id.*

1981. *Id.*; *see* Don Buchanan, *Board of Elections Results Challenged*, St. Croix Source, Nov. 22, 2004.

1982. *Golden*, 2005 WL 6106401, at *1.

1983. *Id.* at *1, *6; *see* Don Buchanan, *There May Be Change on the Board of Elections*, St. Croix Source, Dec. 13, 2004.

1984. *Golden* Docket Sheet, *supra* note 1978 (D.E. 20, 37).

1985. *Id.* (D.E. 48); *Golden*, 2005 WL 6106401, at *1.

1986. *Golden*, 2005 WL 6106401.

Judge Finch died on February 23, 2023. *See* Suzanne Carlson, *Judge Raymond Finch Remembered as Wise, Kind Mentor to Many*, V.I. Daily News, Feb. 25, 2023.

Judge Finch determined that the plaintiff could not be seated as an independent, because she was a Democrat at the time of the election.[1987] She could not be seated as a Democrat on a finding that one of the other Democrats sitting was really an independent, because that claim could have been brought before the Democratic primary election.[1988]

It was reported that the plaintiff was certified by the board to a seat on it anyway.[1989] The case was voluntarily dismissed a year later.[1990]

Serving in the Army Reserves While Running for Office

Neel v. Pippy (Arthur J. Schwab, W.D. Pa. 2:03-cv-302)

> Eight days before a special election to fill a vacancy in Pennsylvania's senate, three voters filed a federal complaint to block the election of a candidate who was a reserve officer recently called to active duty, claiming that the candidacy violated the Military Code. The district court ordered immediate briefing and held a hearing three days later, after which the court concluded that the Military Code did not afford the plaintiffs a private right of action for their case. The military granted the candidate a waiver, and he won.
>
> *Topics:* Getting on the ballot; intervention.

On March 3, 2003, eight days before a special election to fill a vacancy in Pennsylvania's senate, three voters filed a federal complaint in the Western District of Pennsylvania seeking to block the election or the candidacy of the Republican nominee, alleging that section 973 of the Military Code forbade reserve officers on active duty, such as the candidate, from holding office, such as the candidate was seeking.[1991] With their complaint, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction.[1992]

The senate district at issue included southern communities in Allegheny County and parts of Washington County.[1993] The Republican candidate

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1987. *Golden*, 2005 WL 6106401, at *6.

1988. *Id.* at *5.

1989. Don Buchanan, *Golden Gets Nullified and Certified, All Over Again*, St. Croix Source, Mar. 14, 2005.

1990. *Golden* Docket Sheet, *supra* note 1978 (order, Mar. 30, 2006, D.E. 71).

1991. Neel v. Pippy, 247 F. Supp. 2d 707, 708 (W.D. Pa. 2003); Docket Sheet, Neel v. Pippy, No. 2:03-cv-302 (W.D. Pa. Mar. 3, 2003) [hereinafter *Neel* Docket Sheet]; *see* 10 U.S.C. § 973; *see also* Vince Guerrieri, *3 Voters Sue to Stop 37th District Election*, Pittsburgh Trib. Rev., Mar. 4, 2003.

1992. *Neel*, 247 F. Supp. 2d at 708; *Neel* Docket Sheet, *supra* note 1991.

1993. *See* Guerrieri, *supra* note 1991.

was already serving in Pennsylvania's house of representatives.[1994] A captain, he was called to active duty in February, shortly after he was named the Republican nominee.[1995]

The court assigned the case to Judge Arthur J. Schwab, who issued a scheduling order the next day.[1996] Defendants' briefs were due on the afternoon of March 5, a reply brief was due on the morning of March 6, and the hearing was set for the afternoon of March 6.[1997] Judge Schwab directed the parties to brief the court's jurisdiction over the controversy.[1998]

The case was filed during Judge Schwab's first year on the bench, but his private practice had included extensive experience with injunctions.[1999] It was his practice as a judge to implement procedures to join the issues quickly.[2000]

The president pro tempore of Pennsylvania's senate moved to intervene or appear as an amicus curiae, and Pennsylvania's attorney general moved to appear as an amicus curiae.[2001] Judge Schwab allowed both to appear as amici.[2002] After the hearing, Judge Schwab ruled that the Military Code did not afford the plaintiffs a right of action for the relief sought.[2003] Judge Schwab determined that it was not for his court to declare whether the candidate had to choose between the army reserves and Pennsylvania's

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1994. *See id.*

1995. *See id.*; Vince Guerrieri, *Pippy Likely to Stay in Race*, Pittsburgh Trib. Rev., Mar. 6, 2003 [hereinafter *Pippy Likely*].

1996. *Neel* Docket Sheet, *supra* note 1991; Interview with Judge Arthur J. Schwab, Oct. 23, 2012 (noting that the case must have been filed late in the day, because otherwise he would probably have issued his scheduling order on the day that the case was filed).

Tim Reagan interviewed Judge Schwab for this report by telephone.

1997. *Neel*, 247 F. Supp. 2d at 708–09; *Neel* Docket Sheet, *supra* note 1991; *see* Guerrieri, *Pippy Likely*, *supra* note 1995.

1998. Interview with Judge Arthur J. Schwab, Oct. 23, 2012.

1999. *Id.*

2000. *Id.* (noting that it was also important to minimize the court's part in the election story).

2001. *Neel*, 247 F. Supp. 2d at 708–09; *Neel* Docket Sheet, *supra* note 1991.

The attorney general, D. Michael Fisher, is now a circuit judge in the Third Circuit. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

2002. *Neel*, 247 F. Supp. 2d at 709; *Neel* Docket Sheet, *supra* note 1991.

2003. *Neel*, 247 F. Supp. 2d 707; *see* Mark Belko, *Pippy Clears Final Legal Hurdle*, Pittsburgh Post-Gazette, Mar. 7, 2003, at B13.

senate or which the candidate had to choose.[2004] The plaintiffs decided not to appeal.[2005]

The defense department granted the candidate a waiver from the requirements of section 973, so long as he did not actively campaign,[2006] and he won the election.[2007]

Preclearance of a Last-Minute Ballot Disqualification

Connors v. Bennett (W. Harold Albritton, M.D. Ala. 2:02-cv-482)

> A state party chair filed a federal action challenging a state-court order restoring a candidate to a primary-election ballot as a change in voting practices requiring preclearance pursuant to section 5 of the Voting Rights Act. The party excluded the candidate because of a finding concerning the candidate's residency, but the state court restored the candidate to the ballot. The federal court ordered service of the complaint on the candidate to afford him an opportunity to intervene. The federal court ruled against the plaintiff, finding a customary practice of last-minute changes to ballot certifications to correct clerical errors and to accommodate voluntary withdrawals, but not to effect contested disqualifications.
>
> *Topics:* Getting on the ballot; intervention; section 5 preclearance; three-judge court; primary election; matters for state courts.

On April 29, 2002, the executive-committee chair of Alabama's Republican Party filed a federal action in the Middle District of Alabama challenging a state-court order restoring a candidate to the June 4 primary-election ballot as a change in voting practices requiring preclearance pursuant to section 5 of the Voting Rights Act.[2008] After the chair submitted names for the

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2004. *Neel*, 247 F. Supp. 2d at 714.

2005. *See Three to Abide by Ruling on Pippy's Eligibility*, Pittsburgh Trib. Rev., Mar. 8, 2003.

2006. *See* Belko, *supra* note 2003.

2007. *See* James O'Toole, *Pippy Soldiers on to Victory*, Pittsburgh Post-Gazette, Mar. 12, 2003, at B1.

2008. Complaint, Connors v. Bennett, No. 2:02-cv-482 (M.D. Ala. Apr. 29, 2002), D.E. 1; Connors v. Bennett, 202 F. Supp. 2d 1308, 1310 (M.D. Ala. 2002); *see* Amended Complaint, *Connors*, No. 2:02-cv-482 (M.D. Ala. May 14, 2002), D.E. 44 (adding a voter as a plaintiff); *see also* Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination and requiring that preclearance disputes be heard by a three-judge district court); Malcomb Daniels, *State GOP Files Suits to Contest Flowers Run*, Birmingham News, May 1, 2002, at 2.

ballot, he determined that one candidate was not eligible for the ballot because of the candidate's residency, but the state judge ordered the candidate's name restored to the ballot because it had been removed too late.[2009] With his complaint, the chair filed a motion for a temporary restraining order and a preliminary injunction.[2010]

On April 30, the circuit's chief judge designated a three-judge district court to hear the section 5 claim originally assigned to Judge W. Harold Albritton.[2011] Added to the court were local Judge Myron H. Thompson and Atlanta Circuit Judge Frank M. Hull.[2012] Judge Hull attended the case's hearing in person in Montgomery and otherwise worked with the other judges by telephone.[2013] Because this case occurred before the prevalence of electronic filing, parties submitted all filings to each judge.[2014]

On May 1, the three-judge court denied the chair a temporary restraining order, set trial on the action's merits for May 14, and ordered service of the complaint on the candidate to afford him an opportunity to intervene.[2015] The schedule accommodated the parties' agreed time needs for discovery.[2016] On the following day, the candidate moved to intervene.[2017] The court granted intervention on May 8.[2018]

At the May 14 hearing, some evidentiary issues were resolved by an agreed stipulation of facts based on a stipulation of facts proposed by the

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On June 25, 2013, the Supreme Court declined to hold section 5 unconstitutional, but the Court did hold unconstitutional the criteria for which jurisdictions require section 5 preclearance. Shelby County v. Holder, 570 U.S. 529 (2013).

2009. *Connors*, 202 F. Supp. 2d at 1310–14; *see* Malcomb Daniels, *Flowers Back on Ballot for Senate,* Birmingham News, Apr. 24, 2002, at 1; Malcomb Daniels, *GOP Boots 3 Out of Primary: Reasons Include Fee Payment, Residency*, Birmingham News, Apr. 16, 2002, at 1.

2010. Motion, *Connors*, No. 2:02-cv-482 (M.D. Ala. Apr. 29, 2002), D.E. 2.

2011. Designation Order, *id.* (Apr. 30, 2002), D.E. 3 [hereinafter *Connors* Designation Order].

Tim Reagan interviewed Judge Albritton for this report by telephone on June 18, 2013.

2012. *Connors* Designation Order, *supra* note 2011.

2013. Interview with Judge W. Harold Albritton, June 18, 2013.

2014. *Id.*

2015. Order, *Connors*, No. 2:02-cv-482 (M.D. Ala. May 1, 2002), D.E. 5; *see* Malcomb Daniels, *Court Denies GOP's Request to Oust Flowers*, Birmingham News, May 2, 2002, at 6.

2016. Interview with Judge W. Harold Albritton, June 18, 2013.

2017. Intervention Motion, *Connors*, No. 2:02-cv-482 (M.D. Ala. May 2, 2002), D.E. 9.

2018. Order, *id.* (May 8, 2002), D.E. 24.

court.[2019] After the hearing, the court ruled in favor of the defendants, issuing a published opinion three days later.[2020] The court found a customary practice of last-minute changes to ballot certifications to correct clerical errors and to accommodate voluntary withdrawals, but not to effect contested disqualifications, so the state court's decision was not a change in law requiring section 5 preclearance.[2021]

On June 4, the candidate came in third in the primary election.[2022]

Seeking Two Nominations at the Same Time

Avila v. Sandoval (John W. Darrah, N.D. Ill. 1:02-cv-1222)

> A candidate for member of a water-reclamation-district commission filed a federal complaint seeking to have his opponent removed from the primary-election ballot because the opponent was also seeking a nomination for the state senate. The district judge granted the plaintiff immediate relief, and the opponent withdrew from the commission race.
>
> *Topics:* Getting on the ballot; primary election; absentee ballots.

Frank Avila, a candidate for the Democratic nomination for member of the Metropolitan Water Reclamation District of Greater Chicago's commission, filed a federal complaint on February 20, 2002, seeking to have his opponent Martin Sandoval removed from the March 19 ballot because Sandoval was also running for the Democratic nomination for Illinois's senate.[2023] With his complaint, Avila filed a motion for a temporary restraining order or a preliminary injunction.[2024]

Judge John W. Darrah heard the matter on February 26 and granted Avila immediate relief:

> Plaintiff's emergency motion for a [temporary restraining order] is granted. Court suspends absentee ballot voting by the City of Chicago Board of Elections and David Orr, Cook County Clerk until Monday March 4, 2002 at 9:00 a.m. pending a hearing on the merits of this case.

2019. Interview with Judge W. Harold Albritton, June 18, 2013.

2020. Connors v. Bennett, 202 F. Supp. 2d 1308, 1310 (M.D. Ala. 2002); *see* Malcomb Daniels, *Judges Say Flowers May Stay on Ballot*, Birmingham News, May 15, 2002, at 3.

2021. *Connors*, 202 F. Supp. 2d at 1314–21.

2022. *See* Malcomb Daniels, *Erwin, Murphy in GOP Runoff for Senate Seat*, Birmingham News, June 5, 2002, at 5 (reporting that the candidate received 4,663 votes, the two leaders received 6,756 and 5,034 votes, respectively, and a fourth candidate received 705 votes).

2023. Complaint, Avila v. Sandoval, No. 1:02-cv-1222 (N.D. Ill. Feb. 20, 2002), D.E. 1.

2024. Motion, *id.* (Feb. 20, 2002), D.E. 4.

> Absentee ballot voting in the City of Chicago and Suburban Cook County is suspended. The Court orders a mandatory injunction for the City of Chicago Board of Election Commissioners and David Orr, Clerk, Cook County to purchase "No Candidate" stickers to be put over the name of Martin Sandoval pending the outcome of hearing on Monday, March 4, 2002.[2025]

Pursuant to this order, Sandoval withdrew from the commission race.[2026]

Avila and Sandoval, both now running unopposed, won their nomination contests.[2027] On September 3, Judge Darrah dismissed the action as moot.[2028]

Unlawful Bill of Attainder

Caudell v. City of Toccoa (William C. O'Kelley, N.D. Ga. 2:01-cv-105)

> A federal complaint challenged a new state law forbidding members of a city commission from serving as a member of a hospital-authority board, which affected only the plaintiff. The district judge consolidated an injunction hearing with a trial on the merits and struck down the new law as an invalid bill of attainder that was also in conflict with other constitutional and statutory requirements.
>
> *Topics:* Getting on the ballot; equal protection; section 5 preclearance.

On Friday, June 15, 2001, a city commissioner filed a federal complaint in the Northern District of Georgia challenging an act of Georgia's legislature, signed on April 16 by the governor, forbidding members of the city commission for Toccoa from serving as a member of a hospital-authority board.[2029] The plaintiff was the only person burdened by the act.[2030] With his complaint, he filed a motion for a preliminary injunction against en-

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2025. Minutes, *id.* (Feb. 26, 2002), D.E. 6.

Judge Darrah died on March 23, 2017. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

2026. Opinion at 3–4, *Avila*, No. 1:02-cv-1222 (N.D. Ill. Sept. 3, 2002), D.E. 15 [hereinafter *Avila* Opinion]; *see Cook Absentee Ballots Cleared to Mail*, Chi. Trib., Mar. 1, 2002, at 6; Lucio Guerrero, *Senate Candidate Must Drop 2nd Race*, Chi. Sun-Times, Mar. 1, 2002, at 10.

2027. *Avila* Opinion, *supra* note 2026, at 4.

2028. *Id.* at 5.

2029. Docket Sheet, Caudell v. City of Toccoa, No. 2:01-cv-105 (N.D. Ga. June 15, 2001) [hereinafter *Caudell* Docket Sheet]; Caudell v. City of Toccoa, 153 F. Supp. 2d 1371, 1374–75 (N.D. Ga. 2001).

2030. *Caudell*, 153 F. Supp. 2d at 1375.

forcement of the act so that he could qualify for reelection by the September 14 deadline.[2031]

On Monday, Judge William C. O'Kelley set the matter for hearing on July 12.[2032] Because neither party called for a jury trial, Judge O'Kelley consolidated the injunction hearing with a trial on the merits.[2033] Two weeks later, Judge O'Kelley struck down the act: (1) it was an invalid bill of attainder under the federal and Georgia constitutions,[2034] (2) it violated Georgia's provisions for municipal home rule,[2035] (3) it violated equal protection by singling out the plaintiff without justification,[2036] (4) it violated the plaintiff's freedom of association without justification,[2037] and (5) it had not been precleared, as required by section 5 of the Voting Rights Act.[2038]

Eligibility of a Removed Judge to Run for His Own Vacated Seat

Jefferson v. Louisiana Supreme Court (Robert G. James, W.D. La. 3:00-cv-2200)

> A judge removed by the state's supreme court for judicial conduct filed a federal complaint challenging his exclusion from an election to fill his vacant seat. The district judge determined that the federal court lacked jurisdiction to review a state court's judgment.
>
> *Topics:* Getting on the ballot; matters for state courts; primary election.

2031. *Id.* at 1374–75.

2032. *Caudell* Docket Sheet, *supra* note 2029; *Caudell*, 153 F. Supp. 2d at 1374; *see* Transcript at 3, *Caudell*, No. 2:01-cv-105 (N.D. Ga. July 12, 2001, filed Sept. 25, 2001), D.E. 11 [hereinafter *Caudell* Transcript] ("The Court: And so I set it immediately for a hearing, I believe even before the defendants had responded, but you've since responded.").

Judge O'Kelley died on July 5, 2017. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

2033. *Caudell*, 153 F. Supp. 2d at 1374–75; *Caudell* Transcript, *supra* note 2032, at 4–8; *see id.* at 8 ("I don't intend to hear this matter but one time.").

2034. *Caudell*, 153 F. Supp. 2d at 1379–80.

2035. *Id.* at 1380–81.

2036. *Id.* at 1377–78.

2037. *Id.* at 1378.

2038. *Id.* at 1377; *see* Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination).

On June 25, 2013, the Supreme Court declined to hold section 5 unconstitutional, but the Court did hold unconstitutional the criteria for which jurisdictions require section 5 preclearance. Shelby County v. Holder, 570 U.S. 529 (2013).

On September 27, 2000, a Louisiana judge for the City Court of Monroe, Parish of Ouachita—who was removed from office for judicial misconduct by the state's supreme court—and four additional voters filed a federal complaint in the Western District of Louisiana challenging removal of the judge from the ballot for a primary election to fill his seat.[2039] With their complaint, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction.[2040]

Judge Robert G. James set the case for hearing on October 5.[2041] Following the hearing, Judge James determined that the *Rooker-Feldman* doctrine, which states that among federal courts only the Supreme Court has appellate jurisdiction over state-court proceedings, deprived the plaintiffs of relief.[2042] Moreover, "This Court agrees with the conclusion of the Louisiana Supreme Court that a judge removed from office because of misconduct cannot then run in a special election to fill the remainder of his term."[2043]

In 2006, Louisiana's supreme court restored the judge's eligibility for judicial office.[2044] He was again elected to the bench in 2007.[2045]

2039. Complaint, Jefferson v. La. Supreme Ct., No. 3:00-cv-2200 (W.D. La. Sept. 27, 2000), D.E. 1; *see* Supplemental Complaint, *id.* (Sept. 29, 2000), D.E. 4; *see also In re* Jefferson, 753 So. 2d 181 (La. 2000).

2040. Motion, *Jefferson*, No. 3:00-cv-2200 (W.D. La. Sept. 27, 2000), D.E. 2.

2041. Supplemental Order, *id.* (Oct. 2, 2000), D.E. 9 (denying an ex parte temporary restraining order); Order, *id.* (Oct. 2, 2000), D.E. 8 (same); *see* Minutes, *id.* (Oct. 5, 2000), D.E. 11.

2042. Opinion at 7–8, *id.* (Oct. 5, 2000, filed Oct. 6, 2000), D.E. 6 [hereinafter *Jefferson* Opinion]; *see* D.C. Ct. of Appeals v. Feldman, 460 U.S. 462 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923); Martin A. Schwartz, Section 1983 Litigation 21–24 (Federal Judicial Center 3d ed. 2014); *see also Ousted Judge Fails in Try to Stop Election*, Baton Rouge Advocate, Oct. 7, 2000, at 8-B.

2043. *Jefferson* Opinion, *supra* note 2042, at 8–9.

2044. *In re* Jefferson, 927 So. 2d 1103 (La. 2006); *see* Robbie Evans, *Jefferson Eligible for Judicial Office*, Monroe News-Star, Apr. 19, 2006, at 1A.

2045. *See* Elizabeth Fitch, *Jefferson to Don Robes of City Court*, Monroe News-Star, Nov. 18, 2007, at 13a.

B. Candidacy Requirements

For a candidate to appear on the ballot, the candidate typically must submit by a specified date a sufficient number of ballot-petition signatures from eligible voters endorsing the candidate's inclusion on the ballot.[2046] An examination of ballot-petition signatures frequently results in conclusions that some of them are not valid for one reason or another, so candidates generally have to submit substantially more than the minimum requirement to ensure ballot qualification.

For one mayoral election, some signatures were invalidated because the signers did not provide their voter-registration addresses; they provided their residence addresses, and it was possible to maintain a valid voter registration for a time in some circumstances after moving. The trial judge denied the candidate relief from the signature disqualifications.[2047] A complaint that an accurate-address requirement in New York was burdensome "because of the complicated ways in which villages, addresses, counties, and townships cross each other's borders in this region" was similarly unsuccessful.[2048]

Judges have held that it is not unconstitutional to require more signatures for the presidential ballot than for other races,[2049] but it is unconstitutional to require a uniform minimum number of signatures from each covered county.[2050] Another court ruled that it was unconstitutional to

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2046. *See, e.g.*, "Reversing a State Supreme Court's Retroactive Application of a Very Early Ballot Qualification Deadline," *infra* page 320; "Exclusion from the Ballot Because of Invalid Ballot-Petition Signatures," *infra* page 345; "Opportunity to Cure an Insufficient Number of Ballot-Petition Signatures," *infra* page 346; *see also* "Broad Challenge to Ballot-Petition Signature Requirements," *infra* page 338; "Validity of Ballot-Application Signatures," *infra* page 352.

2047. Minutes, Schintzius v. Showalter, No. 3:16-cv-741 (E.D. Va. Sept. 15, 2016), D.E. 33, *as reported in* "Discrepancies Between the Residence Address and the Registration Address of a Ballot-Petition Signer," *infra* page 323.

2048. Order, Lanza v. Wart, No. 5:07-cv-848 (N.D.N.Y. Sept. 4, 2007, D.E. 27), *as reported in* "Burden of New York's Ballot-Petition-Signature Address Requirements," *infra* page 350.

2049. *E.g.*, Order, Nader 2000 Primary Comm., Inc. v. Cenarrusa, No. 1:00-cv-503 (D. Idaho Sept. 8, 2000), D.E. 4, *as reported in* "Greater Ballot Signature Requirement for Presidential Candidates," *infra* page 384.

2050. Stipulated Order, Ariz. Pub. Integrity Alliance Inc. v. Bennett, No. 2:14-cv-1044 (D. Ariz. July 31, 2014), D.E. 26, *as reported in* "County-Based Ballot Nomination Signature Requirement," *infra* page 325; *see also* Injunction, Comm. to Regulate & Control Marijuana v. Heller, No. 2:04-cv-1035 (D. Nev. Aug. 20, 2004), D.E. 21, *aff'd*, ACLU v.

change the signature requirement during an election cycle.[2051] Relief will generally depend upon a showing that but for the improper requirement the candidate would qualify.[2052] Relief can also depend on whether the suit is brought in time for correction.[2053]

Sometimes ballot petitions contain errors, and an insufficient number of valid signatures is only one potential reason for an insufficient filing.[2054] A candidate, or voters supporting the candidate, may challenge the filing requirements as onerous, and these challenges are sometimes filed during the often-tight time window between the qualification deadline and the election.[2055]

Although it is not unconstitutional to disqualify a candidate for failure to properly file ballot-petition papers,[2056] one district judge granted relief to

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Lomax, 471 F.3d 1010 (9th Cir. 2006), *as reported in* "Minimum County Requirements for Ballot Petitions," *infra* page 582 (ballot measures).

2051. Nader 2000 Primary Comm. v. Hechler, 112 F. Supp. 2d 575, 576 (S.D. W. Va. 2000), *as reported in* "Improper Change in the Ballot-Petition Signature Requirement During an Election Cycle," *infra* page 385.

2052. *See, e.g.*, Minutes, Cunningham v. Chi. Bd. of Election Comm'rs, No. 1:03-cv-1160 (N.D. Ill. Feb. 21, 2003), D.E. 7, 2003 WL 444023, *as reported in* "Disqualifying Inactive Voters from Candidacy Petitions," *infra* page 376.

2053. *See, e.g.*, Opinion, Raiklin v. Va. Dep't/Bd. of Elections, No. 3:18-cv-288 (E.D. Va. May 9, 2018), D.E. 5, *as reported in* "Trying to Get on the Ballot After Voting Has Started," *infra* page 316.

2054. *See, e.g.*, "Challenge to Exclusion from the Ballot Orally Denied," *infra* page 296; "Request to Be on the Ballot on the Eve of a Presidential Election," *infra* page 331; "Meritless Challenge to Exclusion from an Election for County Judge," *infra* page 332; "Strict Application of Campaign Filing Requirements," *infra* page 332; "Correcting a Defective Candidacy Petition," *infra* page 344; "Unsuccessful Federal Actions to Achieve Different Results from Unsuccessful State-Court Efforts to Get on a Ballot," *infra* page 355; *see also* "Ballot-Access Requirements in Puerto Rico," *infra* page 375.

2055. Suits against election officials for not disqualifying a candidate are not typically successful. *See, e.g.*, Opinion, Davis v. Jordan, No. 2:20-cv-11819 (E.D. Mich. Dec. 15, 2020), D.E. 35, 2020 WL 7353475, *as reported in* "No Relief from Election Officials' Not Striking a Candidate from the Ballot at a Voter's Request," *infra* page 285.

2056. *See, e.g.*, Lawrence v. Bd. of Election Comm'rs, 524 F. Supp. 2d 1011, 1023–27 (N.D. Ill. 2007) (failure to file with nomination papers the receipt that the candidate received for filing a statement of economic interest), *as reported in* "Disqualification of a Candidate for Failure to Properly File Papers of Candidacy," *infra* page 349; Diaz v. N.Y. City Bd. of Elections, 335 F. Supp. 2d 364, 365–68 (E.D.N.Y. 2004) (an application to replace a withdrawn candidate omitted a signed statement consenting to replace the withdrawn candidate), *as reported in* "Fatal Defect in a Petition to Replace a Primary-Election Candidate," *infra* page 368; Opinion, Marchant v. N.Y. City Bd. of Elections, 1:13-cv-5493 (S.D.N.Y. Aug. 16, 2013), D.E. 9, 2013 WL 4407098 (no violations of equal protection or due process in New York City's stringent filing requirements), *as reported in* "Failure to

a candidate for substantial compliance.[2057] Another judge determined that candidates unable to afford a filing fee must be provided with an alternative.[2058]

Courts have concluded that restrictions on who can collect ballot-petition signatures can violate the First Amendment. Although *signers* can be limited to valid voters, courts have held that it is improper to require *collectors of signatures* to be voters[2059] or even local residents.[2060] Equitable relief was denied, however, to a campaign whose signature collectors falsely claimed to be residents.[2061]

For a party's primary election, judges found that it was not improper to require ballot petitions to be signed[2062] or witnessed[2063] by party members. In other cases, judges found that neither was it improper to permit persons not members of the party to challenge ballot-petition signatures.[2064]

Ironically, there can be filing requirements even for write-in candidates. For example, one court found constitutional a requirement that

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Qualify for a Primary Election Because of Filing Defects," *infra* page 370.

2057. Audio Transcript, Matheson v. N.Y. City Bd. of Elections, No. 1:03-cv-4170 (E.D.N.Y. Aug. 27, 2003) (relief from a scrivener's error), *as reported in* "Failure to Qualify for a Primary Election Because of Filing Defects," *infra* page 370.

2058. Belitskus v. Pizzingrilli, 243 F. Supp. 2d 179, 183 (M.D. Pa. 2001), *aff'd*, 343 F.3d 632 (3d Cir. 2003), *as reported in* "Ballot Filing Fee," *infra* page 387.

2059. *See, e.g.*, Consent Judgment, Moore v. Johnson, No. 2:14-cv-11903 (E.D. Mich. July 1, 2014), D.E. 41, *as reported in* "Ballot-Petition Circulators Do Not Have to Be Registered Voters," *infra* page 327; Nader 2000 Primary Comm. v. Hechler, 112 F. Supp. 2d 575, 580 (S.D. W. Va. 2000), *as reported in* "Improper Change in the Ballot-Petition Signature Requirement During an Election Cycle," *infra* page 385.

2060. Libertarian Party of Virginia v. Judd, 718 F.3d 308 (4th Cir. 2013), *aff'g* 881 F. Supp. 2d 719 (E.D. Va. 2012), *as reported in* "Unconstitutional Residency Requirement for Circulating Ballot Petitions," *infra* page 339.

2061. Blankenship v. Blackwell, 341 F. Supp. 2d 911, 924 (S.D. Ohio 2004), *as reported in* "Ralph Nader Off Ohio's Ballot in 2004," *infra* page 365.

2062. De La Fuente v. Cortés, 261 F. Supp. 3d 543 (M.D. Pa. 2017), *as reported in* "A Minor Candidate's Suits to Be on Presidential-Election Ballots," *infra* page 412.

2063. Amended Opinion at 28, Kaloshi v. N.Y. City Bd. of Elections, No. 1:02-cv-4762 (E.D.N.Y. Sept. 13, 2002), D.E. 9, 2002 WL 31051530, *rev'd on other grounds*, Kaloshi v. Spitzer, 69 F. App'x 17 (2d Cir. 2003), *as reported in* "Requirement That Ballot-Petition Witnesses for a Primary Election Be Members of the Party," *infra* page 380.

2064. Opinion at 3–4, 11–16, Soleil v. New York, No. 1:04-cv-3247 (E.D.N.Y. Mar. 22, 2005), D.E. 33, 2005 WL 662682, *as reported in* "Allowing Any Voter to Challenge Primary-Election Ballot Petitions," *infra* page 378.

write-in candidates file a declaration of intent at least fifty days before the election.[2065]

Collecting ballot-petition signatures became challenging, especially early in the Covid-19 infectious pandemic, before vaccinations were available. Litigation arose over whether signature requirements should be adjusted to accommodate social distancing, whether required by law or exercised as a matter of prudence to curtail spread of the coronavirus.[2066] Remedies included a reduction in the number of signatures required,[2067] an extension of the deadline,[2068] and a requirement that signatures be accepted electronically.[2069] These remedies were generally not extended to ballot petitions for ballot questions.[2070]

A court of appeals opined that a court's authority to recognize unconstitutionality is greater than its authority to specify a remedy.[2071]

A district judge in Colorado denied a prospective candidate relief because the ballot-petition deadline fell during the first few days of the pandemic and social distancing could only have had a modest impact.[2072]

2065. Order at 4, Nader v. Blackwell, No. 2:04-cv-1052 (S.D. Ohio Nov. 2, 2004), D.E. 3, *as reported in* "Ralph Nader Off Ohio's Ballot in 2004," *infra* page 365.

2066. *See* "Ballot-Petition Signature Requirements in Maine During the Covid-19 Pandemic," *infra* page 287; "No Relief from New York's Ballot-Petition Signature Requirements During the Covid-19 Pandemic," *infra* page 293.

2067. Consent Judgment, Ivey v. Lamone, No. 1:20-cv-1995 (D. Md. July 20, 2020), D.E. 5, 2020 WL 4197044; Consent Judgment, Md. Green Party v. Hogan, No. 1:20-cv-1253 (D. Md. June 19, 2020), D.E. 25; *see* "Reductions in Signatures Required to Get on the Ballot in Maryland Because of a Pandemic," *infra* page 290.

"One way the State could have narrowly tailored its election frame-work in response to the COVID-19 pandemic would have been to reduce the number of required signatures proportional to the time lost for signature-gathering due to health concerns." Garbett v. Herbert, 458 F. Supp. 3d 1328, 1331, 1344 (D. Utah 2020), *as reported in* "Modification of Utah's Signature Requirements for a Prospective Candidate During an Infectious Pandemic," *infra* page 297.

2068. Libertarian Party of Ill. v. Pritzker, 455 F. Supp. 3d 738 (N.D. Ill.), *aff'd*, Libertarian Party of Ill. v. Cadigan, 824 F. App'x 415 (7th Cir. 2020), *as reported in* "Ballot-Petition Signature Requirements in Illinois During a Pandemic," *infra* page 299.

2069. Acosta v. Restrepo, 470 F. Supp. 3d 161 (D.R.I. 2020), *as reported in* "Electronic Ballot-Petition Signatures in Rhode Island During a Pandemic," *infra* page 289.

2070. *See, e.g.*, "Ballot-Petition Signature Requirements in Illinois During a Pandemic," *infra* page 299.

2071. Esshaki v. Whitmer, 813 F. App'x 170 (6th Cir. 2020), *as reported in* "Ballot-Petition Signature Deadlines in Michigan During a Pandemic," *infra* page 304.

2072. Order, Garcia v. Griswold, No. 1:20-cv-1268 (D. Colo. May 7, 2020), D.E. 12 [hereinafter May 7, 2020, *Garcia* Order], 2020 WL 2505888, *as reported in* "No Pandemic Relief from a Ballot-Petition Signature Requirement for Signatures Due Very Early in the

Even outside a pandemic, litigation can concern the signature-collection period. In an unusual special election called because it was discovered that the original winner did not become a resident until after the election, the district judge granted challengers relief from a short signature-collection period that coincided with bad weather.[2073] Another judge declined to give a minor candidate a year or more to collect signatures to accommodate his schizophrenia.[2074] In an unsuccessful federal case that was not decided on the merits because of other defects, plaintiffs challenged a Michigan requirement that signatures have extra verification if executed more than 180 days before filing.[2075]

No Relief from Election Officials' Not Striking a Candidate from the Ballot at a Voter's Request

Davis v. Wayne County Election Commission (Sean F. Cox, E.D. Mich. 2:20-cv-11819)

> About four weeks before a primary election, a federal complaint alleged that election officials improperly declined to strike a congressional candidate from the ballot. Five months later, the court dismissed the action because the plaintiff had not shown a violation of federal law.
>
> *Topics:* Getting on the ballot; matters for state courts; primary election.

A frequent litigator and another voter filed a federal complaint in the Eastern District of Michigan on Monday, July 6, 2020, seeking to remove from the August 4 primary-election ballot a candidate for Congress.[2076] Defendants included the candidate and election officials for Detroit and Wayne County.[2077] The complaint stated that the frequent litigator might elect to proceed pro se.[2078] On the following day, the plaintiffs filed an emergency

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Pandemic," *infra* page 295.

2073. Opinion at 1, Sharpe v. Como, No. 1:07-cv-1521 (E.D.N.Y. Apr. 19, 2007), D.E. 7, 2007 WL 1175221, *as reported in* "Judicial Relief from a Tight Ballot-Petition Signature Schedule," *infra* page 347.

2074. A. v. N.Y. Bd. of Elections, 99 F. Supp. 2d 258 (E.D.N.Y. 2000), *as reported in* "A Disabled Candidate's Challenge to Signature-and-Contribution Statutes," *infra* page 389.

2075. *See* "Signing a Ballot Petition Too Long Before It Is Filed," *infra* page 321.

2076. Complaint, Davis v. Jordan, No. 2:20-cv-11819 (E.D. Mich. July 6, 2020), D.E. 1 [hereinafter *Davis* Complaint]; *see* Christine MacDonald, *Activist Tries to Kill Jones' Challenge of Tlaib*, Detroit News, July 7, 2020, at A5.

2077. *Davis* Complaint, *supra* note 2076.

2078. *Id.* at 2 n.1.

motion for summary judgment,[2079] an amended summary-judgment motion,[2080] and a motion to expedite a decision.[2081]

On Wednesday, Judge Sean F. Cox declined supplemental jurisdiction over state-law claims:

> The Court concludes that Plaintiffs' state-law claims would substantially expand the scope of this case beyond that necessary and relevant to the federal claims. Thus, the state-law claims would substantially predominate over the federal claims. The state-law claims also raise novel and complex issues of state law.[2082]

Judge Cox therefore trimmed the complaint to include only three of the original seven claims, only the frequent litigator as a plaintiff, and only some city and county election officials as defendants.[2083] This eliminated from the case the claims on which the plaintiffs sought summary judgment.[2084]

On August 13, the remaining plaintiff sought expedited consideration of his motion to file an amended complaint in advance of the August 17 due date for a response to a pending motion to dismiss the action.[2085] Wayne County election officials responded on the following day that the plaintiff's time pressure resulted from his own delay: "the August Primary Election occurred on August 4, 2020. . . . Yet [the plaintiff] waited until August 13, 2020—9 days later—to seek the Court's permission to file an amended complaint and to receive an expedited briefing schedule."[2086]

With no ruling on the plaintiff's motion to file an amended complaint, the plaintiff filed—one day after his response was due—a motion for a two-day extension of his deadline to respond to the dismissal motion.[2087] On the day of the proposed revised deadline, a defendant argued that the plaintiff had not shown excusable neglect.[2088] Still represented by counsel, the plaintiff responded to the dismissal motion at approximately 1:25 a.m. on the following day—three days after the original deadline—and filed an

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2079. Summary-Judgment Motion, *Davis*, No. 2:20-cv-11819 (E.D. Mich. July 7, 2020), D.E. 5.

2080. Amended Summary-Judgment Motion, *id.* (July 7, 2020), D.E. 7.

2081. Motion, *id.* (July 7, 2020), D.E. 4.

2082. Opinion at 4–5, *id.* (July 8, 2020), D.E. 18, 2020 WL 3833041.

2083. *Id.* at 2–5.

2084. *Id.* at 5–6; Order, *id.* (July 8, 2020), D.E. 19.

2085. Motion, *id.* (Aug. 18, 2020), D.E. 24.

2086. Motion Response at 3, *id.* (Aug. 14, 2020), D.E. 25.

2087. Motion, *id.* (Aug. 18, 2020), D.E. 26.

2088. Motion Response at 1, *id.* (Aug. 19, 2020), D.E. 27.

amended motion to adjust the deadline.[2089] Judge Cox granted the deadline motion and set the case for hearing by video conference on December 10.[2090]

Judge Cox agreed to dismiss the action on December 15; the plaintiff had not shown that the defendants' not removing a candidate from the ballot at the plaintiff's request violated federal law.[2091]

Ballot-Petition Signature Requirements in Maine During the Covid-19 Pandemic

Bond v. Dunlap (1:20-cv-216) and Jorgensen v. Dunlap (1:20-cv-272) (Nancy Torresen, D. Me.)

> Because of social distancing made necessary by the global Covid-19 infectious pandemic, prospective candidates in Maine's 2020 general election sought court-ordered modifications to the ballot-petition signature requirements. One candidate's effort was unsuccessful, and the other's was mooted by her obtaining a sufficient number of signatures without judicial modification.
>
> *Topics:* Getting on the ballot; Covid-19; intervention; laches.

Prospective candidates in the November 3, 2020, general election sought modifications to Maine's ballot-petition signature requirements in light of social distancing made necessary by the global Covid-19 infectious pandemic. One case was unsuccessful, and another was mooted by meeting the state's requirements.

United States Senate

A prospective candidate for the U.S. Senate filed a federal complaint in the District of Maine on Friday, June 19, 2020, against Maine's governor, secretary of state, senate president, and house of representatives speaker, seeking relief from the ballot-petition signature requirements.[2092] Among other relief, the complaint sought a temporary restraining order and a preliminary injunction.[2093]

On the day that the complaint was filed, Judge Nancy Torresen ordered service of the complaint on the state and set the case for a telephone

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2089. Amended Motion, *id.* (Aug. 20, 2020), D.E. 29; Motion Response, *id.* (Aug. 20, 2020), D.E. 28.

2090. Notice, *id.* (Oct. 8, 2020), D.E 34; Docket Sheet, *id.* (July 6, 2020) (order, Aug. 20, 2020).

2091. Opinion, *id.* (Dec. 15, 2020), D.E. 35, 2020 WL 7353475.

2092. Complaint, Bond v. Dunlap, No. 1:20-cv-216 (D. Me. June 19, 2020), D.E. 1.

2093. *Id.* at 23; Docket Sheet, *id.* (June 19, 2020) [hereinafter *Bond* Docket Sheet] (D.E. 2).

conference on Monday.[2094] Judge Torresen's strategy during the pandemic was to hold as telephone conferences proceedings that otherwise would have been held in chambers with just the parties' attorneys, but she would open to the public anything that would have been held in open court.[2095] Judge Torresen ordered the plaintiff to seek the immediate injunction by separate motion and ordered briefing completed by July 13.[2096]

A prospective independent candidate for President moved on July 7 to intervene and obtain similar relief.[2097] After resolving the plaintiff's injunction motion, Judge Torresen denied the intervention motion.[2098]

On July 13, Judge Torresen granted the plaintiff a one-day extension of time to reply to the defendants' brief.[2099]

Judge Torresen denied the plaintiff immediate relief on July 24.[2100] Because of the pandemic, Maine extended the signature submission deadline from May 25 to June 26.[2101] Other independent senate candidates were able to meet the signature requirements during the pandemic, and the requirement for "wet" in-person signatures helped to prevent fraudulent copying of signatures.[2102]

After the election, the parties stipulated dismissal of the case.[2103]

United States President

A minor party's candidate for President filed a federal complaint in the District of Maine on July 31, asking the court to require Maine's secretary of state to cut in half the number of ballot-petition signatures needed to

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2094. *Bond* Docket Sheet, *supra* note 2093 (D.E. 5, 6); *see id.* (minutes, D.E. 7).

Tim Reagan interviewed Judge Torresen for this report by telephone on September 18, 2020.

2095. Interview with Judge Nancy Torresen, Sept. 18, 2020.

2096. *Bond* Docket Sheet, *supra* note 2093 (D.E. 8); *see* Motion, *Bond*, No. 1:20-cv-216 (D. Me. June 29, 2020), D.E. 11 (noting that the signature-collection period had ended and that ballot petitions were due in two days).

2097. Intervention Motion, *Bond*, No. 1:20-cv-216 (D. Me. July 7, 2020), D.E. 12.

2098. *Bond* Docket Sheet, *supra* note 2093 (D.E. 25).

A notice of appeal also moved to expand the case to all fifty states. Notice of Appeal, *Bond*, No. 1:20-cv-216 (D. Me. Oct. 1, 2020), D.E. 27. The court of appeals determined that the appeal was not timely. Order, Bond v. Dunlap, No. 20-1971 (1st Cir. Oct. 27, 2020).

2099. *Bond* Docket Sheet, *supra* note 2093 (D.E. 20); *see* Motion, *Bond*, No. 1:20-cv-216 (D. Me. July 13, 2020), D.E. 19.

2100. Opinion, *Bond*, No. 1:20-cv-216 (D. Me. July 24, 2020), D.E. 24, 2020 WL 4275035.

2101. *Id.* at 12.

2102. *Id.* at 9–10, 24–25.

2103. Stipulation, *id.* (Nov. 19, 2020), D.E. 34.

get on the November 3 general-election ballot.[2104] With her complaint, the plaintiff filed a motion for an expedited hearing, noting, "Nomination petitions must be delivered to the state by August 3, 2020, and the Defendant has indicated that they must finalize the Maine ballot by August 28, 2020."[2105]

Judge Torresen set the case for a telephone conference on August 3, providing the parties with call-in information.[2106] During the conference, Judge Torresen decided that preliminary-injunction briefing should be completed by August 11.[2107]

On August 10, however, Maine reported that the candidate had qualified for the ballot.[2108] The plaintiff dismissed her complaint voluntarily that day.[2109]

Electronic Ballot-Petition Signatures in Rhode Island During a Pandemic

Acosta v. Restrepo (Mary S. McElroy, D.R.I. 1:20-cv-262)

> Because of the global Covid-19 infectious pandemic, a district judge in Rhode Island ordered election officials to accept ballot-petition signatures electronically.
>
> *Topics:* Getting on the ballot; Covid-19; attorney fees.

Six prospective candidates for Rhode Island's senate filed a federal complaint against election officials for Rhode Island and five of its municipalities on Tuesday, June 16, 2020, challenging Rhode Island's requirement of collecting ballot-petition signatures in person during a narrow time window between June 30 and July 10, made difficult by the social distancing that became necessary during the global Covid-19 infectious pandemic.[2110] With their complaint, the plaintiffs filed an emergency motion for injunctive relief and expedited consideration.[2111]

2104. Complaint, Jorgensen v. Dunlap, No. 1:20-cv-272 (D. Me. July 31, 2020), D.E. 1.

2105. Motion, *id.* (July 31, 2020), D.E. 5.

2106. Docket Sheet, *id.* (July 31, 2020) (D.E. 8); *see id.* (minutes, D.E. 11).

2107. *Id.* (deadlines reset, Aug. 3, 2020).

2108. Status Report, *id.* (Aug. 10, 2020), D.E. 13.

2109. Voluntary Dismissal, *id.* (Aug. 10, 2020), D.E. 14.

2110. Complaint, Acosta v. Restrepo, No. 1:20-cv-262 (D.R.I. June 16, 2020), D.E. 1; Acosta v. Restrepo, 470 F. Supp. 3d 161, 163–65 (D.R.I. 2020); *see* Katherine Gregg, *ACLU Sues to Suspend Signature Requirement for R.I. Ballot Access*, Providence J., June 18, 2020, at A5.

2111. Motion, *Acosta*, No. 1:20-cv-262 (D.R.I. June 16, 2020), D.E. 2; *Acosta*, 470 F. Supp. 3d at 165.

Judge Mary S. McElroy set the case for a remote chambers videoconference on Friday at 3:00 p.m.[2112] She set the conference for late in the day so that the parties had the morning to get organized.[2113] She then set the case for a 3:30 p.m. hearing by videoconference on June 23, and then for another videoconference at noon on June 25.[2114]

On June 25, Judge McElroy issued a preliminary injunction requiring Rhode Island's election authorities to accept for the November election ballot-petition signatures collected electronically.[2115] "Because of the pandemic, and the effect the in-person signature requirement will have on ballot access, the current signature process is not narrowly tailored to advance the state's interests."[2116]

The parties stipulated dismissal of the action in September 2021.[2117]

Reductions in Signatures Required to Get on the Ballot in Maryland Because of a Pandemic

Maryland Green Party v. Hogan (Ellen Lipton Hollander, 1:20-cv-1253) and Ivey v. Lamone (1:20-cv-1995) and Dhillon v. Wobensmith (1:20-cv-2197) (Richard D. Bennett) (D. Md.)

> Two district judges in the District of Maryland issued consent decrees relaxing ballot-petition signature requirements for the November 3, 2020, general election in light of social distancing made necessary by a pandemic. A third case seeking further modifications was unsuccessful.
>
> *Topics:* Getting on the ballot; Covid-19; case assignment; attorney fees.

Three cases in the District of Maryland sought modifications to ballot-petition signature requirements in light of a global infectious pandemic. The first two resulted in consent decrees, but the third asked for more than the court was willing to provide.

2112. Docket Sheet, *Acosta*, No. 1:20-cv-262 (D.R.I. June 16, 2020) [hereinafter *Acosta* Docket Sheet].

For this report, Tim Reagan interviewed Judge McElroy and her law clerk Kevin Rolando by telephone on September 4, 2020.

2113. Interview with Judge Mary S. McElroy and her law clerk Kevin Rolando, Sept. 4, 2020.

2114. *Acosta* Docket Sheet, *supra* note 2112.

2115. *Acosta*, 470 F. Supp. 3d 161; *see* Katherine Gregg, *Judge: Signatures Not Worth It in Virus Age*, Providence J., June 24, 2020, at A4.

2116. *Acosta*, 470 F. Supp. 3d at 167.

2117. *Acosta* Docket Sheet, *supra* note 2112 (order granting stipulated dismissal, Sept. 1, 2021); Stipulation, *Acosta*, No. 1:20-cv-262 (D.R.I. Sept. 1, 2021), D.E. 54.

Minor Political Parties

Two minor parties and their chairs filed in the District of Maryland a federal complaint against Maryland's election officials on May 19, 2020, seeking damages for refusals by the governor and the administrator of elections to adequately adjust the ballot-petition signature requirements in light of social distancing made necessary by the global Covid-19 infectious pandemic.[2118] With their complaint, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction modifying the signature requirement.[2119]

On the next day, Judge Ellen Lipton Hollander observed that the motion for a temporary restraining order should not proceed without evidence of sufficient notice to the defendants.[2120] The plaintiffs conferred with the defendants and submitted an agreement to brief an injunction motion by June 3.[2121] Judge Hollander set the case for a telephone conference on May 22.[2122]

At the conference, Judge Hollander agreed to the proposed briefing schedule and set the case for another telephone conference on June 8 and a hearing on June 12.[2123] "I cannot yet determine whether [the hearing] will be in court, via telephone, or via Zoom," Judge Hollander observed.[2124]

Instead of holding the hearing, however, Judge Hollander agreed to the parties' request for time to prepare settlement documents.[2125] On June 19, Judge Hollander issued a consent judgment reducing the number of signatures required for the parties to qualify for the November 3 general-election ballot to five thousand.[2126]

Independent Candidates

On July 7, a prospective candidate for Congress filed a federal complaint in the District of Maryland against the state's administrator of elections seeking relief from the state's ballot-petition signature requirements.[2127] With her complaint, the plaintiff filed a motion for a preliminary injunction

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2118. Complaint, Md. Green Party v. Hogan, No. 1:20-cv-1253 (D. Md. May 19, 2020), D.E. 1.

2119. Motion, *id.* (May 19, 2020), D.E. 2.

2120 Order, *id.* (May 20, 2020), D.E. 6.

2121. Letter, *id.* (May 20, 2020), D.E. 7.

2122. Docket Sheet, *id.* (May 19, 2020) (D.E. 8).

2123. Order, *id.* (May 22, 2020), D.E. 13.

2124. *Id.*

2125. Endorsed Order, *id.* (June 12, 2020), D.E. 23.

2126. Consent Judgment, *id.* (June 19, 2020), D.E. 25; *see* Dhillon v. Wobensmith, 475 F. Supp. 3d 456, 458 (D. Md. 2020).

2127. Complaint, Ivey v. Lamone, No. 1:20-cv-1995 (D. Md. July 7, 2020), D.E. 1.

seeking either a reduction in the number of signatures necessary or an extension to the August 3 deadline.[2128]

Judge Richard D. Bennett held a status conference by telephone on July 13.[2129] The parties submitted a proposed consent judgment one week later.[2130] Judge Bennett issued the consent judgment that day, reducing the signature requirement by half and applying the consent judgment to all prospective independent candidates.[2131] It was further ordered "that if the State of Maryland cannot identify funds to satisfy payment of the attorneys' fee amounts required by separate agreement of the Parties, Plaintiff shall have the right to reopen the proceedings in this case to pursue claims for costs and attorneys' fees in this Court."[2132]

Limits to Relief

Mentioning the other prospective candidate's suit in his complaint, a prospective candidate for mayor of Baltimore filed in the District of Maryland a federal complaint against Maryland's secretary of state and its administrator of elections on July 28 seeking authorization to collect ballot-petition signatures electronically.[2133] With his complaint, the plaintiff filed a motion for a preliminary injunction further modifying the signature requirement.[2134]

The court reassigned the case from Judge Catherine C. Blake to Judge Bennett,[2135] who held a telephone conference on July 29 and set the case for a public telephone hearing on the following day.[2136]

On July 31, Judge Bennett denied the plaintiff immediate relief: "Further modification of these already-altered election law requirements is unnecessary and would run afoul of the public interest, potentially jeopardizing the integrity of the upcoming election."[2137]

Judge Bennett dismissed the action as settled on August 28.[2138]

2128. Preliminary-Injunction Motion, *id.* (July 7, 2020), D.E. 2.

2129. Docket Sheet, *id.* (July 7, 2020).

2130. Joint Motion for Consent Judgment, *id.* (July 20, 2020), D.E. 4.

2131. Consent Judgment, *id.* (July 20, 2020), D.E. 5 [hereinafter *Ivey* Consent Judgment], 2020 WL 4197044; *see Dhillon*, 475 F. Supp. 3d at 458, 460.

2132. *Ivey* Consent Judgment, *supra* note 2131, at 3.

2133. Complaint, Dhillon v. Wobensmith, No. 1:20-cv-2197 (D. Md. July 28, 2020), D.E. 1; *Dhillon*, 475 F. Supp. 3d at 458, 460.

2134. Preliminary-Injunction Motion, *Dhillon*, No. 1:20-cv-2197 (D. Md. July 29, 2020), D.E. 2; *Dhillon*, 475 F. Supp. 3d at 458.

2135. Docket Sheet, *Dhillon*, No. 1:20-cv-2197 (D. Md. July 28, 2020).

2136. Order, *id.* (July 29, 2020), D.E. 4; *Dhillon*, 475 F. Supp. 3d at 458.

2137. *Dhillon*, 475 F. Supp. 3d at 459.

2138. Order, *Dhillon*, No. 1:20-cv-2197 (D. Md. Aug. 28, 2020), D.E. 12.

No Relief from New York's Ballot-Petition Signature Requirements During the Covid-19 Pandemic

Murray v. Cuomo (Mary Kay Vyskocil, 1:20-cv-3571) and Eisen v. Cuomo (Philip M. Halpern, 7:20-cv-5121) (S.D.N.Y.)

> A plaintiff, whose ballot-petition signatures for a primary election were ruled invalid because the signatures had not been collected or witnessed by a member of the party, was denied relief from a signature requirement that was shortened both in time and in number because of an infectious pandemic. Later, a different judge denied another prospective congressional candidate relief from ballot-petition signature requirements.
>
> *Topics:* Getting on the ballot; Covid-19; matters for state courts; primary election; party procedures.

Prospective congressional candidates in New York were unable to persuade federal judges to provide them with relief from New York's ballot-petition signature requirements during the global Covid-19 infectious pandemic.

The Primary Election

A prospective candidate for Congress filed a federal complaint in the Southern District of New York on May 7, 2020, seeking an order placing her on the June 23 Republican primary-election ballot.[2139] On May 8, Judge Mary Kay Vyskocil signed an order that defendants show cause, at a telephone conference on May 15, why relief should not be granted, with briefing to be completed by May 13.[2140]

On May 18, Judge Vyskocil denied the plaintiff immediate relief.[2141]

Observing that the plaintiff had been unsuccessful in a related state-court proceeding, Judge Vyskocil rejected the defendants' argument that the action was foreclosed by the *Rooker-Feldman* doctrine, which states that among federal courts only the Supreme Court has appellate jurisdiction over state-court proceedings,[2142] because the state-court ruling did not cause the plaintiff's alleged injury.[2143] The issue of res judicata had not been briefed adequately for a ruling on that.[2144]

2139. Complaint, Murray v. Cuomo, No. 1:20-cv-3571 (S.D.N.Y. May 7, 2020), D.E. 1.

2140. Order, *id.* (May 8, 2020), D.E. 6 (providing contact information in the public record).

2141. Murray v. Cuomo, 460 F. Supp. 3d 430 (S.D.N.Y. 2020).

2142. *See* D.C. Ct. of Appeals v. Feldman, 460 U.S. 462 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923).

2143. *Murray*, 460 F. Supp. 3d at 438–39.

2144. *Id.* at 439–42.

Observing also that all of the signatures submitted to support the plaintiff's ballot application were ruled invalid because they were not collected or witnessed by a member of the Republican Party, Judge Vyskocil ruled that it was reasonable for the governor to cut short the time allowed to collect signatures, while substantially reducing the number required in light of the Covid-19 infectious pandemic.[2145]

The plaintiff withdrew an interlocutory appeal on May 29[2146] and voluntarily dismissed the case on June 7.[2147]

The General Election

A prospective independent candidate for Congress in the November general election filed a federal complaint in the Southern District on July 3, 2020, challenging New York's in-person signature and witnessing requirements for ballot petitions.[2148] One week later, the plaintiff filed a proposed order to show cause why relief should not be granted.[2149] He filed a letter motion for expedited consideration four days after that.[2150]

Judge Philip M. Halpern set the case for a telephone conference on July 17, publishing telephone-access information in the public record.[2151] On July 17, Judge Halpern set the case for hearing on July 27.[2152] "Counsel for defendants appeared in the courtroom and plaintiff's counsel by means of videoconference. Court heard argument from the parties. Neither party called any witnesses. The Court denied the motion for a preliminary injunction."[2153] At the hearing, Judge Halpern concluded, with respect to signature requirements as modified because of the pandemic, that "the restrictions are not severe, but reasonable and nondiscriminatory."[2154]

The parties stipulated dismissal of the case on August 12.[2155]

2145. *Id.* at 444–48.

2146. Order, Murray v. Cuomo, No. 20-1584 (2d Cir. May 29, 2020), D.E. 20.

2147. Notice, Murray v. Cuomo, No. 1:20-cv-3571 (S.D.N.Y. June 7, 2020), D.E. 18.

2148. Complaint, Eisen v. Cuomo, No. 7:20-cv-5121 (S.D.N.Y. July 3, 2020), D.E. 1; *see* Amended Complaint, *id.* (July 20, 2020), D.E. 28 (adding as a plaintiff a candidate for the state legislature).

2149. Proposed Order, *id.* (July 10, 2020), D.E. 18.

2150. Letter, *id.* (July 14, 2020), D.E. 24.

2151. Endorsed Letter, *id.* (July 15, 2020), D.E. 25.

2152. Order, *id.* (July 17, 2020), D.E. 27.

2153. Docket Sheet, *id.* (July 3, 2020); *see* Order, *id.* (July 27, 2020), D.E. 36.

2154. Transcript at 25, *id.* (July 27, 2020, filed Aug. 5, 2020), D.E. 39.

2155. Stipulation, *id.* (Aug. 12, 2020), D.E. 42.

No Pandemic Relief from a Ballot-Petition Signature Requirement for Signatures Due Very Early in the Pandemic

Garcia v. Griswold (William J. Martínez, D. Colo. 1:20-cv-1268)

> A prospective primary-election candidate sought relief from a state supreme court denying her relief from the ballot-petition signature requirement despite social distancing made necessary by a global infectious pandemic. The federal district judge denied the candidate relief because of her delay in bringing the case and because the pandemic had a small impact on signature gathering, as signatures were due early in the pandemic.
>
> *Topics:* Getting on the ballot; Covid-19; laches; intervention; primary election; matters for state courts; case assignment.

A prospective primary-election candidate for the U.S. Senate filed a federal complaint in the District of Colorado on May 6, 2020, challenging the constitutionality of a state supreme-court ruling denying her a position on the June ballot for not obtaining enough ballot-petition signatures despite the signature-gathering obstacles posed by the global Covid-19 infectious pandemic.[2156] Noting that the ballot would be certified on the following day, the prospective candidate and her campaign filed with their complaint a motion for a temporary restraining order and a preliminary injunction.[2157]

Senior Judge Lewis T. Babcock declined the case.[2158] On May 7, Judge William J. Martínez denied the plaintiffs immediate relief, promising a detailed written order later.[2159] As the signature-submission deadline was March 17, the defendants were prejudiced by laches.[2160] On March 17, moreover, social distancing made necessary by the pandemic was still in its early days, so it could only have a limited impact on signature gathering.[2161]

2156. Complaint, Garcia v. Griswold, No. 1:20-cv-1268 (D. Colo. May 6, 2020), D.E. 1. *See generally Colorado Supreme Court Rules U.S. Senate Candidate Doesn't Belong on Ballot After All*, Denver Post, May 5, 2020, at 2A (reporting on a decision in another prospective candidate's case).

2157. Motion, *Garcia*, No. 1:20-cv-1268 (D. Colo. May 6, 2020), D.E. 7.

2158. Notice, *id.* (May 7, 2020), D.E. 11.

2159. Order, *id.* (May 7, 2020), D.E. 12 [hereinafter May 7, 2020, *Garcia* Order], 2020 WL 2505888.

Tim Reagan interviewed Judge Martínez for this report by telephone on October 27, 2020.

2160. May 7, 2020, *Garcia* Order, *supra* note 2159 (noting that even the state-court action was not filed until April 24).

2161. *Id.* at 3.

Because of the complexities of the case, Judge Martínez knew that he had to call the balls and strikes immediately and issue a thoughtful explanation of his decision later.[2162] He issued a detailed opinion on July 15[2163] and an amended opinion on August 21.[2164]

A prospective candidate for the state legislature had moved to intervene in the case on May 7,[2165] but she withdrew her motion on May 11 in light of Judge Martínez's decision.[2166]

The parties stipulated dismissal of the action on August 28.[2167]

Challenge to Exclusion from the Ballot Orally Denied

Abulafia v. Richman (Katherine Polk Failla, S.D.N.Y. 1:20-cv-3547)

> Five candidates who challenged their exclusion from primary-election ballots were denied immediate relief for reasons explained orally but not included in the publicly accessible record.
>
> *Topics:* Getting on the ballot; primary election.

Five prospective candidates and voters filed a federal complaint in the Southern District of New York on May 6, 2020, seeking reversal of what they alleged were excessively technical reasons for disqualification from the June 23 primary-election ballots.[2168] On the following day, the plaintiffs filed a proposed order granting relief.[2169] On that day, Judge Katherine Polk Failla set the case for a telephonic hearing at noon on May 8.[2170]

On May 8, Judge Failla denied the plaintiffs immediate relief "[f]or the reason set forth in the oral opinion delivered by the Court this afternoon."[2171]

The plaintiffs voluntarily dismissed their complaint on May 20.[2172]

2162. Interview with Judge William J. Martínez, Oct. 27, 2020.

2163. Opinion, *Garcia*, No. 1:20-cv-1268 (D. Colo. July 17, 2020), D.E. 24, 2020 WL 4003648.

2164. Opinion, *id.* (Aug. 21, 2020), D.E. 24, 2020 WL 4926051.

2165. Intervention Motion, *id.* (May 7, 2020), D.E. 10.

2166. Motion Withdrawal, *id.* (May 11, 2020), D.E. 18.

2167. Stipulated Dismissal, *id.* (Aug. 28, 2020), D.E. 31.

2168. Complaint, Abulafia v. Richman, No. 1:20-cv-3547 (S.D.N.Y. May 6, 2020), D.E. 1.

2169. Proposed Order, *id.* (May 7, 2020), D.E. 3, 4.

2170. Order, *id.* (May 7, 2020), D.E. 6.

2171. Order, *id.* (May 8, 2020), D.E. 10.

2172. Notice, *id.* (May 20, 2020), D.E. 11.

Modification of Utah's Signature Requirements for a Prospective Candidate During an Infectious Pandemic

Garbett v. Herbert (2:20-cv-245) and Brown v. Herbert (1:20-cv-52) (Robert J. Shelby, D. Utah)

> A district court modified the ballot-petition signature requirement for a prospective gubernatorial candidate because of social distancing during the Covid-19 global infectious pandemic. Even with the modified requirement, the plaintiff was unable to qualify for the primary-election ballot. After the injunction was issued, a prospective legislative candidate sought relief from the ballot-petition signature requirements, but the court denied the second plaintiff relief.
>
> *Topics:* Getting on the ballot; Covid-19; case assignment; primary election; interlocutory appeal; intervention; pro se party.

A district judge modified the ballot-petition signature requirement for a prospective gubernatorial candidate because of social distancing during the Covid-19 global infectious pandemic. The judge declined to extend the relief to a legislative candidate.

Gubernatorial Candidate

A prospective candidate for the Republican gubernatorial primary election in Utah filed a federal complaint in the District of Utah on April 13, 2020—the deadline for submitting ballot-petition signatures—alleging that Utah had failed to provide prospective candidates with adequate methods of collecting signatures during the Covid-19 pandemic.[2173] On the next day, the plaintiff filed a motion for a preliminary injunction[2174] and a motion for expedited briefing and hearing.[2175] Two days after that, she filed a stipulated motion for expedited briefing, hearing, and decision before the April 29 certification of candidates for the ballot.[2176] On April 16, Judge Robert J. Shelby agreed to order briefing on the injunction completed by the end of the day on April 24.[2177]

2173. Complaint, Garbett v. Herbert, No. 2:20-cv-245 (D. Utah Apr. 13, 2020), D.E. 2; Garbett v. Herbert, 458 F. Supp. 3d 1328, 1331, 1335 (D. Utah 2020).

2174. Preliminary-Injunction Motion, *Garbett*, No. 2:20-cv-245 (D. Utah Apr. 14, 2020), D.E. 6; Garbett v. Herbert, 514 F. Supp. 3d 1342, 1344 (D. Utah 2021); *Garbett*, 458 F. Supp. 3d at 1335.

2175. Motion, *Garbett*, No. 2:20-cv-245 (D. Utah Apr. 14, 2020), D.E. 7.

2176. Motion, *id.* (Apr. 16, 2020), D.E. 15; *Garbett*, 458 F. Supp. 3d at 1335.

2177. Order, *Garbett*, No. 2:20-cv-245 (D. Utah Apr. 16, 2020), D.E. 16.

The court initially assigned the case to Magistrate Judge Paul M. Warner, but the filing of a preliminary-injunction motion triggered random reassignment to a district

At a telephonic hearing on April 27, Judge Shelby granted the candidate relief,[2178] issuing an opinion on April 29 explaining the decision.[2179]

> One way the State could have narrowly tailored its election framework in response to the COVID-19 pandemic would have been to reduce the number of required signatures proportional to the time lost for signature-gathering due to health concerns. . . . Thus, to appear on the ballot, the court will require Garbett to produce sixty-eight percent of the normal signature requirement . . . .[2180]

The hearing was open to the public.[2181] Contact information was posted on the court's calendar and in the docket sheet.[2182] Persons on the call were told that recording the hearing was not permitted.[2183] Because the hearing did not include testimony from witnesses, it was not held by videoconference.[2184] Later during the pandemic, after videoconference capabilities had been enhanced, it might have been held by videoconference even without witnesses.[2185]

On May 2, Utah submitted to the court a tally of the plaintiff's submitted ballot-petition signatures, an amount insufficient to qualify for the ballot under the court's revised requirement.[2186] On May 4, the court of appeals approved the plaintiff's voluntary dismissal of an interlocutory appeal.[2187]

Legislative Candidate

On April 30—over two weeks after learning that her signature count was short—a prospective candidate for Utah's legislature filed a motion to intervene in the gubernatorial candidate's case to benefit from the injunc-

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judge. Docket Sheet, *id.* (Apr. 13, 2020) [hereinafter *Garbett* Docket Sheet] (D.E. 1, 13, 14).

Tim Reagan interviewed Judge Shelby for this report by telephone on October 14, 2020.

2178. *Garbett* Docket Sheet, *supra* note 2177 (D.E. 25); *see* Order, *Garbett*, No. 2:20-cv-245 (D. Utah May 1, 2020), D.E. 40 (denying reconsideration).

2179. *Garbett*, 458 F. Supp. 3d 1328.

2180. *Id.* at 1352; *see* Garbett v. Herbert, 514 F. Supp. 3d 1342, 1344 (D. Utah 2021).

2181. Interview with Judge Robert J. Shelby, Oct. 14, 2020.

2182. *Garbett* Docket Sheet, *supra* note 2177 (D.E. 18); Interview with Judge Robert J. Shelby, Oct. 14, 2020.

2183. Interview with Judge Robert J. Shelby, Oct. 14, 2020.

2184. *Id.*

2185. *Id.*

2186. Notice, Garbett v. Herbert, No. 2:20-cv-245 (D. Utah May 2, 2020), D.E. 42; *see* Garbett v. Herbert, 514 F. Supp. 3d 1342, 1344, 1347 (D. Utah 2021).

2187. Order, Garbett v. Herbert, No. 20-4051 (May 4, 2020); *see Garbett* 514 F. Supp. 3d at 1347.

tion.[2188] She also moved for expedited consideration.[2189] Acting as her own attorney, she filed a separate action on Friday, May 1, seeking an extension of the signature deadline and allowance for electronic submission of signatures.[2190] On Monday, she filed a motion for a temporary restraining order or a preliminary injunction[2191] and a motion for expedited briefing.[2192]

Judge Bruce S. Jenkins granted the defendants' motion to transfer the second case to Judge Shelby.[2193] At a May 6 telephonic status conference, Judge Shelby set the case for hearing on May 13, noting the defendants' agreement not to mail ballots involving the legislative district at issue before May 14.[2194] At the telephonic hearing, Judge Shelby denied the plaintiff immediate relief.[2195] Judge Shelby granted a stipulated dismissal on May 26.[2196]

Summary Judgment

Determining on January 22, 2021, that the case was moot, Judge Shelby granted summary judgment to the defendants in the gubernatorial candidate's action.[2197]

Ballot-Petition Signature Requirements in Illinois During a Pandemic

Libertarian Party of Illinois v. Pritzker (1:20-cv-2112) and Morgan v. White (1:20-cv-2189) (Rebecca R. Pallmeyer and Charles R. Norgle, Sr., N.D. Ill.) and Bambenek v. White (Sue E. Myerscough, C.D. Ill. 3:20-cv-3107)

> Lawsuits filed in two of Illinois's districts sought modifications to ballot-petition signature requirements in light of social distancing made necessary by the global Covid-19 infectious pandemic. An agreed order modified the requirements for candidates. The district judge gave election officials part of the adjustments from the agreed order that they requested, and the court of appeals declined to stay the district judge's decision. District judges in both

2188. Intervention Motion, *Garbett*, No. 2:20-cv-245 (D. Utah Apr. 30, 2020), D.E. 32.

2189. Motion, *id.* (Apr. 30, 2020), D.E. 33.

2190. Complaint, Brown v. Herbert, No. 1:20-cv-52 (D. Utah May 1, 2020), D.E. 2; *see* Amended Complaint, *id.* (May 1, 2020), D.E. 3.

2191. Motion, *id.* (May 4, 2020), D.E. 11.

2192. Motion, *id.* (May 4, 2020), D.E. 13.

2193. Transfer Order, *id.* (May 4, 2020), D.E. 10; *see* Transfer Motion, *id.* (May 4, 2020), D.E. 6.

2194. Docket Sheet, *id.* (May 1, 2020) (D.E. 15).

2195. *Id.* (D.E. 21).

2196. Order, *id.* (May 26, 2020), D.E. 23.

2197. Garbett v. Herbert, 514 F. Supp. 3d 1342 (D. Utah 2021).

districts denied relief from the signature requirements for ballot measures.

Topics: Getting on the ballot; ballot measure; Covid-19; case assignment; interlocutory appeal; laches; intervention; attorney fees.

Election officials in Illinois agreed to an injunction modifying the ballot-petition signature requirements for candidates in the November 3, 2020, general election in light of social distancing made necessary by the global Covid-19 infectious pandemic. District judges in two of Illinois's districts declined to modify the requirements for ballot measures.

Ballot-Petition Signatures for Candidates

Minor parties, prospective independent candidates, and others affiliated with them filed a federal complaint in the Northern District of Illinois on April 2, 2020, against the governor and state election officials seeking modifications to in-person and witnessing ballot-petition signature requirements for the November 3 general election in light of social distancing made necessary by Covid-19.[2198] On the next day, the plaintiffs filed a motion for a temporary restraining order or a preliminary injunction.[2199]

The court assigned the case to Charles R. Norgle, Sr., but on April 10, Judge Robert M. Dow, Jr., acted as emergency judge and set the case for a telephonic hearing at 9:30 a.m. on April 17.[2200]

The court had accommodated the pandemic by assigning a few judges rotating duty days for emergency proceedings.[2201] The emergency judge assigned to the case was Judge Rebecca R. Pallmeyer, and Judge Dow was on duty for the motion.[2202]

2198. Complaint, Libertarian Party of Ill. v. Pritzker, No. 1:20-cv-2112 (N.D. Ill. Apr. 2, 2020), D.E. 1; Libertarian Party of Ill. v. Pritzker, 455 F. Supp. 3d 738, 740 (N.D. Ill. 2020); *see* Amended Complaint, *Libertarian Party of Ill.*, No. 1:20-cv-2112 (N.D. Ill. Apr. 16, 2020), D.E. 17.

2199. Motion, *Libertarian Party of Ill.*, No. 1:20-cv-2112 (N.D. Ill. Apr. 3, 2020), D.E. 2.

2200. Minutes, *id.* (Apr. 10, 2020), D.E. 5.

Judge Dow became Chief Justice John G. Roberts, Jr.'s counselor in October 2022. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges; Press Release, Oct. 3, 2022, www.supremecourt.gov/publicinfo/press/pressreleases/ pr_10-03-22.

2201. Interview with Judge Rebecca R. Pallmeyer, Oct. 7, 2020.

Tim Reagan interviewed Judge Pallmeyer for this report by telephone.

2202. *Id.*

Ballot-Petition Signatures for Ballot Measures

An organization and six persons supporting an amendment to Illinois's constitution filed a federal complaint in the Northern District on April 7 against state and local election officials, seeking modifications to the ballot-petition signature requirements for initiatives.[2203] Two days later, the plaintiffs filed a motion for a preliminary or permanent injunction.[2204]

This case also was assigned to Judge Norgle; Judge Pallmeyer acted as emergency judge on April 9 and set the case for a telephonic hearing at 9:30 a.m. on April 17.[2205]

Emergency Proceedings

A prospective independent candidate for President sought to join the first action on April 13.[2206] Judge Pallmeyer set the intervention motion for a telephonic hearing at 9:30 a.m. on April 17, noting that the parties should contact the court for the call-in number.[2207] Members of the public were permitted to attend the hearing by telephone as well.[2208]

On April 17, Judge Pallmeyer presided over the motions in the candidate case from 9:32 to 10:11 a.m.[2209] She granted the intervention motion, and she invited the parties to continue discussing a settlement proposal and to reconvene on April 21.[2210]

Especially for injunction cases, Judge Pallmeyer looked for resolutions that the parties could agree to.[2211] Generally, injunctions agreed to are more likely to be obeyed than injunctions imposed.[2212]

2203. Complaint, Morgan v. White, No. 1:20-cv-2189 (N.D. Ill. Apr. 7, 2020), D.E. 1; *see* Amended Complaint, *id.* (Apr. 27, 2020), D.E. 26.

2204. Injunction Motion, *id.* (Apr. 9, 2020), D.E. 4.

2205. Minutes, *id.* (Apr. 9, 2020), D.E. 8.

2206. Intervention Motion, Libertarian Party of Ill. v. Pritzker, No. 1:20-cv-2112 (N.D. Ill. Apr. 13, 2020), D.E. 7; *see* Intervention Injunction Motion, *id.* (Apr. 13, 2020), D.E. 10; Intervention Complaint, *id.* (Apr. 13, 2020), D.E. 8.

2207. Minutes, *id.* (Apr. 14, 2020), D.E. 11.

2208. Interview with Judge Rebecca R. Pallmeyer, Oct. 7, 2020 (noting that proceedings early in the pandemic were especially likely to be conducted by telephone rather than by videoconference, and noting that an advantage of that was that the technological success of the proceeding did not depend on individual participants' home bandwidth resources).

2209. Transcript, *Libertarian Party of Ill.*, No. 1:20-cv-2112 (N.D. Ill. Apr. 17, 2020, filed Apr. 20, 2020), D.E. 22.

2210. *Id.* at 27–28; Minutes, *id.* (Apr. 17, 2020), D.E. 21; Libertarian Party of Ill. v. Pritzker, 455 F. Supp. 3d 738, 740 (N.D. Ill. 2020); *see* Transcript, *Libertarian Party of Ill.*, No. 1:20-cv-2112 (N.D. Ill. Apr. 21, 2020, filed Apr. 21, 2020), D.E. 25; Minutes, *id.* (Apr. 21, 2020), D.E. 24.

2211. Interview with Judge Rebecca R. Pallmeyer, Oct. 7, 2020.

Judge Pallmeyer presided over the ballot-measure case from 10:11 to 10:39 a.m.[2213] She did not find support for an injunction before Judge Norgle could preside over the case.[2214] The plaintiffs had not shown diligent signature-collection efforts.[2215]

The court of appeals affirmed the injunction denial on July 8.[2216] "One important question, when a plaintiff seeks emergency relief, is whether the plaintiff has brought the emergency on himself. . . . Plaintiffs had plenty of time to gather signatures before the pandemic began."[2217] The court observed also that because there is no constitutional requirement for states to provide for ballot measures in the first place, Illinois could legally suspend ballot measures altogether during the pandemic.[2218] The plaintiffs dismissed their action voluntarily in August.[2219]

An Agreed Injunction

Meanwhile, in the candidate case, Judge Pallmeyer entered an agreed order on April 23 reducing the signature requirement, extending the deadline, allowing for electronic signatures, and qualifying parties and independent candidates for the November 2020 ballot if they had qualified either in 2016 or in 2018.[2220]

On May 8, however, Illinois's state board of elections asked Judge Pallmeyer to reconsider the injunction it had agreed to, objecting to an August 7 filing deadline and a 90% reduction in the number of signatures required.[2221] At a May 15 telephonic hearing, Judge Pallmeyer agreed to

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2212. *Id.*

2213. Transcript, Morgan v. White, No. 1:20-cv-2189 (N.D. Ill. Apr. 17, 2020, filed Apr. 24, 2020), D.E. 25 [hereinafter Apr. 17, 2020, *Morgan* Transcript]; Minutes, *id.* (Apr. 17, 2020), D.E. 24.

2214. Apr. 17, 2020, *Morgan* Transcript, *supra* note 2213, at 19.

2215. Opinion, *Morgan*, No. 1:20-cv-2189 (N.D. Ill. May 18, 2020), D.E. 50, 2020 WL 2526484 (denying reconsideration); *see* Minutes, *id.* (May 7, 2020), D.E. 38 (same); *see also* Transcript, *id.* (May 7, 2020, filed May 9, 2020), D.E. 39.

2216. Morgan v. White, 964 F.3d 649 (7th Cir. 2020).

2217. *Id.* at 651–52.

2218. *Id.* at 652.

2219. Minutes, *Morgan*, No. 1:20-cv-2189 (N.D. Ill. Aug. 13, 2020), D.E. 67; Stipulation, *id.* (Aug. 11, 2020), D.E. 61.

2220. Order, Libertarian Party of Ill. v. Pritzker, No. 1:20-cv-2112 (N.D. Ill. Apr. 23, 2020), D.E. 27; Libertarian Party of Ill. v. Pritzker, 455 F. Supp. 3d 738 (N.D. Ill. 2020); *see* Rick Pearson, *Judge Oks Skipping of Signatures for Election*, Chi. Trib., Apr. 25, 2020, at C3.

2221. Reconsideration Motion, *Libertarian Party of Ill.*, No. 1:20-cv-2112 (N.D. Ill. May 8, 2020), D.E. 31.

move up the deadline to July 20 but leave the number of signatures required as previously agreed.[2222]

Three weeks and a day later, the board filed a notice of appeal.[2223] The court of appeals denied a stay on Sunday, June 21, noting how long it took the board to seek one and noting that the board did not first seek a stay in the district court.[2224] On August 20, the court of appeals affirmed the injunction.[2225]

Central District

Four days after Judge Pallmeyer entered the original agreed order, a federal complaint filed in the Central District against state and local election officials sought modifications to the ballot-petition signature requirements for initiatives.[2226] With their complaint, filed on Monday, April 27, the plaintiffs filed a motion for a preliminary injunction.[2227] On Tuesday, the plaintiffs filed a motion for an expedited hearing.[2228] Judge Sue E. Myerscough set the case for hearing by videoconference on Friday, posting contact information in the public record.[2229]

On May 1, Judge Myerscough denied the plaintiffs immediate relief.[2230] Following Judge Pallmeyer's lead, Judge Myerscough determined that ballot measures do not present the same constitutional concerns as candidates do with respect to ballot-petition signature requirements.[2231] "Lastly, the Court notes that Plaintiffs simply delayed their suit too long to allow

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2222. Transcript at 20, *id.* (May 15, 2020, filed May 15, 2020), D.E. 35; Minutes, *id.* (May 15, 2020), D.E. 36.

2223. Notice of Appeal, *id.* (June 6, 2020), D.E. 38.

2224. Libertarian Party of Ill. v. Cadigan, 820 F. App'x 446 (7th Cir. 2020); *see* Rick Pearson, *U.S. Appeals Court Rejects Effort to Delay Candidate Filing Rules*, Chi. Trib., June 23, 2020, at C4.

2225. Libertarian Party of Ill. v. Cadigan, 824 F. App'x 415 (7th Cir. 2020).

2226. Complaint, Bambenek v. White, No. 3:20-cv-3107 (C.D. Ill. Apr. 27, 2020), D.E. 1; Bambenek v. White, 613 F. Supp. 3d 1112, 1114 (C.D. Ill. 2020); *see* Amended Complaint, *Bambenek*, No. 3:20-cv-3107 (C.D. Ill. Apr. 30, 2020), D.E. 20.

2227. Preliminary-Injunction Motion, *Bambenek*, No. 3:20-cv-3107 (C.D. Ill. Apr. 27, 2020), D.E. 2; *Bambenek*, 613 F. Supp. 3d at 1114.

2228. Expedited Hearing Motion, *Bambenek*, No. 3:20-cv-3107 (C.D. Ill. Apr. 28, 2020), D.E. 4.

2229. Order, *id.* (Apr. 28, 2020), D.E. 5; *see Bambenek*, 613 F. Supp. 3d at 1114; *see* Transcript at 5, *Bambenek*, No. 3:20-cv-3107 (C.D. Ill. May 1, 2020, filed May 15, 2020), D.E. 26 ("THE COURT: . . . We will have several observers present for today's hearing.").

2230. *Bambenek*, 613 F. Supp. 3d 1112; *see* Opinion, *Bambenek*, No. 3:20-cv-3107 (C.D. Ill. July 2, 2020), D.E. 35, 2020 WL 6556004 (denying reconsideration).

2231. *Bambenek*, 613 F. Supp. 3d at 1115.

the Court to meaningfully tailor injunctive relief without throwing Illinois' electoral system into disarray during an already tumultuous time."[2232]

The case was dismissed voluntarily as moot on November 9.[2233]

Judge Norgle

On September 10, Judge Norgle denied intervention to a prospective candidate with very case-specific difficulties qualifying for the ballot.[2234]

A stipulation to dismiss the case as settled was filed on March 2, 2021.[2235] The prospective presidential candidate allowed to intervene at the beginning of the case challenged the stipulated dismissal to preserve an opportunity to seek attorney fees,[2236] but Judge Norgle denied the challenge and dismissed the case on July 8 because the dismissal did not affect the candidate's ability to seek fees.[2237]

Speed and Correctness

Judge Pallmeyer strove to rule both quickly and correctly.[2238] Among other things, that combination improves public confidence in the courts.[2239] Her law clerks were very helpful.[2240] They dialed in to the proceedings, and she found it beneficial for more than one clerk to assist her with the emergency matters.[2241]

Ballot-Petition Signature Deadlines in Michigan During a Pandemic

Esshaki v. Whitmer (Terrence G. Berg, 2:20-cv-10831), SawariMedia v. Whitmer (Matthew F. Leitman, 4:20-cv-11246), Kishore v. Whitmer (Sean F. Cox, 2:20-cv-11605), Detroit Unity Fund v. Whitmer (Stephanie Dawkins Davis, 4:20-cv-12016), Jobs for Downriver v. Whitmer (George Caram Steeh, 2:20-cv-12115), and Eason v. Whitmer (Robert H. Cleland, 3:20-cv-12252) (E.D. Mich.)

Because of Michigan's stay-at-home order early in the Covid-19 pandemic, a district judge extended the deadline for candidates'

2232. *Id.* at 1116.

2233. Docket Sheet, *Bambenek*, No. 3:20-cv-3107 (C.D. Ill. Apr. 27, 2020).

2234. Opinion, Libertarian Party of Ill. v. Pritzker, No. 1:20-cv-2112 (N.D. Ill. Sept. 10, 2020), D.E. 76, 2020 WL 6600960.

2235. Stipulated Dismissal, *id.* (Mar. 2, 2021), D.E. 84; Status Report, *id.* (Feb. 5, 2021), D.E. 82 (noting settlement negotiations).

2236. Motion, *id.* (Mar. 2, 2021), D.E. 85.

2237. Order, *id.* (July 8, 2021), D.E. 90; Reply, *id.* (Apr. 12, 2021), D.E. 89.

2238. Interview with Judge Rebecca R. Pallmeyer, Oct. 7, 2020.

2239. *Id.*

2240. *Id.*

2241. *Id.* (noting that law clerks really shine when they work together).

ballot-petition signatures and halved the number of signatures required. The court of appeals ruled that the judge was right on the merits but not empowered to specify the remedy. On remand, the district judge ruled that the state's implemented remedy did not quite pass constitutional muster, and the judge informed the state defendants of a possible constitutional remedy. In a second case involving a proposed statewide initiative, the state never proposed to a second judge an adequate remedy, but the case was ultimately withdrawn for failure to provide evidence of substantial signature-collection results. Two additional judges denied ballot-petition signature relief, and a fifth case before a fifth judge was dismissed by stipulation. A sixth judge dismissed an action filed more than a month after the ballot-petition deadline.

Topics: Covid-19; getting on the ballot; ballot measure; laches; primary election; intervention; attorney fees; pro se party.

Because of social distancing made necessary by the coronavirus disease 2019 (Covid-19) infectious pandemic, a prospective primary-election candidate sought modifications of the ballot-petition signature requirements. A district judge ordered modifications, but the court of appeals ruled that although the judge was right on liability, it was not for the court to impose a specific remedy. In that case, and in another case involving a proposed initiative, the state was unable to propose remedies satisfactory to the court. As time wore on, four additional cases over ballot-petition signature requirements were unsuccessful.

Signature Requirements for a House of Representatives Primary-Election Candidate

A prospective primary-election candidate for the U.S. House of Representatives filed a federal complaint in the Eastern District of Michigan on March 31, 2020, seeking relief from an April 21 deadline for filing one thousand ballot-petition signatures in light of the governor's March 24 stay-at-home order issued because of the Covid-19 infectious pandemic.[2242] With his complaint, the plaintiff filed a motion for a temporary restraining order and a preliminary injunction.[2243]

Judge Terrence G. Berg set the case for a telephonic hearing on April 1, instructing the plaintiff's attorney to initiate the conference call and dial in

2242. Complaint, Esshaki v. Whitmer, No. 2:20-cv-10831 (E.D. Mich. Mar. 31, 2020), D.E. 1; Esshaki v. Whitmer, 455 F. Supp. 3d 367, 369–70 (E.D. Mich. 2020).

2243. Motion, *Esshaki*, No. 2:20-cv-10831 (E.D. Mich. Mar. 31, 2020), D.E. 2.

the court when all parties were present.[2244] A prospective candidate for a judge position filed a motion on April 10 to participate as an amicus curiae.[2245] Judge Berg set the case for an additional telephonic hearing on April 13[2246] and a videoconference hearing initiated by the court on April 15.[2247]

This case arose early in the pandemic, and the court was just beginning to use videoconference technology for hearings.[2248] Among the challenges was allowing for unlimited attendance by members of the public and the news media.[2249] The videoconference platform was set up so that the audience would be invisible.[2250] Because of the hard work by court staff, using the videoconference platform was not a challenge for the judge or the lawyers.[2251]

On April 14, another prospective candidate for another judge position moved to intervene in the case,[2252] and the ACLU moved to participate as an amicus curiae.[2253] On April 15, a prospective challenger to the plaintiff in the election filed a motion to participate as an amicus curiae;[2254] a pro se motion sought joinder, alleging difficulties in filing a separate complaint because of the court's closure;[2255] and another pro se filing sought participation in the case as an independent candidate for President.[2256] Judge

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2244. Notice, *id.* (Apr. 1, 2020), D.E. 4.

Tim Reagan interviewed Judge Berg for this report by telephone on September 17, 2020.

2245. Motion, *Esshaki*, No. 2:20-cv-10831 (E.D. Mich. Apr. 10, 2020), D.E. 7; *see* Amicus Brief, *id.* (Apr. 14, 2020), D.E. 13.

2246. Notice, *id.* (Apr. 10, 2020), D.E. 8.

2247. Notice, *id.* (Apr. 10, 2020), D.E. 9; Transcript, *id.* (Apr. 15, 2020, filed Apr. 24, 2020), D.E. 32 [hereinafter *Esshaki* Transcript]; *Esshaki*, 455 F. Supp. 3d at 372 ("The Court heard oral argument on this motion on April 15, 2020, utilizing the social media platform Zoom.").

2248. Interview with Judge Terrence G. Berg, Sept. 17, 2020.

2249. *Id.*

2250. *Id.*

2251. *Id.*

2252. Motion, *Esshaki*, No. 2:20-cv-10831 (E.D. Mich. Apr. 14, 2020), D.E. 11 [hereinafter Apr. 14, 2020, *Esshaki* Intervention Motion].

2253. Motion, *id.* (Apr. 14, 2020), D.E. 14; *see* Amicus Brief, *id.* (Apr. 14, 2020), D.E. 15.

2254. Motion, *id.* (Apr. 15, 2020), D.E. 20; *see* Amicus Brief, *id.* (Apr. 15, 2020), D.E. 21; *see also* Craig Mauger, *Whitmer: Candidate Deadline "Critical,"* Detroit News, Apr. 18, 2020, at B1.

2255. Motion, *Esshaki*, No. 2:20-cv-10831 (E.D. Mich. Apr. 15, 2020), D.E. 17; *see* Docket Sheet, Beard v. Whitmer, No. 2:20-cv-11067 (E.D. Mich. Apr. 3, 2020) (noting consolidation with the earlier case, D.E. 7).

2256. Intervenor's Complaint, *Esshaki*, No. 2:20-cv-10831 (E.D. Mich. Apr. 15, 2020),

Berg granted intervention to prospective candidates and permission to participate as amici to others.[2257]

Judge Berg issued a preliminary injunction on Monday, April 20.[2258] "[E]ven assuming the State has a compelling interest in the need to ensure a modicum of support through the enforcement of the signature requirement, the regulatory means to accomplish that compelling interest are not narrowly tailored to the context of the COVID-19 pandemic."[2259] Judge Berg also found, however, "that the State is legitimately concerned that a lowering of ballot access standards could result in 'laundry list' ballots crowded with names that 'discourage voter participation and confuse and frustrate those who do participate.'"[2260]

To fashion a remedy, Judge Berg received in camera proposals from both sides.[2261] It was important to get the defendants' input on remedies for the sake of workability.[2262]

> The Court considers the proposed remedies suggested by the parties, together with the facts and applicable law, and finds that a three-pronged remedy is necessary to address the nature of the harm while simultaneously respecting the interest of the State. First, the signature requirements must be lowered to account for the fact that the State's action reduced the available time to gather signatures. Second, as the State has conceded that it could still meet its election planning obligations if the due date for signatures were extended until May 8, the Court will order that extension. Finally, to enhance the available means for gathering signatures, the State will be ordered to implement a method that would permit signatures to be gathered through the use of electronic mail. In doing so, the State is directed to design a system that is as "user-friendly" as possible to maximize its efficacy. . . .
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> . . .
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> . . . While any such line-drawing inevitably involves some degree of arbitrariness, common sense suggests that a reasonably diligent candidate should be expected to have reached the half-way point in gathering sig-

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D.E. 18.

2257. Order, *id.* (Apr. 20, 2020), D.E. 22.

2258. Esshaki v. Whitmer, 455 F. Supp. 3d 367 (E.D. Mich. 2020); *see* Beth LeBlanc, *Judge Extends Mich. Filing Date*, Detroit News, Apr. 21, 2020, at B1.

2259. *Esshaki*, 455 F. Supp. 3d at 378.

2260. *Id.* at 382 (quoting Lubin v. Panish, 415 U.S. 709, 715 (1974)).

2261. *Id.* at 372; *Esshaki* Transcript, *supra* note 2247, at 10.

2262. Interview with Judge Terrence G. Berg, Sept. 17, 2020.

> natures when there is only one month to go. Consequently, a reduction in the requirement by fifty percent will be ordered.[2263]

Late in the day on May 5, the court of appeals stayed Judge Berg's remedy, agreeing, however, that a remedy was needed.[2264] "[F]ederal courts have no authority to dictate to the States precisely how they should conduct their elections."[2265] The court observed that perhaps the state would voluntarily adopt the terms of Judge Berg's remedy.[2266]

On May 6, Judge Berg ordered Michigan to file proposed reasonable accommodations by 5:00 p.m. that day and set the case for a videoconference hearing on May 7 at 3:00.[2267] Michigan proposed an additional extension of the filing deadline to May 11 and a modification of the signature requirement to 70% of the statutory requirement.[2268]

Judge Berg granted a May 7 request by Michigan's Republican Party to participate as an amicus curiae.[2269] The amicus lawyering, such as by the ACLU and the Republican Party, was very helpful in this case because of the amici's expansive election-law experience.[2270] Crucial in handling the case's time crunch was the hard and good work by Judge Berg's law clerks.[2271]

Judge Berg heard the case on May 7 and 18.[2272] On May 13, he granted a judicial candidate's May 11 motion to intervene.[2273] He granted another judicial candidate's May 18 motion to intervene when he issued his second preliminary injunction on May 20.[2274]

The state's accommodations included a 50% reduction in the signature requirement if filed by May 8, but the state agreed to put on the ballot only candidates who had either filed a statement of organization or established

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2263. *Esshaki*, 455 F. Supp. 3d at 382–83; *see* Esshaki v. Whitmer, 456 F. Supp. 3d 897 (E.D. Mich. 2020) (denying reconsideration or a stay).

2264. Esshaki v. Whitmer, 813 F. App'x 170 (6th Cir. 2020); *see* Craig Mauger, *Court: State Must Decide on Ballot Changes*, Detroit News, May 6, 2020, at A5.

2265. *Esshaki*, 813 F. App'x at 172.

2266. *Id.* at 172–73.

2267. Docket Sheet, Esshaki v. Whitmer, No. 2:20-cv-10831 (E.D. Mich. Mar. 31, 2020) [hereinafter *Esshaki* Docket Sheet].

2268. Proposal, *id.* (May 6, 2020), D.E. 38.

2269 *Esshaki* Docket Sheet, *supra* note 2267.

2270. Interview with Judge Terrence G. Berg, Sept. 17, 2020.

2271. *Id.*

2272. *Esshaki* Docket Sheet, *supra* note 2267 (minutes, May 7 and 18, 2020).

2273. Order, *Esshaki*, No. 2:20-cv-10831 (E.D. Mich. May 13, 2020), D.E. 52; Motion, *id.* (May 11, 2020), D.E. 47 [hereinafter May 13, 2020, *Esshaki* Intervention Motion].

2274. Esshaki v. Whitmer, 461 F. Supp. 3d 646, 651 (E.D. Mich. 2020); Motion, *Esshaki*, No. 2:20-cv-10831 (E.D. Mich. May 18, 2020), D.E. 58.

a candidate committee by March 10, the date that Michigan's state of emergency began.[2275] Judge Berg determined that the March 10 deadline was not narrowly tailored to the state's interest in weeding out opportunistic candidates and declared it unconstitutional.[2276] Restrained by the court of appeals from ordering a remedy, Judge Berg suggested that constitutional compliance would result from candidates' being given two days to file signatures gathered by May 8.[2277]

A Statewide Initiative

On May 4, the day before the court of appeals stayed Judge Berg's remedy, an organization and three voters supporting a proposed statewide initiative filed a federal complaint in the Eastern District challenging Michigan's election officials' not applying Judge Berg's order to ballot petitions for initiatives.[2278] With their complaint, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction.[2279]

Judge Matthew F. Leitman set the case for a May 21 telephonic status conference, posting the contact information in the public record.[2280] After some briefing, Judge Leitman set the case for a June 5 videoconference hearing, noting that the court would provide the link to participants.[2281] An attorney entered an appearance for the organizational plaintiff on June 1.[2282]

A big believer in not reinventing the wheel, Judge Leitman reviewed Judge Berg's case and other similar cases around the country.[2283] On June 11, Judge Leitman applied the logic of Judge Berg's order to general election initiatives.[2284] "Because Defendants have not shown that their en-

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2275. *Esshaki*, 461 F. Supp. 3d at 646–47 & 649 n.1.

2276. *Id.* at 648–49; *see* Mike Martindale, *Ruling Revives 2 Candidates' Ballot Hopes*, Detroit News, May 21, 2020, at A17.

2277. *Esshaki*, 461 F. Supp. 3d at 650–51.

2278. Complaint, SawariMedia LLC v. Whitmer, No. 4:20-cv-11246 (E.D. Mich. May 4, 2020), D.E. 1.

2279. Motion, *id.* (May 4, 2020), D.E. 2.

2280. Notice, *id.* (May 21, 2020), D.E. 6.

Tim Reagan interviewed Judge Leitman for this report by telephone on September 18, 2020.

2281. Notice, *SawariMedia LLC*, No. 4:20-cv-11246 (E.D. Mich. May 28, 2020), D.E. 10; *see* Transcript, *id.* (June 5, 2020, filed Oct. 16, 2020), D.E. 49.

2282. Notice of Appearance, *id.* (June 1, 2020), D.E. 11.

2283. Interview with Judge Matthew F. Leitman, Sept. 18, 2020.

2284. SawariMedia LLC v. Whitmer, 466 F. Supp. 3d 758 (E.D. Mich. 2020), *appeal voluntarily dismissed*, Order, SawariMedia LLC v. Whitmer, No. 20-1594 (6th Cir. Dec. 9, 2020), D.E. 33.

forcement of the signature requirement and filing deadline are narrowly tailored to the present circumstances, those requirements cannot survive a strict scrutiny analysis as applied to Plaintiffs."[2285] Although Judge Leitman enjoined the signature requirement as unreasonable, Judge Leitman did not specify a more precise remedy.[2286]

Michigan proposed as a remedy modifying neither the number of signatures required nor the submission deadline for the 2020 election; instead, Michigan proposed that the limitation period for signatures be tolled so that signatures already collected could be used for the 2022 election.[2287]

Following a June 16 attorneys-only videoconference, Judge Leitman rejected the proposed remedy and set the case for another videoconference on June 22.[2288] On June 18, Michigan submitted an alternative proposed remedy extending the signature-filing deadline for the November election from May 27 to July 6.[2289]

In preparation for the June 22 videoconference, Judge Leitman obtained consent from all parties to conduct separate settlement discussions with the two sides in videoconference breakout rooms.[2290] A law clerk communicated with all parties and reported to Judge Leitman only whether there was unanimous agreement for separate sessions, not which party, if any, objected.[2291] Settlement was not achieved, and Judge Leitman orally rejected the defendants' proposal:

> I'm going to sustain the objections to this remedy and the original injunction precluding the defendants from keeping this initiative off the ballot by operation of the constitutional provision concerning the minimum number of signatures and the filing deadline, the state defendants are still enjoined from keeping these plaintiffs off the ballot on that basis.[2292]

2285. *SawariMedia LLC*, 466 F. Supp. 3d at 776.

2286. *Id.* at 778–79.

2287. Defendants' Proposed Remedy, *SawariMedia LLC*, No. 4:20-cv-11246 (E.D. Mich. June 15, 2020), D.E. 18.

2288. Order, *id.* (June 16, 2020), D.E. 22; Docket Sheet, *id.* (May 4, 2020) [hereinafter *SawariMedia LLC* Docket Sheet]; *see* Notice, *id.* (June 16, 2020), D.E. 20.

2289. Defendant's Second Proposed Remedy, *id.* (June 18, 2020), D.E. 23; *see* SawariMedia, LLC v. Whitmer, 963 F.3d 595, 597 (6th Cir. 2020).

2290. Transcript at 6–7, *SawariMedia LLC*, No. 4:20-cv-11246 (E.D. Mich. June 22, 2020, filed June 23, 2020), D.E. 28.

2291. *Id.* at 6.

2292. *Id.* at 13.

Judge Leitman issued a written ruling on the following day.[2293]

Michigan immediately appealed Judge Leitman's rulings.[2294] On June 24, Judge Leitman denied Michigan a stay pending appeal;[2295] the court of appeals did so on July 2.[2296] Judge Leitman set the case for another videoconference on July 13.[2297]

On July 7, Michigan informed Judge Leitman and the plaintiffs that they intended to seek a stay from the Supreme Court, and they intended no additional remedy proposal.[2298] Judge Leitman set the case for a videoconference on the next day.[2299] At the conference, Judge Leitman ordered the plaintiffs to provide the court with an update on their signature-collection efforts,[2300] and Judge Leitman again set the case for a videoconference on July 13 at 4:00 p.m.[2301]

Unable to provide evidence of substantial signature collections,[2302] the plaintiffs voluntarily dismissed the action on July 23.[2303] On that day, Michigan withdrew its Supreme Court stay application.[2304]

Judge Leitman greatly appreciated the flexibility afforded by videoconference technology.[2305] Video sessions have many benefits over audio sessions. Among other things, it is much easier on the court reporter.[2306] Although in-person sessions are even better, the ability to hold proceedings by videoconference makes scheduling easier, which is important in cases with a time crunch.[2307]

There was an effort to make open to the public any session that under normal circumstances would be in open court.[2308] If settlement negotia-

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2293. Order, *id.* (June 23, 2020), D.E. 25.

2294. Notice of Appeal, *id.* (June 23, 2020), D.E. 26.

2295. Opinion, *id.* (June 24, 2020), D.E. 32, 2020 WL 3447694.

2296. SawariMedia, LLC v. Whitmer, 963 F.3d 595 (6th Cir. 2020).

2297. Notice, *SawariMedia LLC*, No. 4:20-cv-11246 (E.D. Mich. July 2, 2020), D.E. 35.

2298. Defendants' Statement, *id.* (July 7, 2020), D.E. 36.

2299. Notice, *id.* (July 7, 2020), D.E. 37.

2300. *SawariMedia LLC* Docket Sheet, *supra* note 2288.

2301. Notice, *SawariMedia LLC*, No. 4:20-cv-11246 (E.D. Mich. July 8, 2020), D.E. 38.

2302. Plaintiffs' Declaration, *id.* (July 23, 2020), D.E. 42.

2303. Voluntary Dismissal, *id.* (July 23, 2020), D.E. 43; *see* Order, *id.* (Oct. 19, 2020), D.E. 50 (vacating the injunction).

2304. Letter, Whitmer v. SawariMedia, LLC, No. 20A1 (U.S. July 23, 2020).

2305. Interview with Judge Matthew F. Leitman, Sept. 18, 2020.

2306. *Id.*

2307. *Id.*

2308. *Id.*

tions were expected during the session, Judge Leitman was inclined to not make the session open to the public, subject to the parties' agreement.[2309]

A Minor Party's Presidential Candidate

A minor party's candidates for President and Vice President filed a federal complaint in the Eastern District on June 18, challenging the signature requirements for getting on the ballot in Michigan.[2310] With their complaint, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction.[2311]

On the next day, Judge Sean F. Cox set the case for a telephonic status conference on June 23, providing contact information in the public record.[2312] After the conference, Judge Cox set the case for oral arguments by video on July 2, again providing contact information in the public record.[2313] A few days before the hearing, Judge Cox ordered the plaintiffs to submit information about signatures already collected.[2314]

On July 8, Judge Cox denied the plaintiffs immediate relief.[2315] "A reasonably diligent candidate could be expected to satisfy the State's ballot-access requirements under the circumstances presented . . . ."[2316] The court of appeals affirmed Judge Cox's decision on August 24.[2317]

The plaintiffs dismissed the action voluntarily on September 9.[2318]

A Detroit Initiative

A set of proponents of a municipal initiative filed a federal complaint in the Eastern District against Michigan and Detroit election officials at 3:12 p.m. on July 28, challenging that day as the due date for ballot-petition signatures.[2319] At 3:37, the plaintiffs filed a motion for a temporary re-

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2309. *Id.*

2310. Complaint, Kishore v. Whitmer, No. 2:20-cv-11605 (E.D. Mich. June 18, 2020), D.E. 1; Kishore v. Whitmer, 972 F.3d 745, 749 (6th Cir. 2020).

2311. Motion, *Kishore*, No. 2:20-cv-11605 (E.D. Mich. June 18, 2020), D.E. 3.

2312. Notice, *id.* (June 19, 2020), D.E. 4

2313. Order, *id.* (June 23, 2020), D.E. 6; Notice, *id.* (June 23, 2020), D.E. 7; Transcript, *id.* (July 2, 2020, filed July 9, 2020), D.E. 18.

2314. Order, *id.* (June 29, 2020), D.E. 12.

2315. Opinion, *id.* (July 8, 2020), D.E. 17, 2020 WL 3819125.

2316. *Id.* at 2.

2317. Kishore v. Whitmer, 972 F.3d 745 (6th Cir. 2020).

2318. Notice, *Kishore*, No. 2:20-cv-11605 (E.D. Mich. Sept. 9, 2020), D.E. 25.

2319. Complaint, Detroit Unity Fund v. Whitmer, No. 4:20-cv-12016 (E.D. Mich. July 28, 2020), D.E. 1; Detroit Unity Fund v. Whitmer, 819 F. App'x 421, 422 (6th Cir. 2020); Opinion at 2, *Detroit Unity Fund*, No. 4:20-cv-12016 (E.D. Mich. Aug. 17, 2020), D.E. 12 [hereinafter E.D. Mich. *Detroit Unity Fund* Opinion], 2020 WL 6580458.

straining order and a preliminary injunction.[2320]

The court assigned the case to Judge Stephanie Dawkins Davis,[2321] who conferred with other judges on her court presiding over ballot-petition-signature cases regarding case-management strategies.[2322] An important first step is for the plaintiff to identify who will be representing the defendants and find out when they can meet with the court.[2323]

Judge Davis set the case for an attorneys-only videoconference on July 29, the day after the complaint was filed.[2324] She much preferred videoconference proceedings to telephone proceedings; it is much easier to know who is speaking.[2325]

She then set the case for a videoconference hearing on Friday, August 14, posting contact information in the public record.[2326] At the hearing, Judge Davis reminded the participants, "Parties are not permitted to make any recordings or take any pictures during the course of the proceedings."[2327] From the bench, she denied the plaintiffs immediate relief.[2328] An opinion followed on Monday.[2329]

The plaintiffs unreasonably delayed in asserting their rights.[2330] "Moreover, there were several methods available to Plaintiffs to obtain the requisite signatures without violating the Governor's social distancing requirements."[2331] The court of appeals affirmed Judge Davis's decision on Sep-

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2320. Motion, *Detroit Unity Fund*, No. 4:20-cv-12016 (E.D. Mich. July 28, 2020), D.E. 2; *Detroit Unity Fund*, 819 F. App'x at 422; E.D. Mich. *Detroit Unity Fund* Opinion, *supra* note 2319, at 2.

2321. Docket Sheet, *Detroit Unity Fund*, No. 4:20-cv-12016 (E.D. Mich. July 28, 2020).

Tim Reagan interviewed Judge Davis for this report by telephone on September 16, 2020. Judge Davis was elevated to the court of appeals on June 14, 2022. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

2322. Interview with Judge Stephanie Dawkins Davis, Sept. 16, 2020.

2323. *Id.*

2324. Notice, *Detroit Unity Fund*, No. 4:20-cv-12016 (E.D. Mich. July 28, 2020), D.E. 5.

2325. Interview with Judge Stephanie Dawkins Davis, Sept. 16, 2020.

2326. Notice, *Detroit Unity Fund*, No. 4:20-cv-12016 (E.D. Mich. July 29, 2020), D.E. 6.

2327. Transcript at 5, *id.* (Aug. 14, 2020, filed Aug. 24, 2020), D.E. 13.

2328. *Id.* at 26; E.D. Mich. *Detroit Unity Fund* Opinion, *supra* note 2319, at 2; Detroit Unity Fund v. Whitmer, 819 F. App'x 421, 422 (6th Cir. 2020).

2329. E.D. Mich. *Detroit Unity Fund* Opinion, *supra* note 2319.

2330. *Id.* at 12.

2331. *Id.* at 20.

tember 2,[2332] and Judge Davis entered a stipulated dismissal of the case on September 22.[2333]

Other Municipal Initiatives

Five local ballot-question committees filed a federal complaint in the Eastern District against state and local election officials on August 5, seeking relief from the plaintiffs' inability to satisfy ballot-petition signature requirements by the deadline for the November 3 general election.[2334] On the next day, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction: "time is of the essence in this matter, as absent voter ballots for the November 2020 general election must be printed and mailed to military and overseas voters by September 19, 2020."[2335]

On August 7, Judge George Caram Steeh set the case for hearing by video conference on August 31—providing contact information in the public record—with briefing to be completed by August 24.[2336] Judge Steeh knew that especially for a case involving voting it would be important for the public to be able to observe the proceeding.[2337]

On August 25, however, the parties stipulated dismissal.[2338]

An Independent Candidate for Congress

A prospective independent candidate for Congress in the November general election filed a federal complaint in the Eastern District on Saturday, August 19, seeking relief from the July 16 filing deadline.[2339] With his complaint, the plaintiff filed a motion for a temporary restraining order and a preliminary injunction.[2340]

On Tuesday, Judge Robert H. Cleland denied the plaintiff a temporary restraining order, not persuaded by the filings' "broad generalizations,"

2332. *Detroit Unity Fund*, 819 F. App'x 421.

2333. Dismissal Order, *Detroit Unity Fund*, No. 4:20-cv-12016 (E.D. Mich. Sept. 22, 2020), D.E. 19.

2334. Complaint, Jobs for Downriver v. Whitmer, No. 2:20-cv-12115 (E.D. Mich. Aug. 5, 2020), D.E. 1.

2335. Motion at 3, *id.* (Aug. 6, 2020), D.E. 3.

2336. Notice. *id.* (Aug. 7, 2020), D.E. 6.

Tim Reagan interviewed Judge Steeh for this report by telephone on September 16, 2020.

2337. Interview with Judge George Caram Steeh, Sept. 16, 2020.

2338. Stipulation, *Jobs for Downriver*, No. 2:20-cv-12115 (E.D. Mich. Aug. 25, 2020), D.E. 34.

2339. Complaint, Eason v. Whitmer, No. 3:20-cv-12252 (E.D. Mich. Aug. 19, 2020), D.E. 1; Eason v. Whitmer, 485 F. Supp. 3d 876, 877–78 (E.D. Mich. 2020).

2340. Motion, *Eason*, No. 3:20-cv-12252 (E.D. Mich. Aug. 19, 2020), D.E. 2; *Eason*, 485 F. Supp. 3d at 878.

and set the case for a September 10 videoconference hearing, posting contact information in the public record.[2341]

On September 9, however, Judge Cleland determined that a hearing was not necessary, and he denied the plaintiff a preliminary injunction.[2342] On the one hand, the plaintiff "does not explain why he waited 34 days after the deadline to file this action."[2343] On the other hand, "Plaintiff submits scant information regarding his signature collection efforts."[2344]

The plaintiff voluntarily dismissed his action that day.[2345]

The Conclusion of Judge Berg's Case

On July 30, Judge Berg denied intervention by a plaintiff seeking relief related to the November general election instead of the primary election.[2346]

The plaintiff in Judge Berg's case prevailed in the August 4 primary election.[2347]

On September 2, 2020, Judge Berg dismissed the action with prejudice as moot, except for attorney-fee claims.[2348] The court of appeals ordered similar relief one week later.[2349] On March 30, 2021, Judge Berg issued attorney-fee awards of $15,423.25[2350] and $8,249.18[2351] to two judicial-candidate intervenors.

2341. Order, *Eason*, No. 3:20-cv-12252 (E.D. Mich. Aug. 21, 2020), D.E. 6, 2020 WL 4923694; Notice, *id.* (Sept. 2, 2020), D.E. 11; *see Eason*, 485 F. Supp. 3d at 878.

2342. *Eason*, 485 F. Supp. 3d 876.

2343. *Id.* at 880.

2344. *Id.* at 879.

2345. Voluntary Dismissal, *Eason*, No. 3:20-cv-12252 (E.D. Mich. Sept. 9, 2020), D.E. 13.

2346. Order, Esshaki v. Whitmer, No. 2:20-cv-10831 (E.D. Mich. July 30, 2020), D.E. 66; *see* Intervention Motion, *id.* (July 27, 2020), D.E. 65.

2347. *See* Melissa Nann Burke, *Stevens Picks Up U.S. Chamber's Backing*, Detroit News, Sept. 3, 2020, at A5; Leonard N. Fleming, *Esshaki Holds Slim Lead in Early Returns*, Detroit News, Aug. 5, 2020, at A6.

2348. Order, *Esshaki*, No. 2:20-cv-10831 (E.D. Mich. Sept. 2, 2020), D.E. 71, 2020 WL 5900965.

2349. Order, Esshaki v. Whitmer, No. 20-1336 (6th Cir. Sept. 9, 2020), D.E. 27.

2350. Opinion, *Esshaki*, No. 2:20-cv-10831 (E.D. Mich. Mar. 30, 2021), D.E. 83, 2021 WL 1192913; *see* May 13, 2020, *Esshaki* Intervention Motion, *supra* note 2273.

2351. Opinion, *Esshaki*, No. 2:20-cv-10831 (E.D. Mich. Mar. 30, 2021), D.E. 81, 2021 WL 1192915; *see* Apr. 14, 2020, *Esshaki* Intervention Motion, *supra* note 2252.

Trying to Get on the Ballot After Voting Has Started

Raiklin v. Virginia Department/Board of Elections (John A. Gibney, Jr., E.D. Va. 3:18-cv-288)

> A district judge denied immediate relief to a pro se plaintiff who filed an action challenging his exclusion from a primary-election ballot, because he filed the complaint after early voting had started.
>
> *Topics:* Getting on the ballot; laches; pro se party; primary election; early voting; absentee ballots.

Ivan Raiklin filed a pro se federal complaint in the Eastern District of Virginia's Richmond courthouse on May 1, 2018, alleging that he was wrongfully excluded from the June 12 primary-election ballot for U.S. Senator.[2352] He styled his complaint as a "Complaint and Request for Emergency Injunction."[2353]

On May 9, Judge John A. Gibney found that laches precluded immediate relief.[2354]

> Raiklin may ultimately prevail on the merits of his claim, but the Court cannot equitably enjoin the defendants from printing primary ballots without Raiklin's name when he knew of the defendants' intentions to keep him off of the ballot in early April yet failed to bring this case until after primary ballots had already been printed and made available to the public for voting.[2355]

Early voting began on April 27.[2356] "Between filing his motion and [the time of Judge Gibney's ruling], Raiklin [had] not contacted the Court to request a hearing on his motion."[2357]

Judge Gibney dismissed the complaint without prejudice on July 9 for failure to prosecute the action, also noting mootness.[2358]

2352. Complaint, Raiklin v. Va. Dep't/Bd. of Elections, No. 3:18-cv-288 (E.D. Va. May 1, 2018), D.E. 1 [hereinafter *Raiklin* Complaint]; *see* Opinion, *id.* (July 9, 2018), D.E. 12 [hereinafter *Raiklin* Dismissal Opinion] (noting allegation of a refusal to properly count the candidate's ballot-petition signatures); *see also* Jenna Portnoy & Laura Vozzella, *Senate Hopeful Files Lawsuit Over Ballot Exclusion*, Wash. Post, May 2, 2018, at B4.

2353. *Raiklin* Complaint, *supra* note 2352, D.E. 1, 3.

2354. Opinion, *Raiklin*, No. 3:18-cv-288 (E.D. Va. May 9, 2018), D.E. 5 [hereinafter *Raiklin* Preliminary-Injunction-Denial Opinion]; *see Raiklin* Dismissal Opinion, *supra* note 2352.

2355. *Raiklin* Preliminary-Injunction-Denial Opinion, *supra* note 2354, at 2.

2356. *See* Portnoy & Vozzella, *supra* note 2352; *see also Raiklin* Preliminary-Injunction-Denial Opinion, *supra* note 2354.

2357. *Raiklin* Preliminary-Injunction-Denial Opinion, *supra* note 2354, at 1.

2358. *Raiklin* Dismissal Opinion, *supra* note 2352.

More Signatures Required to Get on a Local Ballot Than to Get on a Statewide Ballot

Acevedo v. Cook County Officers Electoral Board (Elaine E. Bucklo, 1:18-cv-293) and Kowalski McDonald v. Cook County Officers' Electoral Board (John J. Tharp, Jr., 1:18-cv-1277) (N.D. Ill.)

> Two cases challenged the larger number of signatures required to get on a primary-election ballot in Cook County than would be required to get on a primary-election ballot for statewide office. Both district judges and the court of appeals ruled against the plaintiffs.
>
> *Topics:* Getting on the ballot; pro se party; case assignment.

Is it proper to require more signatures to get on a ballot for a local election than to get on a ballot for statewide office? Perhaps, if the burden is not severe, according to the U.S. Court of Appeals for the Seventh Circuit.

First Case

A January 15, 2018, federal complaint filed in the Northern District of Illinois alleged,

> This Civil Rights case challenges as unconstitutional the Illinois Election Code's ballot access requirement that 2018 Democratic Primary Candidates for Countywide offices in the Cook County submit 8,236 valid signatures . . . and that Candidates for Commissioner of the Metropolitan Water Reclamation District of Greater Chicago submit 8,075 valid signatures . . . while Democratic Primary candidates for Illinois Statewide office such as Governor only need to submit 5,000 signatures for access to the ballot.[2359]

The reason for the discrepancy was that primary-election ballot petitions for statewide office required 5,000 signatures, but primary-election ballot petitions for local offices required signatures totaling 0.5% of the number of votes received by a candidate of the party in the most recent general election.[2360] Seven would-be candidates—five for water commissioner, one for county sheriff, and one for county assessor—filed the federal complaint.[2361]

With their complaint, the plaintiffs filed a motion for a temporary restraining order,[2362] set for hearing on the following day.[2363] At the hearing,

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2359. Complaint at 1, Acevedo v. Cook Cty. Officers Electoral Bd., No. 1:18-cv-293 (N.D. Ill. Jan. 15, 2018), D.E. 1 [hereinafter *Acevedo* Complaint].

2360. 10 Ill. Comp. Stat. 5/7–10(a), (d)(1), (g).

2361. *Acevedo* Complaint, *supra* note 2359.

2362. Temporary-Restraining-Order Motion, *Acevedo*, No. 1:18-cv-293 (N.D. Ill. Jan. 15, 2018), D.E. 2.

Judge Elaine E. Bucklo ordered defense responses by January 22 and set the case for another hearing on January 23.[2364]

In 1979, the Supreme Court found an equal-protection violation in Illinois because new political parties and independent candidates needed 25,000 signatures to get on a statewide ballot but over 35,000 signatures to get on a local ballot, measured as 5% of the total votes in the locality's previous election.[2365]

On January 24, 2018, Judge Bucklo ruled against the plaintiffs in light of decisions by the Supreme Court and the U.S. Court of Appeals for the Seventh Circuit clarifying application of the Supreme Court's 1979 case and the considerably smaller number of signatures required in the case before her.[2366]

Second Case

A similar case was filed in February 2018. A candidate for the office of county clerk filed her pro se federal complaint in the Northern District on February 20, challenging her exclusion from the March 20 primary-election ballot.[2367] The plaintiff attributed the high requirement for Cook County to a candidate in the plaintiff's party running unopposed in the last county general election, which was also a presidential election.[2368]

One day after the complaint was filed, Judge Joan Humphrey Lefkow exercised her prerogative as a senior judge and declined assignment of the case, which was reassigned to Judge John J. Tharp, Jr.[2369] A week after filing her complaint, the plaintiff filed a motion for an expedited status conference,[2370] which Judge Tharp granted a day later by setting one for the morning of March 2.[2371]

At the status conference, Judge Tharp set a deadline of that day for a temporary-restraining-order motion, to be fully briefed for a March 13

2363. Notice, *id.* (Jan. 15, 2018), D.E. 3; Acevedo v. Cook Cty. Officers Electoral Bd., 286 F. Supp. 3d 929, 930 (N.D. Ill. 2018).

2364. Minutes, *Acevedo*, No. 1:18-cv-293 (N.D. Ill. Jan. 16, 2018), D.E. 8; *see Acevedo*, 286 F. Supp. 3d at 930; Minutes, *Acevedo*, No. 1:18-cv-293 (N.D. Ill. Jan. 23, 2018), D.E. 15.

2365. Ill. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979).

2366. *Acevedo*, 286 F. Supp. 3d at 929; *see* Acevedo v. Cook Cty. Officers Electoral Bd., 925 F.3d 944, 947 (7th Cir. 2019).

2367. Complaint, Kowalski McDonald v. Cook Cty. Officers' Electoral Bd., No. 1:18-cv-1277 (N.D. Ill. Feb. 20, 2018), D.E. 1.

2368. *Id.* at 4–5.

2369. Transfer, *id.* (Feb. 21, 2018), D.E. 6; Docket Sheet, *id.* (Feb. 20, 2018).

2370. Motion, *id.* (Feb. 27, 2018), D.E. 8.

2371. Minutes, *id.* (Feb. 28, 2018), D.E. 10.

hearing by March 9.[2372] The plaintiff was represented by counsel at the hearing.[2373] On the next day, Judge Tharp announced that he would deny immediate relief with an opinion to follow one day later.[2374]

Judge Tharp ruled against the defendants on their request for abstention pursuant to *Younger v. Harris*, because "the defendants have not and cannot show that the [Cook County Officers Electoral] Board's review of [the plaintiff's] petition implicates the state's interests in investigating, enforcing, and sanctioning violations of its laws."[2375] Judge Tharp decided that a judgment in the defendant's favor in the state courts did not preclude the plaintiff's claims as res judicata, because the state-court judgment was still on appeal.[2376] But Judge Tharp ruled against the plaintiff on the merits, because she could show no intention to disfranchise women and minorities.[2377] The fact that the higher requirement for county offices than for state offices that election cycle was an anomaly further weighed against the plaintiff's merits.[2378]

Affirmance by the Court of Appeals

On June 5, 2019, the court of appeals affirmed Judge Bucklo's dismissal of the first case because the plaintiffs "have not alleged any facts supporting an inference that the burden imposed by [the signature] requirement is severe."[2379]

> Strict scrutiny is not triggered by the existence of a less burdensome restriction—it is triggered only when the challenged regulation itself imposes a severe burden. Because Acevedo has not alleged that the burden imposed by the Cook County signature requirement is severe, the defendants need not show any justification for it beyond Illinois's interest in orderly and fair elections. That interest easily justifies the signature requirement here.[2380]

2372. Minutes, *id.* (Mar. 2, 2018), D.E. 17.

2373. Transcript at 2, *id.* (Mar. 13, 2018, filed June 11, 2018), D.E. 40; Appearance, *id.* (Mar. 13, 2018), D.E. 23.

2374. Minutes, *id.* (Mar. 14, 2018), D.E. 25.

2375. Opinion at 5, *id.* (Mar. 25, 2018), D.E. 26, 2018 WL 1334931.

2376. *Id.* at 5–7.

2377. *Id.* at 10.

2378. *Id.* at 9–10.

2379. Acevedo v. Cook Cty. Officers Electoral Bd., 925 F.3d 944, 948 (7th Cir. 2019).

2380. *Id.* at 946–47; *see id.* at 947–48 ("Though the election is over, [the] claim is not moot because it is capable of repetition, yet evading review.").

An appeal in the second case was dismissed as moot on January 2.[2381] Judge Tharp dismissed the case on July 10 following a scheduled hearing at which neither party appeared.[2382]

Reversing a State Supreme Court's Retroactive Application of a Very Early Ballot Qualification Deadline

Daly v. Tennant (Robert C. Chambers, S.D. W. Va. 3:16-cv-8981)

> A state's secretary of state interpreted a state supreme court's opinion to retroactively apply an early ballot-qualification deadline for independent and unrecognized-party candidates. Two candidates disqualified by the ruling filed a federal complaint, and the district judge granted the candidates a preliminary injunction against the ruling. The plaintiffs were awarded $34,234.81 in attorney fees and costs.
>
> *Topics:* Getting on the ballot; matters for state courts; intervention; attorney fees.

On September 15, 2016, West Virginia's supreme court of appeals issued an opinion that was interpreted by West Virginia's secretary of state as meaning that a revision to West Virginia's election statutes required independent and unrecognized-party candidates for office to have qualified for the November 8 ballot on January 30.[2383]

The Socialist Equality Party's nominee for a seat in West Virginia's house of delegates and the Constitution Party's nominee for President filed a federal complaint in the Southern District of West Virginia on September 19 against West Virginia's secretary of state challenging the constitutionality of the state court's retroactive change of the qualification deadline from August 1 to January 30.[2384] On the following day, the candidates filed an emergency motion for a temporary restraining order.[2385]

2381. McDonald v. Cook Cty. Officers Electoral Bd., 758 F. App'x 527 (7th Cir. 2019).

2382. Notification, *Kowalski McDonald*, No. 1:18-cv-1277 (N.D. Ill. July 10, 2019), D.E. 50.

2383. Wells v. West Virginia *ex rel.* Miller, 237 W. Va. 731, 791 S.E. 2d 361 (2016); *id.*, 791 S.E.2d at 368 ("Whether this was the intention of the Legislature in making the 2015 amendments to the statute is not for this Court to speculate . . . ."); *see id.* 791 S.E.2d at 382 (dissenting opinion by Justice Davis) ("the majority's opinion effectively imposes two conflicting sets of filing deadlines upon independent candidates"); *see also* Phil Kabler, *Court Quashes Wells' Bid*, Charleston Gazette-Mail, Sept. 13, 2016, at 1A; Phil Kabler, *Court Releases Opinion on Wells*, Charleston Gazette-Mail, Sept. 16, 2016, at 1C; Phil Kabler, *In Light of High Court's Ruling, Counties Mull Candidates' Fates*, Charleston Gazette-Mail, Sept. 13, 2016, at 1A.

2384. Complaint, Daly v. Tennant, No. 3:16-cv-8981 (S.D. W. Va. Sept. 19, 2016), D.E. 1; *see* Kate White, *Candidates Say They Still Belong on Ballot in Nov.*, Charleston Gazette-

Judge Robert C. Chambers set the case for hearing on the afternoon of September 22, ordering the secretary to respond to the candidates' motion by September 21.[2386] On September 21, an independent candidate for Putnam County's commission filed a motion to intervene as an additional plaintiff,[2387] and Judge Chambers granted the motion that same day.[2388] The ACLU moved to participate as an amicus curiae,[2389] and Judge Chambers granted that motion on the following day.[2390] Judge Chambers also ordered the Putnam County Clerk joined as a defendant.[2391]

Following the September 22 hearing, Judge Chambers issued a preliminary injunction in the candidates' favor.[2392]

> [The January deadline] unmistakably places a substantial burden on and discriminates against those candidates and voters whose political preferences lie outside the existing political parties. The January deadline deprives these candidates from knowing the political climate of the major parties and what issues will come to the forefront during campaigns.[2393]

On January 24, 2017, Judge Chambers converted the preliminary injunction into a permanent injunction against the statutory filing deadline.[2394] He awarded the plaintiffs $34,234.81 in attorney fees and costs on May 16.[2395]

Signing a Ballot Petition Too Long Before It Is Filed

Myers v. Johnson (Linda V. Parker, E.D. Mich. 4:16-cv-13255)

> Disappointed by their results in state court, signers of a ballot petition for an initiative challenged in federal court a state law deeming signatures over 180 days old presumptively invalid. The district judge concluded that the federal suit was precluded by

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Mail, Sept. 21, 2016, at 1C.

2385. Temporary-Restraining-Order Motion, *Daly*, No. 3:16-cv-8981 (S.D. W. Va. Sept. 20, 2016), D.E. 3.

2386. Order, *id.* (Sept. 20, 2016), D.E. 6.

2387. Intervention Motion, *id.* (Sept. 21, 2016), D.E. 7.

2388. Intervention Order, *id.* (Sept. 21, 2016), D.E. 9.

2389. Amicus Curiae Motion, *id.* (Sept. 21, 2016), D.E. 13.

2390. Amicus Curiae Order, *id.* (Sept. 22, 2016), D.E. 15.

2391. Joinder Order, *id.* (Sept. 22, 2016), D.E. 14.

2392. *See* Kate White, *US Judge Blocks Candidate Removals*, Charleston Gazette-Mail, Sept. 23, 2016, at 1A.

2393. Daly v. Tennant, 216 F. Supp. 3d 699, 706 (S.D. W. Va. 2016); *see* Order, *Daly*, No. 3:16-cv-8981 (S.D. W. Va. Sept. 22, 2016), D.E. 20.

2394. Order, *Daly*, No. 3:16-cv-8981 (S.D. W. Va. Jan. 24, 2017), D.E. 26.

2395. Order, *id.* (May 16, 2017), D.E. 33 (noting that the defendants did not respond to or oppose the fee motion).

> the state-court result and also filed too close to the election for nondisruptive relief.
>
> *Topics:* Getting on the ballot; ballot measure; matters for state courts; laches.

Following an adverse ruling by Michigan's supreme court on Wednesday, September 7, 2016, two signers of a petition for a proposed ballot initiative filed a federal complaint in the Eastern District of Michigan on September 8.[2396] The plaintiffs supported a ballot initiative enabling access to medical marijuana and they opposed a Michigan law requiring extra verification of ballot-petition signatures executed more than 180 days before the filing of the ballot petition.[2397] With their complaint, the plaintiffs filed a motion for a temporary restraining order after hours on Thursday.[2398]

Judge Linda V. Parker set the case for hearing at noon on Tuesday, September 13.[2399] Following a recess of seven minutes, Judge Parker denied the plaintiffs immediate relief.[2400]

> First, the Res Judicata Doctrine bars the Plaintiffs' claims. Michigan's Board of State Canvassers denied ballot access to the Plaintiffs' petition on June 9th. On June 14th, Plaintiff[s] filed suit in the Michigan Court of Claims against the Michigan Secretary of State, the Defendants here . . . .
>
> On August 23rd, the Court of Claims granted the Defendants' Motion for Summary Disposition. Obviously, the Plaintiffs appealed the decision to the Michigan Court of Appeals which denied the appeal for lack

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2396. Complaint, Myers v. Johnson, No. 4:16-cv-13255 (E.D. Mich. Sept. 8, 2016), D.E. 1 [hereinafter *Myers* Complaint]; *see* Mich. Comprehensive Cannabis Law Reform Comm. v. Sec'y of State, 884 N.W.2d 294(1) (Mich. 2016) (denying a complaint for superintending control); Mich. Comprehensive Cannabis Law Reform Comm. v. Sec'y of State, 884 N.W.2d 294(2) (Mich. 2016) (denying review); Order, Mich. Comprehensive Cannabis Law Reform Comm. v. Sec'y of State, No. 334560 (Mich. Ct. App. Sept. 7, 2016) (denying an appeal); *see* Bill Laitner, *Pot Legalization Group Loses High Court Fight*, Detroit Free Press, Sept. 8, 2016, at A5.

2397. *Myers* Complaint, *supra* note 2396, at 1–3.

2398. Temporary-Restraining-Order Motion, *Myers*, No. 4:16-cv-13255 (E.D. Mich. Sept. 8, 2016), D.E. 2; *see* Transcript at 7, *id.* (Sept. 13, 2016) [hereinafter *Myers* Transcript], *filed as* Ex. A, Defendants' Reply Brief, *id.* (Dec. 9, 2016), D.E. 23.

2399. Notice, *id.* (Sept. 9, 2016), D.E. 6.

2400. Order, *id.* (Sept. 13, 2016), D.E. 14; *Myers* Transcript, *supra* note 2398, at 26–31; *see* Brad Devereaux, *Group Plans 2018 Marijuana Petition Drive*, Flint J., Sept. 24, 2016, at A2; *see also* Karen Hopper Usher, *Future of Ballot Initiatives Uncertain*, Big Rapids Pioneer, Oct. 24, 2016, at 5 ("For the first time since 1968, Michigan voters won't face a statewide ballot question when they cast their votes in the presidential election.").

of merit and the grounds presented. Supreme Court denied the Plaintiffs' leave to appeal and here we are.[2401]

Second, "regardless of what this Court does here it really is too late to have any real effect on the ballot presented to Michigan voters on November 8th, or at least to do so in a way that does not threaten the disruption of an orderly election."[2402]

Considering an amended complaint filed on September 28, Judge Parker dismissed the action on May 12, 2017, as both barred by res judicata and failing on the merits: Judge Parker could not conclude that the 180-day rule either had a disparate impact on African American voters or infringed on a constitutionally protected right to travel.[2403]

Discrepancies Between the Residence Address and the Registration Address of a Ballot-Petition Signer

Schintzius v. Showalter (John A. Gibney, Jr., E.D. Va. 3:16-cv-740 and 3:16-cv-741)

> A case removed to federal court in September sought to get a plaintiff candidate on the November ballot for mayor, claiming that plaintiff ballot-petition signers were wrongfully disqualified because they gave their residence addresses instead of their registration addresses under circumstances in which the plaintiffs claimed that the signers could lawfully vote using the old addresses. The district judge denied immediate relief.
>
> *Topics:* Getting on the ballot; removal.

A prospective candidate for mayor of Richmond, Virginia, and six voters filed a complaint and petition for mandamus relief in Richmond's circuit court on August 23, 2016, alleging that the voters' ballot-petition signatures were wrongfully rejected because the signers listed their residence addresses instead of their registration addresses, causing the candidate to fall short in the number of signatures required for a place on the November ballot.[2404] Under certain circumstances, a voter could remain registered at a previous residence for a time.[2405]

2401. *Myers* Transcript, *supra* note 2398, at 27–28.

2402. *Id.* at 30.

2403. Opinion, *Myers*, No. 4:16-cv-13255 (E.D. Mich. May 12, 2017), D.E. 26, 2017 WL 2021064; *see* Amended Complaint, *id.* (Sept. 28, 2016), D.E. 15.

2404. Complaint, Schintzius v. Showalter, No. CL16-3874-8 (Va. Cir. Ct. Richmond Aug. 23, 2016), *attached to* Notice of Removal, Schintzius v. Showalter, No. 3:16-cv-740 (E.D. Va. Sept. 7, 2016), D.E. 1 [*Schintzius* Notice of Removal]; *see* Ned Oliver, *Schintzius Suing to Get Name on Ballot*, Richmond Times-Dispatch, Aug. 24, 2016, at 1B.

2405. *See* Transcript at 12, Schintzius v. Showalter, No. 3:16-cv-741 (E.D. Va. Sept. 8,

Defendant election officials for Richmond and Virginia removed the case to the U.S. District Court for the Eastern District of Virginia on Wednesday, September 7.[2406] Also on September 7, the defendants removed an August 23 circuit-court motion by the same plaintiffs for a temporary injunction.[2407]

On September 8, Judge John A. Gibney, Jr., "had a conference call with all counsel [he] could reach in these cases. The Court was unable to reach counsel for the plaintiffs."[2408] Following the call, Judge Gibney consolidated the two cases under the second case number and set the case for hearing on Monday, September 12.[2409]

Judge Gibney asked the plaintiff's attorney to address the attorney's and the attorney's law firm's ability to represent the plaintiff while the attorney was also a mayoral candidate.[2410] At the hearing, an attorney different from the one with the potential conflict, but from the same firm, appeared for the plaintiff.[2411] "I don't think there is any conflict whatsoever," he said.[2412] Following Judge Gibney's explanation that there was at least a potential appearance of conflict,[2413] the candidate submitted a handwritten waiver.[2414]

2016, filed Sept. 13, 2016), D.E. 31 [hereinafter *Schintzius* Transcript] (argument by the plaintiffs' attorney); *id.* at 62–63 (argument by a defense attorney).

2406. *Schintzius* Notice of Removal, *supra* note 2404; *see* Ned Oliver, *Richmond Mayoral Hopeful's Lawsuit Moved to Federal Court*, Richmond Times-Dispatch, Sept. 9, 2016, at 7A.

2407. Notice of Removal, *Schintzius*, No. 3:16-cv-741 (E.D. Va. Sept. 7, 2016), D.E. 1, *attaching* Temporary-Injunction Motion, Schintzius v. Showalter, No. CL16-3875-1 (Va. Cir. Ct. Richmond Aug. 23, 2016).

2408. Order at 1, *id.* (Sept. 8, 2016), D.E. 2 [hereinafter *Schintzius* Temporary-Restraining-Order–Hearing Order].

2409. *Id.* at 2; *see* Minutes, *id.* (Sept. 12, 2016), D.E. 20.

2410. *Schintzius* Temporary-Restraining-Order–Hearing Order, *supra* note 2408; *see also* Oliver, *supra* note 2406 (reporting that the attorney also had been disbarred by the district court for insufficient truthfulness).

2411. *Schintzius* Transcript, *supra* note 2405; *see* Ned Oliver, *Federal Trial Set for Thursday in Richmond Mayoral Ballot Appeal*, Richmond Times-Dispatch, Sept. 13, 2016, at 2B (reporting that the candidate "was originally represented by his would-be opponent . . . , who is also a lawyer. But at the request of the defendants, the case was moved to federal court, where [the lawyer] is barred from practicing law.").

2412. *Schintzius* Transcript, *supra* note 2405, at 5.

2413. *Id.* at 5–8.

2414. Waiver, *Schintzius*, No. 3:16-cv-741 (E.D. Va. Sept. 12, 2016), D.E. 21.

At the hearing, Judge Gibney denied the plaintiffs immediate relief without an opinion.[2415]

> I think that the requirement that has been imposed here is more than reasonable. It is that somebody provide a valid registration address and—sorry, a valid residence address and use that as a proxy for the registration address. They require people to re-register promptly when they move. So I think they are entitled to assume that the residence and registration are the same address.
>
> And it is a more than reasonable way of insuring that the people who sign the petition are the people who are folks who are allowed to do so.[2416]

Judge Gibney ordered answers filed by the following day and set the case for trial two days after that.[2417] He informed the election officials that although immediate relief had been denied, the defendants were still potentially subject to an injunction putting the plaintiff candidate on the ballot:

> [DEFENSE COUNSEL]: Your Honor, one thing, if I can clarify. Are we permitted to print the ballots today?
>
> THE COURT: You are permitted to do whatever you want to today, because there is no [temporary restraining order], but if you lose on Thursday, you better be prepared to have yourself in gear.
>
> . . .
>
> THE COURT: . . . . You may have to pay some more, but if it turns out you lose this case, you are going to have to change the ballot.[2418]

At trial, Judge Gibney granted judgment to the defendants.[2419]

County-Based Ballot Nomination Signature Requirement

Arizona Public Integrity Alliance Inc. v. Bennett (Neil V. Wake, D. Ariz. 2:14-cv-1044)

Thirteen days before a deadline for primary-election nomination petitions, a federal complaint challenged a requirement of a minimum number of signatures in each of at least three counties as favoring less populous counties. After a hearing held two weeks

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2415. Order, *id.* (Sept. 12, 2016), D.E. 22 [hereinafter *Schintzius* Trial Order]; *Schintzius* Transcript, *supra* note 2405, at 76–78.

2416. *Schintzius* Transcript, *supra* note 2405, at 78.

2417. *Schintzius* Trial Order, *supra* note 2415; *id.* at 80, 82.

2418. *Schintzius* Transcript, *supra* note 2405, at 82–83.

2419. Minutes, *Schintzius*, No. 3:16-cv-741 (E.D. Va. Sept. 15, 2016), D.E. 33; *see* Frank Green, *Court Rejects Bid by Schintzius to Appear on City Mayoral Ballot*, Richmond Times-Dispatch, Sept. 16, 2016, at 5A (reporting that Judge Gibney "said he could not find that [the candidate's] rights were violated and said the requirements for making the ballot were not overly burdensome").

> after the complaint was filed, the district judge denied a motion for preliminary relief as barred by laches. Several weeks later, the state conceded that the county-based signature requirement was unconstitutional, and the judge signed a stipulated judgment in the plaintiffs' favor.
>
> *Topics:* Getting on the ballot; laches; equal protection; primary election; early voting.

Thirteen days before the May 28, 2014, due date for primary-election nomination petitions, four Maricopa County voters and an organization advocating ethics and integrity in government filed a federal complaint in the District of Arizona challenging the portion of the signature requirements that required a minimum number of signatures in at least three counties, claiming that a county-based requirement advantaged voters in less populous counties.[2420]

> A. Nomination petitions shall be signed:
>
> 1. If for a candidate for the office of United States senator or for a state office, excepting members of the legislature and superior court judges, by a number of qualified electors who are qualified to vote for the candidate whose nomination petition they are signing equal to at least *one-half of one per cent of the voter registration of the party of the candidate in at least three counties* in the state, but not less than one-half of one per cent nor more than ten per cent of the total voter registration of the candidate's party in the state.[2421]

According to the complaint, six signatures in Greenlee County for a Republican candidate would be equivalent for the county-based portion of the signature requirement to 3,553 signatures in Maricopa County.[2422] With their complaint, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction.[2423]

On the following day, Judge Neil V. Wake set the case for hearing on May 29.[2424] On May 28, Judge Wake denied a May 21 motion[2425] by the

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2420. Complaint, Ariz. Pub. Integrity Alliance Inc. v. Bennett, No. 2:14-cv-1044 (D. Ariz. May 15, 2014), D.E. 1 [hereinafter *Ariz. Pub. Integrity Alliance Inc.* Complaint]; Opinion at 3, *id.* (June 23, 2014), D.E. 23 [hereinafter *Ariz. Pub. Integrity Alliance Inc.* Opinion], 2014 WL 3715130; *see* Howard Fischer, *Suit Seeking to Change AZ Nominating Process*, Ariz. Daily Star, May 21, 2014, at A7.

2421. Ariz. Rev. Stat. § 16-322 (emphasis added).

2422. *Ariz. Pub. Integrity Alliance Inc.* Complaint, *supra* note 2420, at 4.

2423. Motion, *Ariz. Pub. Integrity Alliance Inc.*, No. 2:14-cv-1044 (D. Ariz. May 15, 2014), D.E. 4.

2424. Order, *id.* (May 16, 2014), D.E. 8.

2425. Motion, *id.* (May 21, 2014), D.E. 15.

plaintiffs to consolidate the injunction hearing with a trial on the merits because of the defendant secretary of state's inadequate time to prepare a merits defense.[2426]

On June 23, approximately one month before the beginning of early voting for the primary election, Judge Wake denied the plaintiffs immediate relief because of their delay in bringing the action.[2427]

> Plaintiffs began looking seriously at the constitutionality of the county-distribution requirement in December 2013. They gave notice to the State on May 2, 2014, that they intended to seek an injunction, but they did not do so until May 15, 2014. The Court set accelerated briefing and a hearing for May 29, 2014.[2428]

On July 31, Judge Wake approved a stipulation that the county-based portion of the signature requirement was unconstitutional and the secretary would not enforce it.[2429]

Ballot-Petition Circulators Do Not Have to Be Registered Voters

Davis v. Johnson (2:14-cv-11818) and Moore v. Johnson (2:14-cv-11903) (Gershwin A. Drain and Matthew F. Leitman, E.D. Mich.)

> Two cases challenged a requirement that ballot-petition signatures be collected by registered voters. One case concerned an election for a local school board, and the other case concerned election to Congress. Following recusal by the judge who was assigned the first case, the cases were assigned to a new judge who issued a preliminary injunction against the registration requirement for collectors of signatures, and the state elected not to appeal.
>
> *Topics:* Getting on the ballot; primary election; recusal; case assignment.

On May 6, 2014, a Highland Park school-board member wishing to run for reelection filed a federal complaint in the Eastern District of Michigan challenging a state requirement that candidacy petition signatures be col-

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2426. Order, *id.* (May 28, 2014), D.E. 21.

2427. *Ariz. Pub. Integrity Alliance Inc.* Opinion, *supra* note 2420; *see* Howard Fischer, *For Now, State Office Seekers Still Need Signatures from 3 Counties*, Ariz. Daily Star, June 24, 2014, at A6.

2428. *Ariz. Pub. Integrity Alliance Inc.* Opinion, *supra* note 2420, at 3.

2429. Order, *Ariz. Pub. Integrity Alliance Inc.*, No. 2:14-cv-1044 (D. Ariz. July 31, 2014), D.E. 26; *see* Howard Fischer, *State Yields on 3-County Petition Rule*, Ariz. Daily Star, July 25, 2014, at C2.

lected by registered voters.[2430] He pleaded a desire to submit his petitions by May 19, stating that "personal obligations thereafter . . . will prevent him from seeking signatures after said date."[2431] On the following day, the school-board member filed a motion for a temporary restraining order.[2432]

On May 8, Judge Gershwin A. Drain set the case for hearing on May 15.[2433] On May 13, however, Judge Drain recused himself.[2434]

Two voters filed a second federal complaint in the district on May 12 challenging the exclusion of candidate petition signatures for John Conyers's congressional reelection because the signatures were gathered by persons not registered to vote in Michigan.[2435] The voters designated their case as related to the school-board member's.[2436]

The court reassigned Judge Drain's case to Judge Matthew F. Leitman and then assigned the related case to Judge Leitman, who held a telephonic status conference with the parties on May 13.[2437] On May 14, Judge Leitman scheduled another status conference for May 19 and a hearing for May 21.[2438] Judge Leitman also held a telephonic status conference on May 15.[2439]

The Conyers case was more time-sensitive than the first case, and Judge Leitman used the status conferences to press the parties on time deadlines for printing ballots.[2440] Judge Leitman was a big believer in tele-

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2430. Complaint, Davis v. Johnson, No. 2:14-cv-11818 (E.D. Mich. May 6, 2014), D.E. 1.

2431. *Id.* at 10.

2432. Temporary-Restraining-Order Motion, *id.* (May 7, 2014), D.E. 5.

2433. Order, *id.* (May 8, 2014), D.E. 9; *see Activist Asks Wayne County Clerk to Certify Conyers—or Wait for Hearing*, Detroit Free Press, May 13, 2014, at A4.

2434. Order, *Davis*, No. 2:14-cv-11818 (E.D. Mich. May 13, 2014), D.E. 16.

2435. Complaint, Moore v. Johnson, No. 2:14-cv-11903 (E.D. Mich. May 12, 2014), D.E. 1; *see* Amended Complaint, *id.* (May 15, 2014), D.E. 12; *see also Conyers Seeks to Get Back on Ballot*, Boston Globe, May 17, 2014, at A2.

2436. Notice, *Moore*, No. 2:14-cv-11903 (E.D. Mich. May 12, 2014), D.E. 2.

2437. Docket Sheet, *id.* (May 12, 2014) [hereinafter *Moore* Docket Sheet]; Docket Sheet, *Davis*, No. 2:14-cv-11818 (E.D. Mich. May 6, 2014) [hereinafter *Davis* Docket Sheet]; Reassignment Order, *Moore*, No. 2:14-cv-11903 (E.D. Mich. May 13, 2014), D.E. 6 (reassigning the second case from Judge Linda V. Parker to Judge Leitman).

Tim Reagan interviewed Judge Leitman for this report by telephone on April 30, 2015.

2438. Order, *Moore*, No. 2:14-cv-11903 (E.D. Mich. May 14, 2014), D.E. 10; Order, *Davis*, No. 2:14-cv-11818 (E.D. Mich. May 14, 2014), D.E. 17; Transcript, *id.* (May 21, 2014, filed May 30, 2014), D.E. 31 [hereinafter May 21, 2014, *Davis* Transcript].

2439. Order, *Moore*, No. 2:14-cv-11903 (E.D. Mich. May 15, 2014), D.E. 22 [hereinafter May 15, 2014, *Moore* Order]; *Moore* Docket Sheet, *supra* note 2437.

2440. Interview with Judge Matthew F. Leitman, Apr. 30, 2015.

phone status conferences, and they worked well here to help the court and the parties establish a doable schedule.[2441]

On May 15, an aspiring candidate for Conyers's seat and the aspiring candidate's campaign manager, whose challenge to Conyers's signatures resulted in Conyers's disqualification, moved to intervene in defense against the voters' case.[2442] They also moved to participate in the school-board member's case as amici curiae.[2443] Noting "essentially a complete overlap between the arguments presented by amici and those presented by Defendants," Judge Leitman granted the amicus curiae motion but denied the intervention motion.[2444] On May 15 and 16, Wayne County's election commission moved to intervene against the two actions.[2445] Judge Leitman granted these motions.[2446]

The court arranged to use an overflow courtroom for the Wednesday, May 21, hearing,[2447] but the overflow courtroom did not turn out to be necessary.[2448] Judge Leitman had received his commission on March 14.[2449] "It was a privilege to have this one be [his] first real substantive argument."[2450] Judge Leitman announced that he would rule on Friday, "out of respect for, for lack of a better word, the dignity and comity for the Secretary of State of Michigan to take a first look at something before a Federal Court assesses its constitutionality."[2451] The secretary promised that she would determine by noon on Friday if Conyers's signatures were insuffi-

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2441. *Id.*

2442. Intervention Motion, *Moore*, No. 2:14-cv-11903 (E.D. Mich. May 15, 2014), D.E. 14; *see Sheffield Challenges Conyers Signatures*, Detroit Free Press, Apr. 30, 2014, at A5.

2443. Motion, *Davis*, No. 2:14-cv-11818 (E.D. Mich. May 15, 2014), D.E. 19.

2444. Order, *Moore*, No. 2:14-cv-11903 (E.D. Mich. May 23, 2014), D.E. 33, 2014 WL 2171097; May 15, 2014, *Moore* Order, *supra* note 2439; *Davis* Docket Sheet, *supra* note 2437.

2445. Intervention Motion, *Davis*, No. 2:14-cv-11818 (E.D. Mich. May 16, 2014), D.E. 25; Intervention Motion, *Moore*, No. 2:14-cv-11903 (E.D. Mich. May 15, 2014), D.E. 23.

2446. *Moore* Docket Sheet, *supra* note 2437; *Davis* Docket Sheet, *supra* note 2437.

On June 10, 2014, the election commission withdrew from the school-board member's case. Notice, *Davis*, No. 2:14-cv-11818 (E.D. Mich. June 10, 2014), D.E. 36.

2447. May 21, 2014, Davis Transcript, *supra* note 2438, at 8.

2448. Interview with Judge Matthew F. Leitman, Apr. 30, 2015.

2449. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

2450. May 21, 2014, *Davis* Transcript, *supra* note 2438, at 139.

"The briefing schedule has been intense. You guys have met every schedule. The written product is terrific." *Id.* at 6.

2451. *Id.* at 139

cient for reasons that would obviate the need to rule on the registration requirement.[2452]

On Friday, May 23, Judge Leitman ordered Conyers's name placed on the August 5 primary-election ballot.[2453]

Judge Leitman's strategy was to rule quickly to allow time for a thoughtful appeal, accommodating the interests of both the parties and the court of appeals and allowing for him to issue a more detailed opinion while the parties were working on an appeal.[2454] In the event, there was no appeal.[2455]

Judge Leitman ordered additional arguments in the other case.[2456] After a June 3 evidentiary hearing at which the school-board-member plaintiff was examined as a witness,[2457] Judge Leitman denied relief on June 17, because the board member could secure a place on the November ballot by paying a $100 fee.[2458]

On July 1, Judge Leitman issued a consent judgment in Conyers's case proscribing a requirement that ballot-petition circulators be registered voters.[2459] Judge Leitman granted a stipulated dismissal in the other case on July 21.[2460]

Conyers was reelected on November 4.[2461] On December 18, the school-board candidate was sentenced to eighteen months in prison for

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2452. *Id.* at 116–17; *see id.* at 43–52, 74–76 (argument by the secretary's attorney that a review of signatures remained in process).

2453. Order, Moore v. Johnson, No. 2:14-cv-11903 (E.D. Mich. May 23, 2014), D.E. 35; *see* Julie Bosman, *Judge Allows Conyers to Be on the Ballot in Michigan*, N.Y. Times, May 24, 2014, at A13; *Federal Judge's Ruling Puts Conyers on Primary Ballot*, Detroit Free Press, May 24, 2014, at A1; *Judge Orders Conyers Put on Ballot*, Boston Globe, May 24, 2014, at A2; Sean Sullivan, *Judge Orders Rep. Conyers Back on Ballot*, Wash. Post, May 24, 2014, at A2.

2454. Interview with Judge Matthew F. Leitman, Apr. 30, 2015.

2455. *Id.*

2456. Order, Davis v. Johnson, No. 2:14-cv-11818 (E.D. Mich. May 23, 2014), D.E. 30, 2014 WL 2158424.

2457. Transcript, *id.* (June 3, 2014, filed June 14, 2014), D.E. 37.

2458. Opinion, *id.* (June 17, 2014), D.E. 38, 2014 WL 2744128.

2459. Consent Judgment, Moore v. Johnson, No. 2:14-cv-11903 (E.D. Mich. July 1, 2014), D.E. 41.

On September 15, 2014, Judge Leitman awarded the plaintiffs $114,999.50 in attorney fees. Stipulated Order, *id.* (Sept. 15, 2014), D.E. 44.

2460. Stipulated Dismissal, *Davis*, No. 2:14-cv-11818 (E.D. Mich. July 21, 2014), D.E. 53.

2461. *See* David Shepardson, Jim Lynch & Lauren Abdel-Razzaq, *Mich. Dems Hope to Buck Republican Tide in U.S. House*, Detroit News, Nov. 5, 2014, at A1.

embezzling nearly $200,000 from the schools.[2462] Three years later, Conyers resigned from Congress during a widespread cultural narrowing of tolerance for histories of sexual harassment.[2463]

Request to Be on the Ballot on the Eve of a Presidential Election

Germalic v. Bullock (Richard G. Andrews, D. Del. 1:12-cv-1347)

> Approximately two weeks before the 2012 presidential election, a plaintiff filed a pro se federal complaint that the state's requirements for being a presidential candidate were too onerous. Three days after the complaint was filed, the district court denied the plaintiff injunctive relief for failure to show any effort to meet ballot qualifications and for seeking relief after the ballots had been printed.
>
> *Topics:* Getting on the ballot; pro se party; laches.

Approximately two weeks before the 2012 presidential election, a plaintiff filed a pro se federal complaint in the District of Delaware, alleging that Delaware's requirements for being a presidential candidate were too onerous.[2464] With his complaint, the plaintiff filed a letter request to proceed in forma pauperis.[2465]

Three days after the complaint was filed, Judge Richard G. Andrews denied the plaintiff injunctive relief for failure to show any effort to meet Delaware's ballot qualifications and for seeking relief after the ballots had been printed.[2466] Judge Andrews denied without prejudice the plaintiff in forma pauperis status for failure to properly seek it.[2467] Upon the plaintiff's

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2462. Judgment, United States v. Davis, No. 2:12-cr-20224 (E.D. Mich. Dec. 29, 2014), D.E. 75; *see* Robert Snell, *Activist Robert Davis Sentenced to 18 Months*, Detroit News, Dec. 19, 2014, at A4.

2463. *See* Yamiche Alcindor, *Facing Harassment Claims, Conyers Says He'll Step Down*, N.Y. Times, Dec. 6, 2017, at A21; Melissa Nann Burke & Jonathan Oosting, *Conyers Resigns Amid Scandal*, Detroit News, Dec. 6, 2017, at A6; Elise Viebeck & David Weigel, *Besieged Conyers Ends His Long Tenure*, Wash. Post, Dec. 6, 2017, at A1.

Conyers died in 2019. *See* Adam Clymer, *John Conyers Jr., 90, Longest-Serving African-American in Congress, Dies*, N.Y. Times, Oct. 28, 2019, at B7; Katy Stech Ferek, *Lawmaker Served More Than 50 Years*, Wall St. J., Oct. 28, 2019, at A4; John Otis, *Longtime Congressman Co-Founded Black Caucus*, Wash. Post, Oct. 28, 2019, at A1.

2464. Complaint, Germalic v. Bullock, No. 1:12-cv-1347 (D. Del. Oct. 22, 2012), D.E. 2.

2465. In Forma Pauperis Request, *id.* (Oct. 22, 2012), D.E. 1.

2466. Opinion, *id.* (Oct. 25, 2012), D.E. 4, 2012 WL 5336214.

2467. *Id.*; Order, *id.* (Oct. 25, 2012), D.E. 5.

failure to pay the filing fee or properly seek in forma pauperis status, Judge Andrews dismissed the action on November 27 without prejudice.[2468]

Meritless Challenge to Exclusion from an Election for County Judge

Ferone v. Board of Elections (Andrew L. Carter, Jr., S.D.N.Y. 1:12-cv-6342)

> After the district judge denied immediate relief to plaintiffs seeking by federal action to reverse the exclusion from the ballot of a prospective candidate whose ballot-application papers were defective, the plaintiffs dismissed their case voluntarily.
>
> *Topic:* Getting on the ballot.

An attorney, contesting his exclusion from the ballot for Bronx County surrogate judge because of a defective ballot-petition cover sheet, filed a federal complaint in the Southern District of New York on August 20, 2012, on behalf of twenty-one supporters.[2469]

Judge Andrew L. Carter, Jr., held a hearing on August 24,[2470] at the end of which he denied the plaintiffs immediate relief.[2471] Judge Carter issued a voluntary dismissal of the case on September 12.[2472]

Strict Application of Campaign Filing Requirements

Somers v. All Improperly Filed Candidates (3:12-cv-1191) and Smith v. South Carolina State Election Commission (3:12-cv-1543) (Cameron McGowan Currie, Clyde H. Hamilton, and J. Michelle Childs) and Williams v. South Carolina State Election Commission (Henry F. Floyd, David C. Norton, and Richard Mark Gergel, 2:12-cv-2760) (D.S.C.)

> Many candidates were disqualified from primary-election ballots following a state supreme court's strict interpretation of a candidacy filing statute. A candidate who was not disqualified filed a federal action attacking the disqualifications. The district court determined that a candidate who was not disqualified and who was not suing as a voter lacked standing for the suit. In a related case, disqualified candidates filed a federal action arguing that the state supreme-court decision could not have effect without preclearance pursuant to section 5 of the Voting Rights Act. A

2468. Order, *id.* (Nov. 27, 2012), D.E. 7.

2469. Proposed Order to Show Cause, Ferone v. Bd. of Elections, No. 1:12-cv-6342 (S.D.N.Y. Aug. 20, 2012), D.E. 3; *see* Defendants' Brief at 1–2, *id.* (Aug. 23, 2012), D.E. 5; *see also* Joe Stepansky & Jacob Hodes, *New Surrogate Joined Old Game*, Riverdale Press, Feb. 27, 2013.

2470. Docket Sheet, *Ferone*, No. 1:12-cv-6342 (S.D.N.Y. Aug. 20, 2012).

2471. Transcript at 66, *id.* (Aug. 24, 2012, filed Jan. 28, 2013), D.E. 7.

2472. Order, *id.* (Sept. 12, 2012), D.E. 6; *see* Stepansky & Hodes, *supra* note 2469.

> three-judge district court determined that the state court's interpretation of the statute comported with the statute's plain meaning, so it could not be a change requiring preclearance. Another section 5 complaint alleged that preclearance was required for a state supreme-court decision approving a special primary election after it was determined that the only candidate in the original primary election was not exempt from the filing requirements at issue in the previous cases. A new three-judge court determined that the state supreme court's decision was an application of existing law rather than a change in voting procedures.
>
> *Topics:* Getting on the ballot; campaign materials; section 5 preclearance; three-judge court; recusal; case assignment; intervention; laches.

On May 2, 2012, South Carolina's supreme court adopted a strict interpretation of a candidacy filing statute, an interpretation that conflicted with common practice, so many candidates were disqualified from the state's June 12 primary election.[2473] The statute required candidates to "file a statement of economic interests for the preceding calendar year *at the same time and with the same official* with whom the candidate files a declaration of candidacy or petition for nomination."[2474]

On May 4, Amanda Somers, a candidate who was not disqualified, filed a federal complaint in the District of South Carolina on behalf of herself and on behalf of (1) all other properly filed candidates and (2) all persons entitled to vote under the Uniformed and Overseas Citizens Absentee Voting Act of 1986 (UOCAVA).[2475] In addition to South Carolina's election commission and other election officials, Somers named as defendants all improperly filed candidates involved in the primary election.[2476]

2473. Anderson v. S.C. Election Comm'n, 397 S.C. 551, 725 S.E.2d 704 (S.C. 2012); *see* Florence Cty. Democratic Party v. Florence Cty. Republican Party, 398 S.C. 124, 727 S.E.2d 418 (S.C. 2012) (rejecting arguments to relax the strict interpretation); *see also* Tim Flach, *50 Local Candidates May Be Off Ballot*, Columbia State, May 4, 2012; Tucker Mitchell, *Supreme Court Ruling Knocks Nearly 100 Off S.C. Ballots*, Florence Morning News, May 3, 2012.

2474. S.C. Code § 8-13-1356(B) (emphasis added).

2475. Complaint, Somers v. All Improperly Filed Candidates, No. 3:12-cv-1191 (D.S.C. May 4, 2012), D.E. 1 [hereinafter *Somers* Complaint]; Somers v. S.C. State Election Comm'n, 871 F. Supp. 2d 490, 491 (D.S.C. 2012); *see* 52 U.S.C. §§ 20301–20311; *see also Candidate Sues, Lawmakers Offer Fix*, Greenville News, May 5, 2012. *See generally* Robert Timothy Reagan, Overseas Voting: The Uniformed and Overseas Citizens Absentee Voting Act (Federal Judicial Center 2016).

2476. *Somers* Complaint, *supra* note 2475.

The court assigned the case to Judge Joseph F. Anderson, Jr.,[2477] who recused himself because of family connections to elective offices.[2478] On May 7, the case was reassigned to Judge Cameron McGowan Currie.[2479] On the following day, Judge Currie entered into the case's docket sheet a text order reminding the plaintiff, "No decision on the merits may be made until all Defendants are served and have an opportunity to respond. Service is a responsibility which rests on Plaintiff and which Plaintiff is directed to accomplish as quickly as possible."[2480] The plaintiff subsequently dropped all improperly filed candidates as defendants.[2481]

Judge Currie held a status conference on the afternoon of May 10.[2482] On the day of the conference, a candidate stricken from the ballot moved to intervene as a plaintiff.[2483] Judge Currie granted intervention,[2484] but the motion was withdrawn on the following day.[2485] Also on May 11, the circuit's Chief Judge William B. Traxler, Jr., named a three-judge district court to hear the plaintiff's claimed violation of section 5 of the Voting Rights Act.[2486] South Carolina had decided to comply with UOCAVA by sending overseas absentee ballots for federal offices by the statutory deadline of forty-five days before the election and to send overseas absentee ballots for South Carolina offices later, after the repercussions of the state

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2477. Docket Sheet, *Somers*, No. 3:12-cv-1191 (D.S.C. May 4, 2012) [hereinafter *Somers* Docket Sheet] (D.E. 10).

2478. Interview with Judge Cameron McGowan Currie, Sept. 6, 2012.

Tim Reagan interviewed Judge Currie for this report by telephone.

2479. *Somers* Docket Sheet, *supra* note 2477; Transcript at 7, *Somers*, No. 3:12-cv-1191 (D.S.C. May 10, 2012, filed May 11, 2012), D.E. 27 [hereinafter *Somers* Transcript].

2480. *Somers* Docket Sheet, *supra* note 2477; *see Somers* Transcript, *supra* note 2479, at 9.

2481. Somers v. S.C. State Election Comm'n, 871 F. Supp. 2d 490, 495 (D.S.C. 2012).

2482. *Somers* Transcript, *supra* note 2479.

2483. Intervention Motion, *Somers*, No. 3:12-cv-1191 (D.S.C. May 10, 2012), D.E. 17; *Somers* Transcript, *supra* note 2479, at 3, 11–12.

2484. *Somers* Docket Sheet, *supra* note 2477 (D.E. 18).

2485. Intervention Withdrawal, *Somers*, No. 3:12-cv-1191 (D.S.C. May 11, 2012), D.E. 20.

2486. Order, *id.* (May 11, 2012), D.E. 21; *see* Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination and requiring that preclearance disputes be heard by a three-judge district court); *see also Somers* Transcript, *supra* note 2479, at 56 (statement by Judge Currie that she would request a three-judge court).

On June 25, 2013, the Supreme Court declined to hold section 5 unconstitutional, but the Court did hold unconstitutional the criteria for which jurisdictions require section 5 preclearance. Shelby County v. Holder, 570 U.S. 529 (2013).

supreme court's decision had been worked out.[2487] The plaintiff alleged that this was an election change requiring section 5 preclearance.[2488]

The three-judge court—Judge Currie, Circuit Judge Clyde H. Hamilton, and District Judge J. Michelle Childs—heard the action on May 14.[2489] Two days later, it dismissed the case for lack of standing.[2490] "Counsel for Somers failed to articulate any concrete and particularized injury that Somers has incurred or was likely to incur as a result of the transmission of separate federal and state ballots. Somers, therefore, has no standing as a candidate to pursue a Section 5 claim."[2491] Nor had she shown a relationship with UOCAVA voters close enough to sue on their behalf; the courts were open for them to seek relief on their own.[2492] Judge Currie observed that standing is often an important issue in an election case and one that the court should consider early in the case.[2493]

A second action was filed on June 11, the day before the primary election.[2494] Five candidates stricken from the ballots alleged that the state supreme court's decision was without current effect because it had not received section 5 preclearance and that the statute in question violated equal protection.[2495] The statute exempted incumbents: "This section does not apply to a public official who has a current disclosure statement on file . . . ."[2496] With their complaint, the plaintiffs filed a motion for a temporary restraining order.[2497]

The court assigned this case to Judge Currie as related to the *Somers* case.[2498] Filing errors by the plaintiff's attorney caused a delay in the case's

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2487. Somers v. S.C. State Election Comm'n, 871 F. Supp. 2d 490, 493–94 (D.S.C. 2012).

2488. *Id.* at 494.

2489. *Somers* Docket Sheet, *supra* note 2477 (D.E. 31).

Judge Hamilton died on September 2, 2020, and Judge Childs was elevated to a seat on the Court of Appeals for the District of Columbia Circuit on July 25, 2022. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

2490. *Somers*, 871 F. Supp. 2d 490; *see* Reagan, *supra* note 2475, at 16–17.

2491. *Somers*, 871 F. Supp. 2d at 496–97 (footnote omitted).

2492. *Id.* at 497–98.

2493. Interview with Judge Cameron McGowan Currie, Sept. 6, 2012.

2494. Docket Sheet, Smith v. S.C., No. 3:12-cv-1543 (D.S.C. June 11, 2012) [hereinafter *Smith* Docket Sheet].

2495. Complaint, *id.* (June 11, 2012), D.E. 1; Smith v. S.C. Election Comm'n, 874 F. Supp. 2d 483, 491 (D.S.C. 2012).

2496. S.C. Code § 8-13-1356(A).

2497. Motion, *Smith*, No. 3:12-cv-1543 (D.S.C. June 11, 2012), D.E. 4.

2498. *Smith* Docket Sheet, *supra* note 2494; Interview with Judge Cameron McGowan

opening by the clerk's office, so there was a delay in Judge Currie's learning that she had the case.[2499] The clerk's office subsequently established procedures by which assigned judges are notified more promptly of emergency cases assigned to them even if there are delays in the processing of the cases' filings.[2500]

On the day that the case was filed, Judge Traxler referred it to the same three-judge court for the section 5 claim as he empaneled for the first case.[2501] With Judges Hamilton and Currie in the courtroom and Judge Childs appearing by telephone midway through the hearing, after conducting a court proceeding in another case, the three-judge court conducted a telephonic hearing that same day.[2502] The court denied the plaintiffs immediate relief.[2503] The court concluded that the state court's interpretation of the statute comported with the statute's plain meaning, so it could not be a change requiring preclearance.[2504] The court found no equal-protection violation in different financial filing requirements for incumbents and nonincumbents,[2505] and the plaintiffs' claim for immediate relief was further burdened by the doctrine of laches.[2506] An amended complaint filed on September 21[2507] did not persuade the court to reach a different result.[2508]

On September 20, South Carolina's supreme court reached another conclusion[2509] that resulted in a section 5 complaint alleging that the court's opinion required preclearance before it could go into effect.[2510] The state courts' challenge was to resolve a state senate primary election in which it was discovered after the election that the only candidate who qualified for the ballot qualified in error because election authorities mis-

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Currie, Sept. 6, 2012.

2499. Interview with Judge Cameron McGowan Currie, Sept. 6, 2012.

2500. *Id.*

2501. Order, *Smith*, No. 3:12-cv-1543 (D.S.C. June 11, 2012), D.E. 7; Transcript at 3, *id.* (June 11, 2012, filed Aug. 8, 2012), D.E. 12 [hereinafter *Smith* Transcript].

2502. *Smith* Transcript, *supra* note 2501.

2503. Smith v. S.C. Election Comm'n, 874 F. Supp. 2d 483 (D.S.C. 2012).

2504. *Id.* at 495.

2505. *Id.* at 497.

2506. *Id.* at 498–99.

2507. Amended Complaint, Smith v. S.C., No. 3:12-cv-1543 (D.S.C. Sept. 21, 2012), D.E. 18.

2508. Opinion, *id.* (Oct. 3, 2012), D.E. 42, 2012 WL 4741636 (dismissing the case).

2509. Tempel v. S.C. State Election Comm'n, 400 S.C. 374, 735 S.E.2d 453 (S.C. 2012); *see The District 41 Roller Coaster*, Charleston Post & Courier, Sept. 22, 2012, at A10.

2510. Complaint, Williams v. S.C. State Election Comm'n, No. 2:12-cv-2760 (D.S.C. Sept. 24, 2012), D.E. 1 [hereinafter *Williams* Complaint].

takenly thought that he was entitled to the incumbent exemption from the dual filing requirement.[2511] South Carolina's supreme court approved a special primary election as a remedy.[2512] The subsequent section 5 complaint was filed by a voter on September 24, while an October 2 special primary runoff election was pending.[2513]

> The injunction he requests would, among other things, prevent [the candidate whose disqualification created the need for a special election] or any other person from appearing on the general election ballot as the Republican Party nominee for the District 41 Senate seat, and effectively ensure the election of the Democratic Party nominee by default.[2514]

Judge Traxler named Circuit Judge Henry F. Floyd and District Judges David C. Norton and Richard Mark Gergel as the three-judge court to hear the new section 5 claim.[2515] Judges Floyd and Gergel held a telephone conference with the parties on September 27 and set the case for hearing on October 16.[2516] On September 28, the plaintiff filed an amended complaint[2517] and a motion for a preliminary injunction.[2518]

The victor of the aberrant primary election won the special primary runoff election on October 2.[2519] On October 18, the court concluded that the state supreme court's opinion was an application of law to an unusual factual situation and not a change in election procedures.[2520]

2511. *Tempel*, 400 S.C. at 376–79, 735 S.E.2d at 454–56.

The candidate was disqualified pursuant to a state judge's ruling. *See* Robert Behre, *Senate 41 Election Finally in Voters' Hands*, Charleston Post & Courier, Oct. 14, 2012, at B19.

2512. *Tempel*, 400 S.C. at 386, 735 S.E.2d at 457.

2513. *Williams* Complaint, *supra* note 2510; *see Dist. 41 Primary Heads to Runoff*, Charleston Post & Courier, Sept. 19, 2012, at B17.

2514. Opinion at 2, *Williams*, No. 2:12-cv-2760 (D.S.C. Oct. 18, 2012), D.E. 52 [hereinafter *Williams* Opinion].

2515. Order, *id.* (Sept. 27, 2012), D.E. 11.

2516. Order, *id.* (Sept. 28, 2012), D.E. 8 (noting Judge Norton's assignment to the case as the judge to preside over matters not requiring three judges); Docket Sheet, *id.* (Sept. 24, 2012) (D.E. 7); *see* Robert Behre, *Dis. 41 Lawsuit Heard*, Charleston Post & Courier, Oct. 17, 2012, at B18.

2517. Amended Complaint, *Williams*, No. 2:12-cv-2760 (D.S.C. Sept. 28, 2012), D.E. 12.

2518. Preliminary-Injunction Motion, *id.* (Sept. 28, 2012), D.E. 13.

2519. *Williams* Opinion, *supra* note 2514, at 5–6; *see* Robert Behre, *Thurmond Wins Dist. 41 GOP Runoff*, Charleston Post & Courier, Oct. 3, 2012, at B19.

2520. *Williams* Opinion, *supra* note 2514, at 10–13; *see Thurmond to Remain on Ballot, Judges Rule*, Charleston Post & Courier, Oct. 18, 2012, at B1.

The twice victorious primary-election victor won the general election.[2521]

Broad Challenge to Ballot-Petition Signature Requirements

Dekom v. New York (Joanna Seybert, E.D.N.Y. 2:12-cv-1318)

> The district judge denied immediate relief in a broad prospective challenge to New York's ballot-petition signature requirements filed pro se by three prospective candidates. After full briefing, the judge dismissed the action.
>
> *Topics:* Getting on the ballot; pro se party; equal protection; case assignment; recusal.

A March 16, 2012, pro se federal complaint filed in the Eastern District of New York by three prospective candidates for legislative office four days before the beginning of the ballot-petition signing period broadly challenged New York's petition signature requirements:

> In order to be nominated, New York would make a pregnant woman go door-to-door in a high crime area. It would make a man in a wheelchair go up stairs. It would make a senior citizen walk on icy walkways after dark. It wouldn't do anything to a Hispanic voter because he's locked out of the system, along with parts of our armed forces. This is what the government of New York considers the "least restrictive" means of exercising the right to vote.[2522]

On the day that the complaint was filed, Judge Joanna Seybert held an ex parte hearing with the first named plaintiffs and denied the plaintiffs immediate relief.[2523] Noting that because the signature period had not yet started it was not clear that the case was ripe, Judge Seybert announced, "I'm denying the temporary order to obtain an injunction here, because I don't see the immediacy . . . ."[2524] An appeal was dismissed on March 12, 2013, as moot.[2525]

2521. *See* Robert Behre, *Final Election Results Are Becoming Clear*, Charleston Post & Courier, Nov. 8, 2012, at A4.

2522. Complaint at 26, Dekom v. New York, No. 2:12-cv-1318 (E.D.N.Y. Mar. 16, 2012), D.E. 1; Transcript at 2, *id.* (Mar. 16, 2012, filed July 16, 2013), D.E. 68 [hereinafter *Dekom* Transcript]; *see* Amended Complaint, *id.* (June 12, 2012), D.E. 23.

2523. *Dekom* Transcript, *supra* note 2522; Minutes, *Dekom*, No. 2:12-cv-1318 (E.D.N.Y. Mar. 16, 2012), D.E. 5.

2524. *Dekom* Transcript, *supra* note 2522, at 3.

2525. Order, Dekom v. New York, No. 12-1446 (2d Cir. Mar. 12, 2013), D.E. 121.

As the case proceeded, Judge Seybert denied the pro se plaintiffs permission to file documents electronically, but granted them the privilege of receiving electronic notices of filings.[2526]

On July 13, 2012, the first two named plaintiffs and their wives filed a separate pro se federal action alleging mistreatment by local party officials.[2527] This case was assigned to Judge Seybert as related to the March 16 case.[2528] On September 18, 2013, Judge Seybert granted the defendants a dismissal and denied the plaintiffs' motion for recusal because of her previous rulings against them and previous affiliation with the party.[2529]

Judge Seybert resolved the signature case by dismissing it on June 18, 2013, also denying a motion for her recusal.[2530] On August 13, Judge Seybert dismissed another pro se action by the first named plaintiff challenging state-court fees pertaining to the plaintiff's efforts in the 2013 election cycle.[2531]

Unconstitutional Residency Requirement for Circulating Ballot Petitions

Perry v. Judd (3:11-cv-856) and Shuttleworth v. Moran (3:12-cv-257) (John A. Gibney, Jr., E.D. Va.)

> Two weeks before absentee ballots were to be ordered from printing companies for the 2012 Republican presidential primary election in Virginia, a federal complaint alleged that a ballot petition was wrongfully rejected four days previously. Among the claims, the complaint alleged that Virginia unconstitutionally required persons collecting petition signatures to be Virginia resi-

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2526. Order, *Dekom*, No. 2:12-cv-1318 (E.D.N.Y. May 29, 2012), D.E. 18 ("All Plaintiffs' filings must be either hand-delivered or mailed to the *Pro Se* Office with proof of service."); Order, *Dekom*, No. 2:12-cv-1318 (E.D.N.Y. Apr. 20, 2012), D.E. 16.

2527. Complaint, Dekom v. Nassau County, No. 2:12-cv-3473 (E.D.N.Y. July 13, 2012), D.E. 1.

2528. Notice, *id.* (July 17, 2012), D.E. 3.

Also related was a 2005 housing action by the first named defendant, Complaint, Dekom v. Suozzi, No. 2:05-cv-5099 (E.D.N.Y. Oct. 31, 2005), D.E. 1, which was dismissed in 2006 by Judge Arthur D. Spatt for failure to prosecute it, Order, *id.* (May 22, 2006), D.E. 5.

2529. Opinion, *Dekom*, No. 2:12-cv-3473 (E.D.N.Y. Sept. 18, 2013), D.E. 21, 2013 WL 5278019, *aff'd*, 595 F. App'x 12 (2d Cir. 2014).

2530. Opinion, *Dekom*, No. 2:12-cv-1318 (E.D.N.Y. June 18, 2013), D.E. 66, 2013 WL 3095010, *aff'd*, 583 F. App'x 15 (2d Cir. 2014).

2531. Opinion, Dekom v. Agostino, No. 2:13-cv-4510 (E.D.N.Y. Aug. 13, 2013), D.E. 6, 2013 WL 4095214, *appeal dismissed,* Order, Dekom v. Agostino, No. 13-3775 (2d Cir. Nov. 14, 2013), D.E. 16 (dismissing the appeal for failure to pay the filing fee).

> dents. The judge instructed the parties to provide other disqualified candidates with notice of the suit so that they could seek to intervene. On the day that ballot printing was to be ordered, the judge ruled that the ballots should not be printed until after a hearing four days later. The district judge and the court of appeals determined that the plaintiff should have challenged ballot-petition rules at the beginning of the petition period rather than at the end. The district judge also opined that it was unconstitutional to require signature gatherers to be residents. A few months later, a would-be candidate for a congressional primary election challenged the residency requirement because it caused him to be just a few signatures short of the requirement for the primary-election ballot. Perhaps in light of the district judge's earlier opinion, the candidate was certified for the ballot.
>
> *Topics:* Getting on the ballot; laches; primary election.

Two weeks before local election boards were to order absentee ballots from printing companies for the 2012 Republican presidential primary election in Virginia, Texas Governor Rick Perry filed a federal complaint in the Eastern District of Virginia's Richmond courthouse alleging that his ballot petition was wrongfully rejected four days previously.[2532] Among his claims, Perry alleged that Virginia unconstitutionally required persons collecting petition signatures to be Virginia residents.[2533] On the day after he filed his complaint, Perry filed a motion for a temporary restraining order and a preliminary injunction.[2534]

On December 28, 2011, the day after the complaint was filed, Judge John A. Gibney, Jr., set the case for hearing on the following day.[2535] At the hearing, Judge Gibney set a second hearing for January 13, 2012; briefing was ordered completed by January 11, and answers were due January 3.[2536]

2532. Complaint, Perry v. Judd, No. 3:11-cv-856 (E.D. Va. Dec. 27, 2011), D.E. 1 [hereinafter *Perry* Complaint]; Perry v. Judd, 840 F. Supp. 2d 945, 949, 951, 953 (E.D. Va. 2012); *see* Amended Complaint, *Perry*, No. 3:11-cv-856 (E.D. Va. Jan. 4, 2012), D.E. 30 [hereinafter *Perry* Amended Complaint]; *see also* Andrew Cain, *Perry Files Suit to Get on Primary Ballot*, Richmond Times-Dispatch, Dec. 28, 2011).

2533. *Perry* Amended Complaint, *supra* note 2532, at 11–12; *Perry* Complaint, *supra* note 2532, at 5–6; *Perry*, 840 F. Supp. 2d at 949.

2534. Motion, *Perry*, No. 3:11-cv-856 (E.D. Va. Dec. 27, 2011), D.E. 7; *see* Andrew Cain, *Perry Files Emergency Motion to Get His Name on Ballot*, Richmond Times-Dispatch, Dec. 29, 2011.

2535. Docket Sheet, *Perry*, No. 3:11-cv-856 (E.D. Va. Dec. 27, 2011).

Tim Reagan interviewed Judge Gibney for this report by telephone on September 4, 2013.

2536. Minutes, *Perry*, No. 3:11-cv-856 (E.D. Va. Dec. 29, 2011), D.E. 14 [hereinafter

Judge Gibney made clear that he would not permit any delays.[2537] He decided that other Republican presidential candidates disadvantaged by Virginia's ballot-petition restrictions should be invited to intervene,[2538] so he ordered the defendants to provide contact information for them, and he ordered the plaintiffs to provide the other candidates with case filings.[2539] On January 4, Judge Gibney granted intervention to Newt Gingrich, John Huntsman, Jr., and Rick Santorum.[2540]

On Monday, January 9, the day that absentee ballots were to be ordered from the printers, Judge Gibney held a telephonic conference: "I am trying to figure out how we can proceed with this case without having the Commonwealth moot it or attempt to build a [laches] defense by printing and circulating ballots."[2541] Over its objection, Judge Gibney directed the commonwealth's board of elections to instruct local boards not to print or send out absentee ballots until after the Friday hearing.[2542] Virginia's elections board immediately appealed Judge Gibney's direction, but the appeal was not heard before Judge Gibney's January 13 hearing.[2543]

On January 10, Judge Gibney denied a January 9 pro se motion to intervene by a more minor presidential candidate.[2544] At the January 13 hearing, Judge Gibney denied a nonparty citizen's motion to dismiss the case,

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Perry Minutes]; *see Perry*, 840 F. Supp. 2d at 949; *see also* Frank Green, *Judge Sets Timetable for Perry's Bid to Get on Va. Ballot*, Richmond Times-Dispatch, Dec. 30, 2011.

2537. Interview with Judge John A. Gibney, Jr., Sept. 4, 2013.

2538. *Id.*

2539. *Perry* Minutes, *supra* note 2536; Notice of Service, *Perry*, No. 3:11-cv-856 (E.D. Va. Dec. 30, 2011), D.E. 15.

2540. Order, *Perry*, No. 3:11-cv-856 (E.D. Va. Jan. 4, 2012), D.E. 27; *Perry*, 840 F. Supp. 2d at 949; *see* Amended Intervenor Complaint, *Perry*, No. 3:11-cv-856 (E.D. Va. Jan. 6, 2012), D.E. 38; Intervenor Complaint, *id.* (Jan. 4, 2012), D.E. 28; *see also* Frank Green, *Santorum, Gingrich, Huntsman Join Perry's Ballot Suit*, Richmond Times-Dispatch, Jan. 5, 2012.

2541. Transcript at 4, *Perry*, No. 3:11-cv-856 (E.D. Va. Jan. 9, 2012, filed Jan. 9, 2012), D.E. 47 [hereinafter Jan. 9, 2012, *Perry* Transcript].

2542. Opinion, *id.* (Jan. 10, 2012), D.E. 54; Order, *id.* (Jan. 9, 2012), D.E. 46; Jan. 9, 2012, *Perry* Transcript, *supra* note 2541, at 8–11; *see* Frank Green, *Federal Judge Says to Wait on GOP Ballot*, Richmond Times-Dispatch, Jan. 10, 2012; Larry O'Dell, *Judge in Perry's Va. Suit Blocks Absentee Ballots*, Newport News Daily Press, Jan. 10, 2012, at A9.

"Just for the record, both Friday and Monday are state holidays." Jan. 9, 2012, *Perry* Transcript, *supra* note 2541, at 12 (remarks by an attorney appearing for the commonwealth's board of elections).

2543. Docket Sheets, Perry v. Judd, Nos. 12-1042 and 12-1047 (4th Cir. Jan. 10, 2012).

2544. Order, *Perry*, No. 3:11-cv-856 (E.D. Va. Jan. 10, 2012), D.E. 50; *see* Intervention Motion, *id.* (Jan. 9, 2012), D.E. 45.

declined the citizen's request to participate in the hearing, and accepted the motion as an amicus curiae brief.[2545]

After the January 13 evidentiary hearing, Judge Gibney ruled that laches barred the candidates' requested relief; they should have brought the action at the beginning of the signature-collection period rather than at the end.[2546] On January 19, the court of appeals agreed: "Movant had every opportunity to challenge the various Virginia ballot requirements at a time when the challenge would not have created the disruption that this last-minute lawsuit has."[2547]

"To allow the parties a complete review on any appeal, . . . [Judge Gibney addressed] the other issues raised by the parties."[2548] In particular, "the Court believes that the residency requirements for petition circulators will likely be declared unconstitutional."[2549]

Judge Gibney's on-the-record views as to the constitutionality of requiring collectors of ballot-petition signatures to be state residents may have helped to shorten the life of a time-sensitive case filed later in 2012.

On Friday, April 6, a plaintiff wishing to challenge the incumbent in a June 12 primary election for the Democratic nomination for one of northern Virginia's representatives in Congress filed a federal complaint alleging that the plaintiff was wrongfully denied a place on the primary-election

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2545. Transcript at 4–5, *id.* (Jan. 13, 2012, filed Jan. 17, 2012), D.E. 82 [hereinafter Jan. 13, 2012, *Perry* Transcript]; Order, *id.* (Jan. 13, 2012), D.E. 70; *see* Motion, *id.* (Jan. 11, 2012), D.E. 67.

2546. Perry v. Judd, 840 F. Supp. 2d 945, 949, 953–55, 960–61 (E.D. Va. 2012); *see* Jan. 13, 2012, *Perry* Transcript, *supra* note 2545, at 157 ("THE COURT: . . . I can't figure out for the life of me how I can put them on the ballot if they don't have the signatures."); *see also* Frank Green, *Judge Won't Add Candidates to Va. Primary*, Richmond Times-Dispatch, Jan. 14, 2012; Anita Kumar, *4 GOP Candidates Lose Lawsuit to Get on Va. Primary Ballot*, Wash. Post, Jan. 14, 2012, at A6; Larry O'Dell, *Judge Rejects GOP Primary Ballot Appeal*, Newport News Daily Press, Jan. 14, 2012, at A3; Michael D. Shear, *4 Candidates Denied Ballot Spots in Virginia*, N.Y. Times, Jan. 14, 2012, at A14.

Judge Gibney's concerted efforts to quickly resolve the immediate issue were substantially assisted by good briefs and arguments ably prepared in short order. Interview with Judge John A. Gibney, Jr., Sept. 4, 2013.

2547. Perry v. Judd, 471 F. App'x 219, 220 (4th Cir. 2012); *see* Michael Martz, *Decks Cleared for GOP Primary*, Richmond Times-Dispatch, Jan. 22, 2012 ("Perry has since dropped out of the Republican presidential race. Only U.S. Rep. Ron Paul of Texas and former Massachusetts Gov. Mitt Romney will appear on the primary ballot in Virginia."); Larry O'Dell, *Appeals Court Refuses to Add Perry to Va. Ballot*, Newport News Daily Press, Jan. 18, 2012, at A5.

2548. *Perry*, 840 F. Supp. 2d at 955.

2549. *Id.* at 958.

ballot.[2550] According to the complaint, the plaintiff was "17 signatures short of the required 1,000" and approximately thirty-six signatures were disqualified because they were collected by the campaign manager who worked in Virginia but lived in Maryland.[2551] With his complaint, the plaintiff filed a motion for a temporary restraining order and a preliminary injunction.[2552]

The court assigned the case to Judge Robert E. Payne, who recused himself on April 9.[2553] Judge Gibney held a conference call with the parties on April 10 to determine whether the parties needed anything from the court immediately.[2554] The parties told Judge Gibney that they were in negotiations.[2555] On April 27, Judge Gibney granted the plaintiff a voluntary dismissal.[2556]

News media reported that party officials certified the plaintiff for the primary-election ballot after they discovered that they had initially miscounted his ballot application signatures.[2557] In the election, the incumbent prevailed.[2558]

On May 29, 2013, the court of appeals affirmed a July 30, 2012, holding by Judge Gibney in a third case that a residency requirement for collectors of ballot-petition signatures is unconstitutional absent narrow tailoring to a compelling interest, which Virginia had not shown.[2559]

2550. Complaint, Shuttleworth v. Moran, No. 3:12-cv-257 (E.D. Va. Apr. 6, 2012), D.E. 1.

2551. *Id.* at 9–11.

2552. Motion, *id.* (Apr. 6, 2012), D.E. 2.

2553. Recusal, *id.* (Apr. 9, 2012), D.E. 5.

2554. Docket Sheet, *id.* (Apr. 6, 2012); Interview with Judge John A. Gibney, Jr., Sept. 4, 2013.

2555. Interview with Judge John A. Gibney, Jr., Sept. 4, 2013.

2556. Order, *Shuttleworth*, No. 3:12-cv-257 (E.D. Va. Apr. 27, 2012), D.E. 10.

2557. Ben Pershing, *In Va. Race, Underdog Targets Ethics Issue*, Wash. Post, May 24, 2012, at B1 (describing the underlying facts as murky).

2558. *See Rep. Moran Handles Primary Challenge, Heads to General Election*, Arlington Sun Gazette, June 13, 2012.

2559. Libertarian Party of Virginia v. Judd, 718 F.3d 308 (4th Cir. 2013), *aff'g* 881 F. Supp. 2d 719 (E.D. Va. 2012), *cert. denied*, 571 U.S. 1071 (2013); *see* Andrew Cain, *Judge Strikes Down Va. Law on Ballot Petitions*, Richmond Times-Dispatch, Aug. 1, 2012; *Court Rejects Ballot Access Provision*, Staunton Daily News Leader, May 30, 2013, at A3; Larry O'Dell, *Judge Strikes Down Va. Petition-Circulator Law*, Newport News Daily Press, Aug. 1, 2012, at A4.

Correcting a Defective Candidacy Petition

Varner v. Husted (Algenon L. Marbley, S.D. Ohio 2:11-cv-748)

> A candidate filed a federal complaint claiming that her candidacy petition was wrongfully rejected because she had withdrawn a defective petition. Similar cases were pending before Ohio's supreme court, so the district judge set alternate dates for a preliminary-injunction hearing, depending upon how promptly the state court ruled. As it turned out, the state court's ruling was favorable to the federal plaintiff, who ultimately won her election.
>
> *Topics:* Getting on the ballot; matters for state courts.

A federal complaint filed in the Southern District of Ohio on August 17, 2011, sought an order placing on the November ballot a candidate for fiscal officer of Noble Township in Defiance County, alleging that her denial of a place on the ballot was an improper response to her effort to correct a filing error.[2560] With her complaint, she filed a motion for a temporary restraining order.[2561] The court assigned the case to Judge Algenon L. Marbley, who set an in-person conference for August 22.[2562]

Pending before Ohio's supreme court at the time were two mandamus petitions seeking relief similar to the relief sought in the federal action; the mandamus petitions concerned offices in Lucas County, the county that includes Toledo. Ohio's secretary of state had decided that candidates who withdrew their petitions could not refile.[2563] In comity and out of respect for the supreme court's proceedings, Judge Marbley made inquiries to the supreme court as to scheduling information.[2564] He wanted to balance deference to the state court with a prompt resolution of the action before him.[2565]

On August 22, Judge Marbley decided that he would hold a preliminary-injunction hearing on September 6 if the mandamus actions had been decided by then, but he would hold the hearing on September 13 otherwise.[2566] Ohio's supreme court granted the mandamus petitions on

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2560. Complaint, Varner v. Husted, No. 2:11-cv-748 (S.D. Ohio Aug. 17, 2011), D.E. 3.

2561. Temporary-Restraining-Order Motion, *id.* (Aug. 17, 2011), D.E. 4.

2562. Order, *id.* (Aug. 17, 2011), D.E. 5.

Tim Reagan interviewed Judge Marbley for this report by telephone on July 11, 2012.

2563. *See* Tyrel Linkhorn, *2 Candidates Who Refiled Forbidden from Ballot*, Toledo Blade, July 23, 2011.

2564. Interview with Judge Algenon L. Marbley, July 11, 2012.

2565. *Id.*

2566. Order, *Varner*, No. 2:11-cv-748 (S.D. Ohio Aug. 22, 2011), D.E. 6.

September 9: Ohio law permitted the timely withdrawal of a defective candidacy petition and the filing of a valid new one.[2567]

On notice that Defiance County's board of elections was to consider the federal plaintiff's candidacy petition on September 13, Judge Marbley indefinitely postponed his injunction hearing.[2568] Judge Marbley granted a voluntary dismissal on September 15.[2569]

The federal plaintiff won her election.[2570]

Exclusion from the Ballot Because of Invalid Ballot-Petition Signatures

Briscoe v. Biggs (Eric F. Melgren, D. Kan. 2:10-cv-2488)

> A would-be independent candidate for Congress filed a pro se petition for a writ of mandamus ordering his inclusion on the November ballot on the grounds that he was excluded because of improperly invalidated ballot-petition signatures. The court denied immediate relief for lack of a likelihood of success on the merits and to protect the public interest in orderly elections.
>
> *Topics:* Getting on the ballot; pro se party.

A would-be independent candidate for Congress filed on September 7, 2010, in the District of Kansas's Kansas City courthouse a pro se federal petition for a writ of mandamus ordering his inclusion on the November ballot on the grounds that he had been excluded because of improperly invalidated ballot-petition signatures.[2571] On September 13, the candidate filed motions for a preliminary injunction and a temporary restraining order to expedite consideration of the case and for summary judgment.[2572]

2567. State *ex rel.* Coble v. Lucas Cty. Bd. of Elections, 130 Ohio St. 3d 132, 956 N.E.2d 282 (2011); State *ex rel.* Mahoney v. Lucas Cty. Bd. of Elections, 130 Ohio St. 3d 29, 955 N.E.2d 935 (2011); *see* Nolan Rosenkrans, *Court Rules Candidates to Stay on Ballot*, Toledo Blade, Sept. 9, 2011.

2568. Order, *Varner*, No. 2:11-cv-748 (S.D. Ohio Sept. 13, 2011), D.E. 14.

2569. Order, *id.* (Sept. 15, 2011), D.E. 16.

2570. Election Summary Report, www.defiance-county.com/boardofelections/pdf/G11%20ELECTION%20SUMMARY%20REPORT.pdf, *archived at* web.archive.org/web/20160322202100/www.defiance-county.com/boardofelections/pdf/G11%20ELECTION%20SUMMARY%20REPORT.pdf (election results); www.defiance-county.com/townships/noble.html, *archived at* web.archive.org/web/20120901173405/www.defiance-county.com/townships/noble.html (township officer roster, referring to the fiscal officer as clerk).

2571. Petition, Briscoe v. Biggs, No. 2:10-cv-2488 (D. Kan. Sept. 7, 2010), D.E. 1.

2572. Motions, *id.* (Sept. 13, 2010), D.E. 6–8.

On September 16, Judge Eric F. Melgren denied the candidate immediate relief.[2573] "The Court cannot conclude that Plaintiff has demonstrated, or can demonstrate a likelihood of success on the merits, nor that the injunction would not adversely affect the public interest in orderly elections."[2574]

Ruling on pending motions, Judge Melgren dismissed the action on April 27, 2011, because of mootness, Eleventh Amendment immunity for state officials acting in official capacities, and quasijudicial immunity for state officials acting in their individual capacities.[2575]

Opportunity to Cure an Insufficient Number of Ballot-Petition Signatures

Douglas v. Niagara County Board of Elections (Richard J. Arcara, W.D.N.Y. 1:07-cv-609)

> On the day before a primary election, a complaint alleged that the plaintiff was wrongfully denied a place on the ballot. After the election, the judge concluded that the plaintiff was not entitled to relief.
>
> *Topics:* Getting on the ballot; primary election.

On the day before New York's September 18, 2007, primary election, a postal worker filed a federal complaint in the Western District of New York's Buffalo courthouse alleging that he was wrongfully denied a position on the ballot as Niagara Falls' first African American candidate for mayor.[2576] The plaintiff alleged that he was wrongfully denied an opportunity to cure an insufficient number of petition signatures.[2577] With his complaint, the plaintiff filed a motion for a temporary restraining order and a preliminary injunction[2578] and a motion to expedite the case.[2579]

2573. Opinion, *id.* (Sept. 16, 2010), D.E. 11.

2574. *Id.*

2575. Opinion, *id.* (Sept. 7, 2010), D.E. 27.

2576. Complaint, Douglas v. Niagara Cty. Bd. of Elections, No. 1:07-cv-609 (W.D.N.Y. Sept. 17, 2007), D.E. 3 [hereinafter *Douglas* Complaint]; *see* Thomas J. Prohaska, *Douglas Sues to Get Back in Mayoral Race*, Buffalo News, Sept. 22, 2007, at D3.

2577. *Douglas* Complaint, *supra* note 2576; *see also* Thomas J. Prohaska, *Elections Board Rules Anello Out of Primary Race*, Buffalo News, Aug. 10, 2007, at D1 (reporting that the incumbent also failed to qualify for the ballot).

2578. Motion, *Douglas*, No. 1:07-cv-609 (W.D.N.Y. Sept. 17, 2007), D.E. 1.

2579. Motion, *id.* (Sept. 17, 2007), D.E. 2.

On September 19, Judge Richard J. Arcara granted expedition and set a hearing on injunctive relief for October 4.[2580] Judge Arcara presided over the hearing on October 4, 5, and 11.[2581]

On October 16, Judge Arcara granted the defendants' motion to dismiss.[2582] Although Judge Arcara noted deficiencies in the notice procedures of Niagara County's board of elections,[2583] Judge Arcara denied the plaintiff relief because

> (1) he did not have a protected property or liberty interest in his candidacy for Mayor of Niagara Falls; and (2) even if he did have a protected interest, the availability of an expedited judicial procedure to review the BOE's determination afforded him with an adequate pre-deprivation opportunity to be heard.[2584]

Judicial Relief from a Tight Ballot-Petition Signature Schedule

Sharpe v. Como (Nicholas G. Garaufis, E.D.N.Y. 1:07-cv-1521)

> Because the winner of a special election to fill a city-council vacancy did not establish residency in the council district until after the election, the victor declined the victory and the mayor quickly scheduled a new special election, with the ballot-petition signature-collection period to begin immediately. Two prospective candidates filed a federal complaint alleging that they did not have enough notice and time to collect sufficient signatures. The district judge granted relief to one of the plaintiffs, who had collected the greater number of signatures and who had qualified for the first special election.
>
> *Topics:* Getting on the ballot; case assignment; intervention.

Following unsuccessful efforts in state court,[2585] two prospective candidates for an April 24, 2007, special election to fill a vacancy in New York's city council filed a federal complaint in the Eastern District of New York on April 12 seeking an injunction putting them both on the ballot.[2586] Of the

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2580. Order, *id.* (Sept. 19, 2007), D.E. 4; *see* Prohaska, *supra* note 2576.

2581. Docket Sheet, *Douglas*, No. 1:07-cv-609 (W.D.N.Y. Sept. 17, 2007); *see* Dan Herbeck, *Hoping for Court to Rekindle Candidacy*, Buffalo News, Oct. 5, 2007, at D1.

2582. Opinion, *Douglas*, No. 1:07-cv-609 (W.D.N.Y. Oct. 16, 2007), D.E. 23 [hereinafter *Douglas* Opinion], 2007 WL 3036809.

2583. *Id.* at 9; *see* Dan Herbeck, *Douglas Loses Bid for Ballot in Falls*, Buffalo News, Oct. 17, 2007, at B1.

2584. *Douglas* Opinion, *supra* note 2582, at 11; *see* Herbeck, *supra* note 2583.

2585. *See* Rachel Monahan, *Pol Position OK on New Ballot, Sez Judge,* N.Y. Daily News, Apr. 13, 2007, at 4.

2586. Complaint, Sharpe v. Como, No. 1:07-cv-1521 (E.D.N.Y. Apr. 12, 2007), D.E. 1;

1,002 petition signatures required for ballot qualification, Wellington Sharpe had 832 valid signatures and Maria Gina Faustin had 391.[2587]

A special election had already been held on February 20, but circumstances suggested that the victor, Mathieu Eugene, did not live in the council district on the day of election, so he declined the post and, on March 8, publicly called for another special election.[2588] On the following day, the mayor declared that a second special election would be held on April 24, and candidates had from Friday, March 9, until Wednesday, March 21, to acquire ballot-petition signatures.[2589] A harsh winter storm, strong enough to close schools, hit the region on Friday, March 16.[2590]

On the day that the complaint was filed, Judge Brian M. Cogan set the case for hearing before Judge Nicholas G. Garaufis on April 18.[2591] When an assigned judge was unavailable at the time an emergency case was filed, the judge on miscellaneous duty handled the case until the assigned judge was available.[2592]

In open court, Judge Garaufis granted Eugene's motion to intervene.[2593] On April 19, following a second day of hearing, Judge Garaufis ordered Sharpe added to the ballot, but not Faustin.[2594]

Because Eugene controlled when he would decline the post and call for a second special election, his "manipulation gave him a head start against his would-be rivals" in setting in motion a petition drive.[2595] Because of preparations required to launch a petition drive, and because of the winter storm, "both Sharpe and Faustin found it difficult or impossible to collect signatures on either of the two weekends that fell within the petitioning period."[2596] Sharpe finished third in the first special election, and the sec-

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Opinion at 1, *id.* (Apr. 19, 2007), D.E. 7 [hereinafter *Sharpe* Opinion], 2007 WL 1175221.

2587. *Sharpe* Opinion, *supra* note 2586, at 5 & n.3; *see* Frank Lombardi, *Only Two Make Grade for Special Elex Ballot*, N.Y. Daily News, Apr. 12, 2007, at 1.

2588. *Sharpe* Opinion, *supra* note 2586, at 2–3.

2589. *Id.* at 3–4.

2590. *Id.* at 4–5.

2591. Order to Show Cause, *Sharpe*, No. 1:07-cv-1521 (E.D.N.Y. Apr. 12, 2007), D.E. 3; *Sharpe* Opinion, *supra* note 2586, at 6.

Tim Reagan interviewed Judge Garaufis for this report by telephone on October 14, 2015.

2592. Interview with Judge Nicholas G. Garaufis, Oct. 14, 2015.

2593. *Sharpe* Opinion, *supra* note 2586, at 6.

2594. *Id.* at 1, 6, 12–13; *see* John Marzulli, *Judge Lets Sharpe Be 3rd Man in 2nd Council Vote*, N.Y. Daily News, Apr. 20, 2007, at 75.

2595. *Sharpe* Opinion, *supra* note 2586, at 12.

2596. *Id.* at 5.

ond-place finisher did not run the second time, "suggesting that Sharpe will be an especially viable candidate in the Second Special Election."[2597] Judge Garaufis determined that the injury to first-time candidate Faustin was less.[2598]

> This decision is limited to the specific facts before me and should be read narrowly. What makes this case unique, and what compels me to order that Sharpe's name be added to the ballot, is that the Second Special Election became necessary because of the conduct of someone who intended to run in it, namely Matheiu Eugene.[2599]

Eugene won the election, and Sharpe again placed third.[2600]

Judge Garaufis signed a stipulated dismissal of the case on June 11, 2007.[2601]

Disqualification of a Candidate for Failure to Properly File Papers of Candidacy

Lawrence v. Board of Election Commissioners (Elaine E. Bucklo, N.D. Ill. 1:07-cv-566)

> A would-be candidate filed a federal complaint challenging a requirement that he file with his nomination papers the receipt he received for filing his statement of economic interest. The district judge granted summary judgment to the defendants. The claims were barred by res judicata because they were not raised in an unsuccessful state-court proceeding on the same matter. Nor was it unconstitutional to disqualify as a candidate someone who failed to properly file papers of candidacy.
>
> *Topic:* Getting on the ballot.

On January 30, 2007, a would-be candidate for Chicago alderman in the February 27 election, his campaign committee, and three voters filed a federal complaint in the Northern District of Illinois, challenging on its face and as applied the constitutionality of a requirement that he file with his nomination papers the receipt he received for filing his statement of economic interest.[2602]

2597. *Id.* at 10.

2598. *Id.*

2599. *Id.* at 12.

2600. *See* Jonathan P. Hicks, *Haitian-Born Candidate Wins Again in Brooklyn*, N.Y. Times, Apr. 25, 2007, at B2; Frank Lombardi, *Déjà vu for Winner of Council Race*, N.Y. Daily News, Apr. 25, 2007, at 2.

2601. Stipulated Dismissal, Sharpe v. Como, No. 1:07-cv-1521 (E.D.N.Y. June 11, 2007, filed July 12, 2007), D.E. 10.

2602. Complaint, Lawrence v. Bd. of Election Comm'rs, No. 1:07-cv-566 (N.D. Ill. Jan.

On February 6, Judge Elaine E. Bucklo granted a three-week extension request by Illinois's attorney general to accommodate the attorney general's convenience.[2603] On February 8, the plaintiffs filed motions for an expedited hearing, acknowledging that it was too late to restore the would-be candidate's name to the February 27 ballot but arguing that he could be added to an April 17 runoff election.[2604] Judge Bucklo granted the motions and set the matter for hearing on February 23.[2605]

On February 27, Judge Bucklo granted summary judgment to the defendants.[2606] The plaintiffs' claims were barred by res judicata, because they failed to raise them in a state-court proceeding on the same matter in which they lost.[2607] Judge Bucklo also found that it was not unconstitutional for Illinois to disqualify as a candidate someone who failed to properly file papers of candidacy.[2608]

Burden of New York's Ballot-Petition-Signature Address Requirements

Sundwall v. Kelleher (Lawrence E. Kahn, 1:06-cv-1191) and Lanza v. Wart (David N. Hurd, 5:07-cv-848) (N.D.N.Y.)

> A district judge overruled a minor party's election-eve challenge to a requirement that persons signing ballot petitions provide accurate residential addresses in light of "the complicated ways in which villages, addresses, counties, and townships cross each other's borders" in New York. A different district judge reached a similar decision one year later.
>
> *Topics:* Getting on the ballot; pro se party; primary election.

Nearly five weeks before the November 7, 2006, general election, the Libertarian Party, its candidate for Congress in a New York district, and two voters filed a federal complaint in the Northern District of New York chal-

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30, 2007), D.E. 1; Lawrence v. Bd. of Election Comm'rs, 524 F. Supp. 2d 1011, 1013–15 (N.D. Ill. 2007); *see* Amended Complaint, *Lawrence*, No. 1:07-cv-566 (N.D. Ill. Feb. 13, 2007), D.E. 19; Amended Complaint, *id.* (Feb. 12, 2007), D.E. 21; *see also* Mark Brown, *Just Getting on the Ballot Is More Than Half the Battle*, Chi. Sun-Times, Jan. 11, 2007, at 2.

2603. Minutes, *Lawrence*, No. 1:07-cv-566 (N.D. Ill. Feb. 6, 2007), D.E. 13; *see* Extension Motion, *id.* (Feb. 6, 2007), D.E. 11.

2604. Expedited-Hearing Motion, *id.* (Feb. 8, 2007), D.E. 16; Expedited-Hearing Motion, *id.* (Feb. 8, 2007), D.E. 14.

2605. Minutes, *id.* (Feb. 23, 2007), D.E. 55; Minutes, *id.* (Feb. 22, 2007), D.E. 43.

2606. *Lawrence*, 524 F. Supp. 2d 1011; Minutes, *Lawrence*, No. 1:07-cv-566 (N.D. Ill. Feb. 27, 2007), D.E. 52.

2607. *Lawrence*, 524 F. Supp. 2d at 1018–23.

2608. *Id.* at 1023–27.

lenging ballot-petition requirements that resulted in the invalidation of 1,305 signatures.[2609] The complaint alleged that requiring accurate addresses for petition signers was impermissibly burdensome "because of the complicated ways in which villages, addresses, counties, and townships cross each other's borders in this region."[2610] The plaintiffs sought injunctive relief, including a temporary restraining order.[2611]

On the day the complaint was filed, Judge Lawrence E. Kahn issued an order that the defendant members of New York's board of elections show cause at a hearing five days later why relief should not be granted.[2612] At the hearing, Judge Kahn ruled that the signature address requirements were not unduly burdensome or restrictive.[2613]

A candidate wishing to run for county district attorney in the September 18, 2007, Republican primary election filed a pro se federal complaint in the Northern District on August 21 challenging ballot-petition signature requirements that resulted in the invalidation of signatures that incorrectly listed the towns or cities of the signers' residences.[2614]

On August 23, Judge David N. Hurd ordered defendants to show cause at a hearing on September 4 why relief should not be granted.[2615] At the hearing, Judge Hurd denied relief and dismissed the complaint.[2616]

The plaintiff ran in the Conservative Party's primary election, and he was defeated.[2617]

2609. Complaint, Sundwall v. Kelleher, No. 1:06-cv-1191 (N.D.N.Y. Oct. 5, 2006), D.E. 1.

2610. *Id.* at 3–4.

2611. Brief, *id.* (Oct. 5, 2006), D.E. 3.

2612. Order, *id.* (Oct. 5, 2006), D.E. 5.

2613. Order, *id.* (Oct. 10, 2006), D.E. 8; *see* Minutes, *id.* (Oct. 10, 2006), D.E. 7.

2614. Complaint, Lanza v. Wart, No. 5:07-cv-848 (N.D.N.Y. Aug. 21, 2007), D.E. 1; *see* Charles McChesney, *Lanza to Appeal to Federal Court*, Syracuse Post-Standard, Aug. 27, 2007, at B1 (reporting that the plaintiff was unsuccessful seeking state-court relief).

2615. Order, *Lanza*, No. 5:07-cv-848 (N.D.N.Y. Aug. 23, 2007), D.E. 5.

2616. Order, *id.* (Sept. 4, 2007), D.E. 27; Minutes, *id.* (Sept. 4, 2007), D.E. 29; *see* Charles McChesney, *Judge: Lanza Still Off Ballot*, Syracuse Post-Standard, Sept. 5, 2007, at A1 ("It may be unfair and it may be unnecessary, but the state law that has kept Salvatore Lanza off this month's Republican primary ballot is not unconstitutional, a federal judge ruled Tuesday.").

2617. *See* Charles McChesney, *Dodd Tops Challenger in Conservative Ballot*, Syracuse Post-Standard, Sept. 19, 2007, at B1.

Validity of Ballot-Application Signatures

Stockman v. Williams (Lee Yeakel and Sam Sparks, W.D. Tex. 1:06-cv-742)

> On September 19, 2006, an independent candidate for Congress filed a federal action to get his name on the ballot. The assigned judge was away that week, so another judge presided over a temporary-restraining-order hearing. Because absentee ballots would be issued in a few days' time, and because the plaintiff did not name all necessary defendants, immediate relief was denied. The originally assigned judge determined the following week that the case was filed too late to obtain relief.
>
> *Topics:* Getting on the ballot; laches; case assignment.

On Tuesday, September 19, 2006, Steve Stockman filed a federal action in the Western District of Texas's Austin courthouse against Texas's secretary of state, seeking an order to place Stockman's name on the ballot as an independent candidate for Texas district 22's member of Congress.[2618] The complaint challenged disqualifications of his ballot-petition signatures.[2619]

The election for this office drew attention because incumbent Tom DeLay resigned from Congress after he won the Republican Party primary election, and the Republican Party could not legally name a replacement for him on the general-election ballot.[2620]

The court assigned Stockman's case to Judge Sam Sparks, but Judge Sparks was away that week.[2621] Judge Lee Yeakel was the other active district judge in Austin; Judges Sparks and Yeakel coordinated their travel schedules to avoid occasions when they were both out of town at the same time.[2622] Judge Yeakel offered to either preside over initial proceedings or

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2618. Complaint, Stockman v. Williams, No. 1:06-cv-742 (W.D. Tex. Sept. 19, 2006), D.E. 1 [hereinafter *Stockman* Complaint]; *see* Amended Complaint, *id.* (Sept. 19, 2006), D.E. 13.

2619. *Stockman* Complaint, *supra* note 2618.

2620. Texas Democratic Party v. Benkiser, 459 F.3d 582 (5th Cir.) (holding that the U.S. Constitution permits a residency requirement only on the day of election and Texas law does not permit a party's replacing a nominee who merely withdraws from the race), *aff'g* Opinion, No. 1:06-cv-459 (W.D. Tex. July 6), D.E. 40 (Judge Sam Sparks), 2006 WL 1851295, *and stay denied*, Docket Sheet, No. 06A139 (U.S. Aug. 7, 2006) (Justice Scalia); *see Stockman* Complaint, *supra* note 2618, at 1.

2621. Transcript, *Stockman*, No. 1:06-cv-742 (W.D. Tex. Sept. 20, 2006, filed Sept. 27, 2006), D.E. 17 [hereinafter Sept. 20, 2006, *Stockman* Transcript].

Tim Reagan interviewed Judge Sparks for this report by telephone on September 19, 2012.

2622. Interview with Judge Sam Sparks, Sept. 19, 2012.

Tim Reagan interviewed Judge Yeakel for this report by telephone on September 12, 2012. Judge Yeakel retired on May 1, 2023. Federal Judicial Center Biographical Directory

take assignment of the case.[2623] Judge Sparks chose to retain the case, over which he would preside when he returned.[2624] Judge Yeakel relied on Judge Sparks's law clerks for preliminary matters.[2625]

Judge Yeakel held a hearing on Stockman's motion for a temporary restraining order on the case's second day.[2626]

> . . . I have checked with Judge Sparks' calendar and Judge Sparks could entertain a hearing on a temporary injunction on September the 28th in the afternoon, which is not exactly a long way away. My experience in private practice, and it hasn't changed much since I have been on this Court, is that it is often better to get the lawyers together and encourage them to get everything put together before a temporary injunction hearing, because then both sides have a better opportunity to present all of their exhibits and you have a better record and you've got a record that one side or the other can appeal from, and it's a pretty expeditious way to do it that way.[2627]

After the hearing, the secretary moved to dismiss the action.[2628] On the third day, Judge Yeakel denied the temporary restraining order because Stockman had not included all necessary parties as defendants and because the issuing of absentee ballots was only days away.[2629]

> I am concerned that the election directors and the clerks are not parties to this action because I have a real question, regardless of whether they from time to time take advice from the Secretary of State as to whether the granting of injunctive relief as prayed for against the Secretary of State in any way affects the actions of the election directors and the county clerks in the four counties in which they are relocated. I concede that it is easier if you only have one party, but these are the persons who actually are in charge of mailing out the ballots and taking care of the administrative acts of obtaining the ballots and sending them out.
>
> I have concern about what we have referred to as the laches argument. I am bothered by the fact that we are here at a time when I am told that the clerks and elections directors must take action by Saturday to send the mail-out ballots to servicemen, when in fact the disagreement

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of Article III Federal Judges, www.fjc.gov/history/judges.

2623. Interview with Judge Lee Yeakel, Sept. 12, 2012.

2624. *Id.*

2625. *Id.*

2626. Docket Sheet, *Stockman*, No. 1:06-cv-742 (W.D. Tex. Sept. 19, 2006) [hereinafter W.D. Tex. *Stockman* Docket Sheet].

2627. Sept. 20, 2006, *Stockman* Transcript, *supra* note 2621, at 2–3.

2628. Motion to Dismiss, *Stockman*, No. 1:06-cv-742 (W.D. Tex. Sept. 20, 2006), D.E. 9.

2629. Order, *id.* (Sept. 21, 2006), D.E. 12.

> between Mr. Stockman and the Secretary of State was apparently known as early as June the 22nd.[2630]

Judge Sparks held another hearing one week later.[2631] He determined that the case was filed too late to obtain the desired relief.[2632]

> It's too late for any injunction from this judge. That doesn't mean that I'm satisfied with what I'm doing. I don't think I'm ever satisfied in elections squabbles because I think, you know, the Secretary of State is to serve the people, and whether that occurred in this case or not, I don't know. I wouldn't mind having a week to find out. But I'm not going to set aside the election and—not set aside the election but set aside the election process under these circumstances. The harm it would cause is far more than the benefit in the event I had an evidentiary hearing and determined that you were correct.[2633]

Judge Sparks issued an order on October 2 stating that injunctive relief could seriously disrupt the coming election and that the ballot-application signature requirements imposed by Texas were not unreasonable.[2634] On October 26, the court of appeals summarily affirmed Judge Sparks's order.[2635]

Judge Sparks dismissed the action on January 19, 2007.[2636]

2630. Sept. 20, 2006, *Stockman* Transcript, *supra* note 2621, at 39–40.

2631. Transcript, *Stockman*, No. 1:06-cv-742 (W.D. Tex. Sept. 28, 2006, filed Oct. 11, 2006), D.E. 34 [hereinafter Sept. 28, 2006, *Stockman* Transcript]; W.D. Tex. *Stockman* Docket Sheet, *supra* note 2626.

2632. Sept. 28, 2006, *Stockman* Transcript, *supra* note 2631, at 74 ("what I can find very clearly is that this lawsuit should have been filed in June").

2633. *Id.* at 75.

2634. Order, *Stockman*, No. 1:06-cv-742 (W.D. Tex. Sept. 19, 2006), D.E. 31.

2635. Opinion, Stockman v. Williams, No. 06-51346 (5th Cir. Oct. 26, 2006).

2636. Judgment, *Stockman*, No. 1:06-cv-742 (W.D. Tex. Jan. 19, 2007), D.E. 59.

Unsuccessful Federal Actions to Achieve Different Results from Unsuccessful State-Court Efforts to Get on a Ballot

Ramratan v. New York City Board of Elections (Nicholas G. Garaufis and Dora L. Irizarry, 1:06-cv-4770), Bert v. New York City Board of Elections (Charles P. Sifton, 1:06-cv-4789), Brown v. Board of Elections (Kiyo A. Matsumoto, 1:08-cv-3512), Fischer v. Suffolk County Board of Elections (Joanna Seybert, 2:08-cv-4171), Minnus v. Board of Elections (Sandra L. Townes, 1:10-cv-3918), Fischer v. NYS Board of Elections (Joanna Seybert, 2:12-cv-5397), and Pidot v. New York State Board of Elections (Joseph F. Bianco, 2:16-cv-3527) (E.D.N.Y.) and Williams-Bey v. Commissioners of Elections (Katherine B. Forrest, 1:12-cv-3836), Thomas v. New York City Board of Elections (Shira A. Scheindlin, 1:12-cv-4223), and Moore v. McFadden (Edgardo Ramos, 1:14-cv-6643) (S.D.N.Y.)

> In ten cases, district judges denied relief contrary to state-court results to prospective candidates in the Eastern District of New York in 2006, 2008, 2010, 2012, and 2016 and in the Southern District of New York in 2012 and 2014.
>
> *Topics:* Getting on the ballot; matters for state courts; primary election; pro se party; case assignment; laches; recusal.

In ten cases, federal district judges in New York denied relief to prospective candidates contrary to state-court results. The tenth case found a second life in another district, but the court of appeals ordered the case dismissed.

Eastern District of New York

2006: State Assembly and State Party Committee

A federal complaint filed in the Eastern District of New York on August 31, 2006, sought an injunction putting on the September 12 Democratic primary-election ballot a candidate for state assembly and a candidate for female member of the party's state committee.[2637] A suit in state court to achieve the same end was unsuccessful, pursuant to an August 22 decision by the supreme court's appellate division.[2638] The federal court assigned the federal case to Judge Edward R. Korman as related to a case filed on July 27 challenging New York's requirement that witnesses to primary-election

2637. Complaint, Ramratan v. N.Y. City Bd. of Elections, No. 1:06-cv-4770 (E.D.N.Y. Aug. 31, 2006), D.E. 1.

2638. Butler v. Duvalle, 32 A.D.3d 514, 819 N.Y.S.2d 670 (N.Y. App. Div. 2006); *see* Opinion at 1–2, *Ramratan*, No. 1:06-cv-4770 (E.D.N.Y. Sept. 7, 2006), D.E. 8 [hereinafter *Ramratan* Opinion], 2006 WL 2583742.

ballot-petition signatures be members of the party.[2639] Because Judge Korman determined that the two cases were not sufficiently related to each other to require assignment to the same judge, the court reassigned the new case to Judge Nicholas G. Garaufis.[2640]

On September 7, Judge Garaufis denied the plaintiffs a preliminary injunction, finding "extensive support" for the state court's conclusion that the prospective candidates' petition drives were "permeated with fraud."[2641] On September 8, Judge Garaufis again denied the plaintiffs a preliminary injunction sought by a motion and an amended complaint filed that day.[2642] On September 11, the plaintiffs filed a motion for reconsideration,[2643] which Judge Dora L. Irizarry denied,[2644] ruling in place of Judge Garaufis because of his unavailability and the time-sensitive nature of the motion.[2645] Judge Garaufis signed a stipulated dismissal on October 17.[2646]

2006: State Senate

Nine voters filed a federal complaint against New York City's elections board on September 1 seeking to place their preferred candidate on the primary-election ballot for state senate.[2647] The court assigned the case to Judge Charles P. Sifton.[2648] He was unavailable, and Judge Eric N. Vitaliano was on two-week miscellaneous duty, so Judge Vitalianao set the case for

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2639. Notice, *Ramratan*, No. 1:06-cv-4770 (E.D.N.Y. Aug. 31, 2006), D.E. 2; *see* Docket Sheet, Maslow v. Wilson, No. 1:06-cv-3683 (E.D.N.Y. July 27, 2006).

2640. Docket Sheet, *Ramratan*, No. 1:06-cv-4770 (E.D.N.Y. Aug. 31, 2006).

2641. *Ramratan* Opinion, *supra* note 2638, at 5.

2642. Order, *Ramratan*, No. 1:06-cv-4770 (E.D.N.Y. Sept. 8, 2006), D.E. 15; *see* Motion, *id.* (Sept. 8, 2006), D.E. 13, 14; Amended Complaint, *id.* (Sept. 8, 2006), D.E. 12.

2643. Motion, *id.* (Sept. 11, 2006), D.E. 17.

2644. Order, *id.* (Sept. 11, 2006), D.E. 20, 2006 WL 2614256.

2645. *Id.* at 1 n.1.

2646. Stipulated Dismissal, *id.* (Oct. 31, 2006), D.E. 22.

2647. Complaint, Bert v. N.Y. City Bd. of Elections, No. 1:06-cv-4789 (E.D.N.Y. Sept. 1, 2006), D.E. 1.

2648. Docket Sheet, *id.* (Sept. 1, 2006).

Judge Sifton died on November 9, 2009. Federal Judicial Center Biographical Directory of Article III Federal Judges [hereinafter FJC Biographical Diectory], www.fjc.gov/history/judges.

hearing before Judge Sifton on September 6.[2649] On September 7, Judge Sifton denied the voters a preliminary injunction.[2650]

The plaintiffs alleged that a proper hearing would result in the recertification of enough signatures to qualify their candidate for the ballot.[2651] First, "Plaintiffs fail . . . to specify even now which signatures they propose to validate or why the Board was wrong in invalidating the signatures. . . . This Court cannot be expected to issue a preliminary injunction on mere conclusory statements by movants."[2652] Second, "there is reason to conclude that the plaintiffs are merely acting as the pawns of the candidate in order to give him a second bite at the apple in federal court. . . . [I]t seems likely that res judicata would bar plaintiffs' claims if this case were to be heard on the merits."[2653] Third, "Whatever injury has been suffered as a result of any erroneous decision by the Board of Elections could not conceivably be remedied in the few days remaining before the election."[2654] The plaintiffs did not bring the federal action until more than three weeks after their candidate lost his case in state court.[2655] Judge Sifton signed a stipulated dismissal on November 13, 2007.[2656]

2008: Congress

On August 27, 2008, eleven voters filed a federal complaint seeking an injunction placing their candidate for Congress on the September 9 Democratic Party primary-election ballot.[2657] Judge Kiyo A. Matsumoto set the case for hearing on September 5, the Friday after Labor Day.[2658]

Judge Matsumoto granted the plaintiffs an extension of five hours for service on the defendants, granted the defendants an additional day to re-

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2649. Order to Show Cause, *Bert*, No. 1:06-cv-4789 (E.D.N.Y. Sept. 1, 2006), D.E. 6; *see* Minutes, *id.* (Sept. 6, 2006), D.E. 11; Interview with Judge Eric N. Vitaliano, Sept. 23, 2015.

Tim Reagan interviewed Judge Vitaliano for this report by telephone.

2650. Opinion, *Bert*, No. 1:06-cv-4789 (E.D.N.Y. Sept. 7, 2006), D.E. 7, 2006 WL 2583741.

2651. *Id.* at 6.

2652. *Id.* at 6, 10.

2653. *Id.* at 15.

2654. *Id.* at 9.

2655. *Id.* at 8–9.

2656. Stipulated Dismissal, *id.* (Nov. 14, 2007), D.E. 14.

2657. Complaint, Brown v. Bd. of Elections, No. 1:08-cv-3512 (E.D.N.Y. Aug. 27, 2008), D.E. 1.

2658. Order to Show Cause, *id.* (Aug. 28, 2008), D.E. 2; *see* Transcript, *id.* (Sept. 5, 2008, filed Sept. 30, 2008), D.E. 15.

spond, and reset the hearing for one hour later.[2659] Finding no deprivation of federal rights in the candidate's state-court efforts to reverse invalidation of ballot-petition signatures, Judge Matsumoto issued an opinion on September 8 denying the plaintiffs immediate relief.[2660] Following a September 26 status conference,[2661] Judge Matsumoto signed a stipulated dismissal of the case on September 29.[2662]

2008: State Senate

A prospective candidate for state senate filed a pro se federal complaint on October 14, 2008, seeking an injunction putting him on the November 4 ballot as the Democratic Party's nominee.[2663] The court assigned the case to Judge Joanna Seybert as related to three previous pro se actions by the same plaintiff.[2664]

Judge Seybert heard the case on October 23[2665] and denied immediate relief on October 27.[2666] Although the appellate division of New York's su-

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2659. Opinion at 2–4, *id.* (Sept. 8, 2008), D.E. 9.

2660. *Id.* at 31.

2661. Transcript, *id.* (Sept. 26, 2008, filed Oct. 1, 2008), D.E. 16.

2662. Stipulated Dismissal, *id.* (Sept. 29, 2008), D.E. 14.

2663. Complaint, Fischer v. Suffolk Cty. Bd. of Elections, No. 2:08-cv-4171 (E.D.N.Y. Oct. 14, 2008), D.E. 1.

2664. Notice, *id.* (Oct. 14, 2008), D.E. 5.

An October 31, 2007, complaint "alleges that Defendants have been using Plaintiff's software without obtaining a license for its use." Opinion at 2, Fischer v. Talco Trucking, Inc., No. 2:07-cv-4564 (E.D.N.Y. Sept. 24, 2008), D.E. 1, 2008 WL 4415280; Second Amended Complaint, *id.* (June 29, 2009), D.E. 42; First Amended Complaint, *id.* (Nov. 15, 2007), D.E. 4; Complaint, *id.* (Oct. 31, 2007), D.E. 1. Judge Seybert dismissed the case on December 21, 2009. Opinion, *id.* (Dec. 21, 2009), D.E. 47, 2009 WL 5066902; Opinion, *id.* (Jan. 27, 2010), D.E. 50, 2010 WL 409104 (denying reconsideration).

A November 21, 2007, notice of removal attempted to remove actions pending in Wyoming's state court involving a dispute over children of the plaintiff and the defendant. Amended Complaint, Fischer v. Clark, No. 2:07-cv-4871 (E.D.N.Y. Nov. 26, 2007), D.E. 2; Notice of Removal, *id.* (Nov. 21, 2007), D.E. 1. Judge Seybert dismissed the case on December 7 for lack of jurisdiction over a case removed from another state. Order, *id.* (Dec. 7, 2007), D.E. 5, 2007 WL 4327872. The plaintiff filed an original federal action on September 16, 2008, challenging removal of his children from New York to Wyoming by their mother. Complaint, Fischer v. Clark, No. 2:08-cv-3807 (E.D.N.Y. Sept. 16, 2008), D.E. 1; *see* Notice, *id.* (Oct. 15, 2008), D.E. 8 (assigning the case to Judge Seybert as related to the previous two pro se actions by the same defendant). On July 14, 2010, Judge Seybert dismissed the case. Order, *id.* (July 14, 2010), D.E. 22 (dismissing the case for failure to file an amended complaint); Opinion, *id.* (Sept. 24, 2009), D.E. 17, 2009 WL 3063313 (dismissing the case for lack of jurisdiction, but allowing amendment of the complaint).

2665. Transcript, *Fischer*, No. 2:08-cv-4171 (E.D.N.Y. Oct. 23, 2008, filed Nov. 13, 2012), D.E. 33 [hereinafter *Fischer* Transcript]; Minutes, *id.* (Oct. 23, 2008), D.E. 17.

preme court had affirmed, on October 16, a decision that the plaintiff had not submitted enough valid ballot-petition signatures,[2667] the plaintiff argued that "the electorate wants a democratic candidate."[2668] Judge Seybert determined that the federal action was barred by res judicata and the *Rooker-Feldman* doctrine, which states that among federal courts only the Supreme Court has appellate jurisdiction over state-court proceedings, because the federal case followed an unsuccessful similar action in state court.[2669] Judge Seybert dismissed the case on August 14, 2009.[2670]

2010: District Leader

An incumbent female district leader and four other voters filed a federal complaint on August 25, 2010, seeking an injunction placing the incumbent on the September 14 primary-election ballot.[2671] Judge Sandra L. Townes set the case for hearing on September 2.[2672] On September 3, Judge Townes denied the plaintiffs immediate relief.[2673] She noted, "The complaint is completely devoid of factual contentions and evidentiary support."[2674] Moreover, the plaintiffs challenged the constitutionality of state statutes without showing proper notice to the state's attorney general.[2675] A previous state-court proceeding challenging the incumbent's removal

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2666. Opinion, *id.* (Oct. 27, 2008), D.E. 21 [hereinafter Oct. 27, 2008, *Fischer* Opinion], 2008 WL 4865941.

2667. *Id.* at 3; *see* Rick Brand, *A First: LaValle Runs Unopposed*, Newsday, Oct. 12, 2008, at G5; Zachary Dowdy, *LaValle Challenger Seeks Ways to Fight On*, Newsday, July 30, 2008, at A24 ("Fischer had amassed 1,475 signatures in his effort to challenge the eight-term incumbent, but the Board of Elections ruled out 620 of them, leaving him 145 signatures short of qualifying for the ballot.").

2668. *Fischer* Transcript, *supra* note 2665, at 16.

2669. Oct. 27, 2008, *Fischer* Opinion, *supra* note 2666, at 6–10, *aff'd*, Order, Fischer v. Suffolk Cty. Bd. of Elections, No. 08-5329 (2d Cir. Nov. 3, 2008), *filed as* Order, *Fischer*, No. 2:08-cv-4171 (E.D.N.Y. Dec. 9, 2008), D.E. 29; Opinion, *Fischer*, No. 2:08-cv-4171 (E.D.N.Y. Oct. 31, 2008), D.E. 24 (denying reconsideration); *see* D.C. Ct. of Appeals v. Feldman, 460 U.S. 462 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923); *see also* Martin A. Schwartz, Section 1983 Litigation 21–24 (Federal Judicial Center 3d ed. 2014).

2670. Opinion, *Fischer*, No. 2:08-cv-4171 (E.D.N.Y. Aug. 14, 2009), D.E. 30, 2009 WL 2524859.

2671. Complaint, Minnus v. Bd. of Elections, No. 1:10-cv-3918 (E.D.N.Y. Aug. 25, 2010), D.E. 1.

2672. Order to Show Cause, *id.* (Aug. 26, 2010, filed Aug. 30, 2010), D.E. 4.

Judge Townes died on February 8, 2018. FJC Biographical Directory, *supra* note 2648.

2673. Opinion, *Minnus*, No. 1:10-cv-3918 (E.D.N.Y. Aug. 26, 2010, filed Sept. 3, 2010), D.E. 9, 2010 WL 3528544.

2674. *Id.* at 2 n.2.

2675. *Id.* n.1.

from the ballot for failure to include the word "female" in the position title on ballot-petition papers was dismissed because neither the incumbent nor a qualified attorney appeared at court.[2676]

On December 13, Judge Townes presided over a proceeding at which the incumbent's attorney acknowledged that the plaintiffs no longer had a case, and he asked for a dismissal.[2677] The attorney requested the proceeding so that the incumbent could address the court.[2678]

2012: Power Authority

The prospective 2008 senate candidate filed another pro se federal complaint on October 26, 2012, with two other pro se plaintiffs, seeking an injunction putting them on the ballot for Long Island Power Authority trustee.[2679] Assigned the case as related to the previous cases filed by the first plaintiff,[2680] Judge Seybert set the case for hearing on November 1.[2681] On October 31, she heard the plaintiffs ex parte, but denied them immediate relief, and reset the November 1 hearing for November 2.[2682] Judge Seybert found the action barred by the *Rooker-Feldman* doctrine as an improper appeal from the state courts' determination that the trustee position was properly a position that was appointed and not elected.[2683] She dismissed the case on January 28, 2014.[2684]

Southern District of New York

2012: Congress

A prospective candidate and two other voters filed a pro se federal complaint in the Southern District of New York on May 14, 2012, seeking an

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2676. *Id.* at 3–4.

2677. Transcript, *id.* (Dec. 13, 2010, filed Dec. 16, 2010), D.E. 12.

2678. *Id.*; *see id.* at 8 ("So for the record and moving forward, I know that there's nothing that we can do about my situation right now but there is something that can be done in the future.").

2679. Complaint, Fischer v. NYS Bd. of Elections, No. 2:12-cv-5397 (E.D.N.Y. Oct. 26, 2012), D.E. 1; *see* Mark Harrington, *Sparring Over "Legitimacy" of LIPA's Board*, Newsday, Oct. 28, 2012, at A26 (describing the repeat plaintiff as someone "who has filed lawsuits in state and federal court seeking to force LIPA to hold trustee elections"); Rick Brand, *Lawsuit: Hold Elections for LIPA Trustees*, Newsday, July 27, 2012, at A14.

2680. Notice, *Fischer*, No. 2:12-cv-5397 (E.D.N.Y. Nov. 13, 2012), D.E. 11.

2681. Order to Show Cause, *id.* (Oct. 26, 2012), D.E. 15.

2682. Minutes, *id.* (Oct. 31, 2012), D.E. 13; Order to Show Cause, *id.* (Oct. 31, 2012), D.E. 12; *see* Minutes, *id.* (Nov. 2, 2012), D.E. 16.

2683. Opinion, *id.* (Nov. 7, 2012), D.E. 17 (noting that the state's court of appeals dismissed an appeal on October 18, 2012); Opinion, *id.* (May 28, 2013), D.E. 25, 2013 WL 2316665 (denying reconsideration and recusal).

2684. Order, *id.* (Jan. 28, 2014), D.E. 29.

order placing the candidate's name on the Democratic primary-election ballot for a congressional district.[2685]

Three days later, the court assigned the case to Judge Katherine B. Forrest,[2686] who ruled that day that the suit was barred by the *Rooker-Feldman* doctrine.[2687]

On May 29, an attorney filed a second federal complaint on behalf of five voters seeking an injunction putting the candidate on the ballot.[2688] Judge Shira A. Scheindlin heard the case on May 30[2689] and issued an opinion denying the plaintiffs relief on June 4.[2690]

> There are many potential grounds that would bar plaintiffs from obtaining relief from this Court. But because of the parties' need for a rapid resolution of this motion—and in accordance with the principle that the Court should not reach questions unnecessary for that resolution—I address only the two simplest ones here: (1) plaintiffs have not shown that the Board has deprived them of any constitutionally-protected interest and (2) even if such a deprivation did occur, plaintiffs have received due process through the putative candidate's challenge to his exclusion from the ballot.[2691]

An appeal was dismissed on August 23 for failure to prosecute it.[2692]

2014: State Senate

Three voters filed a pro se federal complaint in the Southern District on August 19, 2014, seeking an injunction putting a candidate they supported on the September 9 Democratic primary-election ballot for state senator.[2693] Judge Edgardo Ramos issued an order on the following day that the defendants show cause on August 22 why relief should not be granted to

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2685. Complaint, Williams-Bey v. Comm'rs of Elections, No. 1:12-cv-3836 (S.D.N.Y. May 14, 2012), D.E. 1.

2686. Order, *id.* (May 17, 2012), D.E. 4.

Judge Forrest resigned on September 11, 2018. FJC Biographical Directory, *supra* note 2648.

2687. Opinion, *Williams-Bey*, No. 1:12-cv-3836 (S.D.N.Y. May 17, 2012), D.E. 6.

2688. Complaint, Thomas v. N.Y. City Bd. of Elections, No. 1:12-cv-4223 (S.D.N.Y. May 29, 2012), D.E. 1.

2689. Docket Sheet, *id.* (May 29, 2012).

Judge Scheindlin retired on April 29, 2016. FJC Biographical Directory, *supra* note 2648.

2690. Thomas v. N.Y. City Bd. of Elections, 898 F. Supp. 2d 594 (S.D.N.Y. 2012).

2691. *Id.* at 598.

2692. Docket Sheet, Thomas v. N.Y. City Bd. of Elections, No. 12-2766 (2d Cir. July 13, 2012) (D.E. 15).

2693. Complaint, Moore v. McFadden, No. 1:14-cv-6643 (S.D.N.Y. Aug. 19, 2014), D.E. 2.

the plaintiffs.[2694] At the hearing, Judge Ramos took under advisement the plaintiffs' plea for a preliminary injunction.[2695]

An attorney filed an amended complaint on the plaintiffs' behalf on August 25.[2696] Judge Ramos denied the preliminary injunction two days later.[2697] The candidate initially qualified for the ballot, but a few days after confirming the candidate's qualification based on a sufficient number of valid ballot-petition signatures, the county board of elections determined that the number of valid signatures was not sufficient.[2698] A state-court challenge to the candidate's ballot exclusion was unsuccessful because of defective service on the person whose objection resulted in the candidate's disqualification.[2699] On August 29, Judge Ramos explained in an opinion supporting his denial of the preliminary injunction that procedures offered the candidate to contest his exclusion from the ballot were adequate.[2700]

The plaintiffs dismissed their action on September 1.[2701]

Eastern District

2016: Congress

On the day before the June 28, 2016, congressional primary election, a prospective candidate and a voter filed a federal class action in the Eastern District to modify the primary-election date or otherwise remedy the candidate's exclusion from the ballot.[2702] On June 24, following a three-day hearing, a state-court judge found that the candidate had submitted a sufficient number of valid signatures to merit a place on the ballot, but the judge also found that it was too late for a remedy.[2703] On the day that the federal complaint was filed, Judge Joseph F. Bianco denied the plaintiffs immediate relief upon a determination that they were not seeking to en-

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2694. Order, *id.* (Aug. 20, 2014), D.E. 4.

2695. Docket Sheet, *id.* (Aug. 19, 2014).

2696. Amended Complaint, *id.* (Aug. 25, 2014), D.E. 7.

2697. Order, *id.* (Aug. 27, 2014), D.E. 17.

2698. Opinion at 3, *id.* (Aug. 29, 2014), D.E. 21.

2699. *Id.* at 3–5.

2700. *Id.* at 8–19.

2701. Voluntary Dismissal, *id.* (Sept. 1, 2014), D.E. 22.

2702. Complaint, Pidot v. N.Y. State Bd. of Elections, No. 2:16-cv-3527 (E.D.N.Y. June 27, 2016), D.E. 1 [hereinafter E.D.N.Y. *Pidot* Complaint]; *see* Proposed Order to Show Cause, *id.* (June 27, 2016), D.E. 10; *see also* Rick Brand, *Philip Pidot Lawsuit in 3rd C.D. Gets July 11 Hearing*, Newsday, June 30, 2016, at 12.

2703. Opinion, Pidot v. Macedo, No. 3448/2016 (N.Y. Sup. Ct. June 24, 2016), *filed as* Ex. A, E.D.N.Y. *Pidot* Complaint, *supra* note 2702; *see* Paul LaRocco, *Philip Pidot Bid for Primary Ballot "Impossible," Judge Says*, Newsday, June 25, 2016, at 10.

join the next day's election but to enjoin certification of a victor for the candidate's party.[2704] On July 6, Judge Bianco granted the plaintiffs a voluntary dismissal.[2705]

Related Action in the Northern District of New York

Adding an additional voter as a named plaintiff, the candidate filed a federal class-action complaint in the Northern District of New York on July 13.[2706] New York's congressional primary-election date was set in advance of New York's customary September primary-election date by Northern District Judge Gary L. Sharpe in 2012 to comply with the Uniformed and Overseas Citizens Absentee Voting Act of 1986 (UOCAVA), which requires federal absentee ballots to be sent to overseas voters at least forty-five days before the general election.[2707] On July 18, Judge Sharpe denied the candidate's request to regard the new case as related to the closed case resulting in the date order.[2708]

At an August 17 hearing, Judge Frederick J. Scullin, Jr., dismissed the candidate's prospective primary-election opponent as a defendant, because the plaintiffs sought no relief against him, but permitted the opponent to intervene.[2709] Judge Scullin granted the plaintiffs a special primary election to be held on October 6 and ordered election officials to seek a UOCAVA hardship waiver,[2710] which the federal government granted.[2711] The candi-

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2704. Order, *Pidot*, No. 2:16-cv-3527 (E.D.N.Y. June 27, 2016), D.E. 11.

Judge Bianco was elevated to the court of appeals on May 13, 2019. FJC Biographical Directory, *supra* note 2648.

2705. Order, *Pidot*, No. 2:16-cv-3527 (E.D.N.Y. July 6, 2016), D.E. 26; *see* Rick Brand, *Philip Pidot Drops Federal Suit, Plans New One*, Newsday, July 11, 2016, at 12.

2706. Complaint, Pidot v. N.Y. State Bd. of Elections, No. 1:16-cv-859 (N.D.N.Y. July 13, 2016), D.E. 1.

2707. Opinion, United States v. New York, No. 1:10-cv-1214 (N.D.N.Y. Jan. 27, 2012), D.E. 59, 2012 WL 254263; *see* Pub. L. No. 99-410, 100 Stat. 924, *as amended*, 52 U.S.C. §§ 20301–20311; *see also* Robert Timothy Reagan, Overseas Voting: The Uniformed and Overseas Citizens Absentee Voting Act 11–12 (Federal Judicial Center 2016).

2708. Order, *Pidot*, No. 1:16-cv-859 (N.D.N.Y. July 18, 2016), D.E. 11; *see* Notice, *id.* (July 14, 2016), D.E. 6.

2709. Transcript at 3–4, 20, 24, *id.* (Aug. 17, 2016, filed Sept. 7, 2016), D.E. 116.

2710. Order, *id.* (Aug. 17, 2016), D.E. 66; *see* Rick Brand, *Judge Orders Oct. 6 Primary in 3rd Congressional District*, Newsday, Aug. 18, 2016, at 8.

"In all, there are only 246 military and overseas absentees that could play a role in the Oct. 6 GOP primary. State election officials say there are 1,012 military and absentee ballots that could be affected in the general election." Rick Brand, *Military Ballots Go Out for 3rd District Congressional Primary*, Newsday, Aug. 24, 2016, at 10.

2711. Notice, *Pidot*, No. 1:16-cv-859 (N.D.N.Y. Aug. 29, 2016), D.E. 99; *see* Michael Gormley, *Jack Martins Loses Bid to Stop Absentee Ballots in 3rd CD Race*, Newsday, Sept.

date's primary-election opponent filed a notice of appeal on August 30 challenging the order requiring him to face the candidate plaintiff in a primary election.[2712]

Judge Scullin granted a motion by the opposing political party's nominee to intervene to oppose any effort to move the date of the general election.[2713] Judge Scullin also accepted an amicus curiae brief from the Reserve Officers Association urging a delay in the general election for the one congressional seat to allow enough time for overseas voters to participate.[2714] On August 30, Judge Scullin decided not to order a change in the general-election date.[2715]

At the conclusion of oral argument on September 14, the court of appeals vacated Judge Scullin's injunction and ordered the district court to dismiss the complaint.[2716] In a summary order issued two days later, the court explained that although the *Rooker-Feldman* doctrine did not bar the relief that Judge Scullin ordered, because the candidate actually won in state court, injunctive relief was not supported by the equities, especially because the disappointing outcome of failing to be included on the primary-election ballot nevertheless resulted from due process.[2717]

7, 2016, at 12.

2712. Notice of Appeal, *Pidot*, No. 1:16-cv-859 (N.D.N.Y. Aug. 30, 2016), D.E. 101; *see* Michael Gormley, *Jack Martins Considers Appeal After Denied Moving 3rd CD Election*, Newsday, Sept. 1, 2016, at 33.

2713. Docket Sheet, *Pidot*, No. 1:16-cv-859 (N.D.N.Y. July 13, 2016) [hereinafter N.D.N.Y. *Pidot* Docket Sheet] (D.E. 98); *see* Intervention Motion, *id.* (Aug. 25, 2016), D.E. 81; *see also* Michael Gormley, *Martins Appeals to Move 3rd CD General Election to December*, Newsday, Sept. 2, 2016, at 11.

2714. Amicus Brief, *Pidot*, No. 1:16-cv-859 (N.D.N.Y. Aug. 26, 2016), D.E. 91; N.D.N.Y. *Pidot* Docket Sheet, *supra* note 2713 (D.E. 90).

2715. Opinion, *Pidot*, No. 1:16-cv-859 (N.D.N.Y. Aug. 31, 2016), D.E. 103; Transcript at 25, *id.* (Aug. 30, 2016, filed Sept. 6, 2016), D.E. 115; Minutes, *id.* (Aug. 30, 2016), D.E. 102; *see* Michael Gormley, *Judge Keeps Key LI Congressional Election in November*, Newsday, Aug. 31, 2016, at 6.

2716. Oral Argument, Pidot v. N.Y. State Bd. of Elections, No. 16-3028 (2d Cir. Sept. 14, 2016), D.E. 132, ww3.ca2.uscourts.gov/decisions/isysquery/b4e03066-0e5e-4942-801c-69efd89e4c32/1/doc/16-3028.mp3 (audio recording); *see* Order to Expedite, *id.* (Sept. 2, 2016), D.E. 33; *see also* Rick Brand, *Federal Appeals Court Rejects GOP Primary in 3rd CD*, Newsday, Sept. 15, 2016, at 14.

2717. Martins v. Pidot, 663 F. App'x 814 (2d Cir. 2016).

Ralph Nader Off Ohio's Ballot in 2004

Blankenship v. Blackwell (Edmund A. Sargus, Jr., 2:04-cv-965) and Nader v. Blackwell (George C. Smith, 2:04-cv-1052) (S.D. Ohio)

> Because Ralph Nader failed to qualify for the 2004 presidential ballot in Ohio, his supporters filed a federal complaint challenging the constitutionality of a requirement that ballot-petition circulators be state residents. Because of unclean hands—petition circulators had falsely claimed to be state residents—a district judge denied the plaintiffs immediate relief. On election day, the Nader campaign challenged Ohio's requirement that write-in candidates file a declaration of intent fifty days before the election. The court of appeals determined that the secretary of state had qualified immunity.
>
> *Topics:* Getting on the ballot; write-in candidate; laches; intervention; case assignment.

Supporters of Ralph Nader for President in 2004 filed a federal action in the Southern District of Ohio on October 6, 2004, challenging the constitutionality of Ohio's requirement that persons circulating petitions to place a candidate on Ohio's ballot be Ohio residents.[2718] The plaintiffs sought a temporary restraining order and a preliminary injunction.[2719] There were 14,473 signatures supporting Nader's ballot petition, but only 6,464 were determined to be valid.[2720] In response to a challenge, 1,956 of those were disqualified because the circulators were not Ohio residents, although they falsely represented that they were.[2721] That meant that Nader had fewer than the 5,000 signatures required to be on the ballot.[2722]

2718. Complaint, Blankenship v. Blackwell, No. 2:04-cv-965 (S.D. Ohio Oct. 6, 2004), D.E. 1; Blankenship v. Blackwell, 341 F. Supp. 2d 911, 913 (S.D. Ohio 2004); *see* John McCarthy, *Five Election Lawsuits Filed in Courts in Ohio*, Cincinnati Post, Oct. 12, 2004, at A9; Andrew Welsh-Huggins, *Nader Sues State Over Signature-Gathering Law*, Akron Beacon J., Oct. 8, 2004, at B4.

The statute also required that circulators be registered voters. Ohio Rev. Code § 3503.06(A); Blankenship v. Blackwell, 429 F.3d 254, 255 (6th Cir. 2005).

2719. Motion, *Blankenship*, No. 2:04-cv-965 (S.D. Ohio Oct. 6, 2004), D.E. 2; *Blankenship*, 341 F. Supp. 2d at 913.

2720. *Blankenship*, 429 F.3d at 255; *Blankenship*, 341 F. Supp. 2d at 914; Blankenship v. Blackwell, 103 Ohio St. 3d 567, 567–68, 817 N.E. 2d 382, 383–84 (Ohio 2004); *see* Laura A. Bischoff, *Nader Ruled off Ohio's Ballot*, Dayton Daily News, Sept. 29, 2004, at 1A; Julie Carr Smyth & T.C. Brown, *Cleveland Plain Dealer*, Sept. 29, 2004, at A1.

2721. *Blankenship*, 429 F.3d at 255–56; *Blankenship*, 341 F. Supp. 2d at 915.

2722. *Blankenship*, 429 F.3d at 255–56; *Blankenship*, 341 F. Supp. 2d at 914, 916; *Blankenship*, 103 Ohio St. 3d at 567–68, 817 N.E. 2d at 383–84; *see* Ohio Rev. Code § 3513.257(A).

On the case's second day, the challengers to Nader's ballot petition moved to intervene,[2723] and Judge Edmund A. Sargus, Jr., ultimately granted intervention, noting that participation of the intervenors did not slow down the case.[2724]

Shortly after the case was filed, Judge Sargus held a telephonic status conference, as specified by the local rule for temporary restraining orders and preliminary injunctions.[2725] Judge Sargus determined that although time was short there was time for briefing by both sides, a little discovery, and oral argument.[2726] Judge Sargus did not issue injunctions without briefing and evidence from both sides unless he had to.[2727]

At an October 12 hearing, Judge Sargus denied the plaintiffs relief and dismissed the case.[2728] Although "[i]t is clear that the requirement of Ohio law that circulators must be residents is a restriction on the guarantees of the First Amendment,"[2729] Judge Sargus determined that the fraud employed in obtaining signatures for Nader constituted unclean hands, which disqualified the plaintiffs from equitable relief.[2730]

On October 18, the court of appeals denied the plaintiffs an emergency injunction, "because they cannot demonstrate a likelihood of success on the merits."[2731] On November 16, 2005, the court of appeals dismissed the appeal as moot.[2732]

2723. Intervention Motion, *Blankenship*, No. 2:04-cv-965 (S.D. Ohio Oct. 7, 2004), D.E. 3; *Blankenship*, 341 F. Supp. 2d at 917.

2724. *Blankenship*, 341 F. Supp. 2d at 917–18 & n.7.

Tim Reagan interviewed Judge Sargus for this report by telephone on August 8, 2012.

2725. *Blankenship*, 341 F. Supp. 2d at 913 n.1; *see* S.D. Ohio L.R. 65.1(a).

2726. Interview with Judge Edmund A. Sargus, Jr., Aug. 8, 2012.

2727. *Id.*

2728. *Blankenship*, 341 F. Supp. 2d 911; Minutes, *Blankenship*, No. 2:04-cv-965 (S.D. Ohio Oct. 12, 2004), D.E. 15; Transcript, *id.* (Oct. 12, 2004, filed Oct. 15, 2004), D.E. 21 [hereinafter *Blankenship* Transcript].

2729. *Blankenship*, 341 F. Supp. 2d at 922.

2730. *Id.* at 924; *Blankenship* Transcript, *supra* note 2728, at 50 ("the record is replete with what can be deemed, I think without fear of overstatement, instances of actual fraud"); *see* Stephen Dyer, *Nader Blocked from Ohio Ballot*, Akron Beacon J., Oct. 13, 2004, at B1; Alan Johnson, *Nader's Plea to Be on Ballot Denied*, Columbus Dispatch, Oct. 13, 2004, at 4B.

2731. Order, Blankenship v. Blackwell, No. 04-4259 (6th Cir. Oct. 18, 2004), 2004 WL 2390113; *see* Lisa Cornwell, *Appeals Court Denies Nader's Bid for Ballot*, Cincinnati Post, Oct. 19, 2004, at A3.

2732. Blankenship v. Blackwell, 429 F.3d 254, 259 (6th Cir. 2005).

Two days before the plaintiffs filed the federal action, they sought a writ of mandamus from Ohio's supreme court.[2733] On October 22, 2004, Ohio's supreme court denied the writ because of laches: the plaintiffs had waited until too close to the election to challenge the applicable Ohio statute.[2734] The U.S. Supreme Court declined to enjoin this ruling.[2735]

On the day of the election, the plaintiffs in the first federal action, joined by the candidates for President and Vice President themselves, filed another federal action challenging the constitutionality of an Ohio statute preventing the counting of write-in votes for Nader because he had not filed a declaration of intent at least fifty days before the election.[2736] With the complaint, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction.[2737] After oral argument that same day,[2738] Judge George C. Smith denied the motion.[2739] Judge Smith held that the fifty-day filing requirement was "sufficiently narrowly drawn to serve an important state interest and survives close scrutiny."[2740] In addition, the claims were barred by laches because they came nearly two months after the ballot signatures were challenged, the reason a write-in candidacy became necessary.[2741] On March 1, 2005, Judge Smith dismissed the case as moot.[2742]

In 2006, Nader filed a nominal damages suit against Ohio's secretary of state to again challenge the constitutionality of Ohio's residency requirement for petition circulators.[2743] The court originally assigned the case to

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2733. Blankenship v. Blackwell, 103 Ohio St. 3d 567, 569, 817 N.E. 2d 382, 385 (Ohio 2004).

2734. *Id.* at 567, 571–75, 817 N.E. 2d at 383, 386–89; *see* Alan Johnson, *Nader Too Late in Requesting Spot on Ballot, State's High Court Rules*, Columbus Dispatch, Oct. 23, 2004, at 4D.

2735. Blankenship v. Blackwell, 543 U.S. 951 (2004); *see Supreme Court Declines to Put Nader on Ohio Ballot*, Cincinnati Post, Oct. 27, 2004, at A6.

2736. Complaint, Nader v. Blackwell, No. 2:04-cv-1052 (S.D. Ohio Nov. 2, 2004), D.E. 1.

The statute later required that the declaration be filed seventy-two days before the election. Ohio Rev. Code § 3513.041.

2737. Motion, *Nader*, No. 2:04-cv-1052 (S.D. Ohio Nov. 2, 2004), D.E. 2.

2738. Minutes, *id.* (Nov. 2, 2004), D.E. 4.

2739. Order, *id.* (Nov. 2, 2004), D.E. 3 [hereinafter Nov. 2, 2004, *Nader* Order].

Judge Smith died on April 15, 2020. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

2740. Nov. 2, 2004, *Nader* Order, *supra* note 2739, at 4.

2741. *Id.* at 3–4.

2742. Order, *Nader*, No. 2:04-cv-1052 (S.D. Ohio Mar. 1, 2005), D.E. 7.

2743. Complaint, Nader v. Blackwell, No. 2:06-cv-821 (S.D. Ohio Sept. 28, 2006),

Judge Michael H. Watson, but approximately one month later it reassigned the case to Judge Sargus as related to his earlier petition case.[2744] In 2007, Judge Sargus determined that Nader did not have standing to challenge the secretary's application of the statute when the contested signatures were tainted by fraud, and furthermore the secretary had both qualified and absolute immunity with respect to the constitutionality of his application of the statute.[2745] In 2008, the court of appeals determined that Nader had standing and the residency requirement was unconstitutional, but the secretary had qualified immunity from suit.[2746]

With many types of cases, and election cases were certainly one of those types, Judge Sargus believed that it was very important for the court to have clear and rigorous procedures for case assignment, such as his court had developed.[2747] The principle of random assignment was crucially important.[2748] If recusal is required for the assigned judge, the case should be reassigned at random rather than to a convenient colleague, even if that makes reassignment somewhat more cumbersome.[2749] Senior judges in the Southern District of Ohio were eligible to handle temporary restraining orders in election cases only if they were available for such orders throughout the year.[2750]

Fatal Defect in a Petition to Replace a Primary-Election Candidate

Diaz v. New York City Board of Elections (I. Leo Glasser, E.D.N.Y. 1:04-cv-3836)

> The district judge denied a discrimination claim filed by a plaintiff who was excluded as a replacement candidate for a primary election, because the plaintiff's replacement application omitted a required signed consent to replace the withdrawn candidate.
>
> *Topics:* Getting on the ballot; equal protection; primary election; intervention.

D.E. 2.

2744. Order, *id.* (Sept. 28, 2006), D.E. 3; Interview with Judge Edmund A. Sargus, Jr., Aug. 8, 2012 (noting that a related case was one in which the relief sought could conflict with the outcome of another case).

2745. Opinion at 5–8, *Nader*, No. 2:04-cv-1052 (S.D. Ohio Sept. 28, 2006), D.E. 16.

2746. Nader v. Blackwell, 545 F.3d 459, 478–79 (6th Cir. 2008).

2747. Interview with Judge Edmund A. Sargus, Jr., Aug. 8, 2012.

2748. *Id.*

2749. *Id.*

2750. *Id.*

A prospective candidate for female member of the Democratic State Committee for the 54th Assembly District filed a federal complaint in the Eastern District of New York on September 3, 2004, challenging her exclusion from the September 14 primary-election ballot.[2751] On the day that the case was filed, Magistrate Judge Steven M. Gold set the case for hearing on September 9.[2752] On September 7, District Judge I. Leo Glasser set the September 9 hearing for his courtroom.[2753]

Judge Glasser denied the plaintiff a preliminary injunction putting her on the ballot.[2754] He issued an opinion explaining his ruling on September 14.[2755]

The plaintiff complained of discrimination in rejecting her application to replace a candidate who had withdrawn from the committee primary election.[2756] Judge Glasser determined that omission from the plaintiff's ballot petition of a signed consent to replace the withdrawn candidate was a fatal defect and no discrimination was shown.[2757]

On September 6, 2005, Judge Glasser signed a voluntary dismissal.[2758]

2751. Complaint, Diaz v. N.Y. City Bd. of Elections, No. 1:04-cv-3836 (E.D.N.Y. Sept. 3, 2004), D.E. 1 [hereinafter *Diaz* Complaint].

2752. Order to Show Cause, *id.* (Sept. 3, 2004), D.E. 3.

Judge Gold retired on January 4, 2021. Judicial Milestones, www.uscourts.gov/judicial-milestones/steven-m-gold.

2753. Order to Show Cause, *Diaz*, No. 1:04-cv-3836 (E.D.N.Y. Sept. 7, 2004), D.E. 2.

2754. Diaz v. N.Y. City Bd. of Elections, 335 F. Supp. 2d 364 (E.D.N.Y. 2004); Minutes, *Diaz*, No. 1:04-cv-3836 (E.D.N.Y. Sept. 9, 2004), D.E. 8.

2755. Opinion, *Diaz*, No. 1:04-cv-3836 (Sept. 14, 2004), D.E. 7, 335 F. Supp. 2d 364.

2756. *Diaz* Complaint, *supra* note 2751; *Diaz*, 335 F. Supp. 2d at 365–67.

2757. *Diaz*, 335 F. Supp. 2d at 365–68.

2758. Order, *Diaz*, No. 1:04-cv-3836 (E.D.N.Y. Sept. 6, 2005), D.E. 15.

Failure to Qualify for a Primary Election Because of Filing Defects

Matheson v. New York City Board of Elections (Edward R. Korman, 1:03-cv-4170), Marchant v. New York City Board of Elections (Kiyo A. Matsumoto, 1:11-cv-4099), and Marchant v. New York City Board of Elections (Roslynn R. Mauskopf, 1:10-cv-3847) (E.D.N.Y.) and Marchant v. New York City Board of Elections (Katherine Polk Failla, 1:13-cv-5493), Escoffery-Bey v. New York City Board of Elections (Jesse M. Furman, 1:13-cv-5656), Keeling v. Sanchez (Paul A. Engelmayer, 1:13-cv-5731), and Newsome v. New York City Board of Elections (Ronnie Abrams, 1:13-cv-5787) (S.D.N.Y.)

> In 2003, 2010, 2011, and 2013, supporters of a perennial New York primary-election candidate filed federal actions—the first three in the Eastern District of New York and the last in the Southern District of New York—challenging the candidate's exclusion from the ballot for insufficient ballot-petition signatures. The first action was successful. Similar actions on behalf of other candidates filed in the Southern District of New York in 2013 were unsuccessful, in one case because relief had been obtained in parallel state-court proceedings.
>
> *Topics:* Getting on the ballot; primary election; matters for state courts; pro se party; case assignment; attorney fees; intervention.

On August 22, 2003, eleven voters filed a federal complaint in the Eastern District of New York seeking an injunction placing Everly Brown on the September 9 Democratic primary-election ballot for New York's city council, alleging that some of the candidate's ballot-petition signatures were improperly ruled invalid.[2759] Judge John Gleeson set the case for hearing before Judge Nicholas G. Garaufis on August 28.[2760] On August 25, the court reassigned the case to Judge Edward R. Korman.[2761]

At a three-hour proceeding on Wednesday, August 27, Judge Korman concluded that there might have been enough valid signatures improperly invalidated, and because inspection of voting machines was scheduled for

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2759. Complaint, Matheson v. N.Y. City Bd. of Elections, No. 1:03-cv-4170 (E.D.N.Y. Aug. 22, 2003), D.E. 1.

2760. Order to Show Cause, *id.* (Aug. 22, 2003), D.E. 2.

Judge Gleeson resigned on March 9, 2016. Federal Judicial Center Biographical Directory of Article III Federal Judges [hereinafter FJC Biographical Directory], www.fjc.gov/history/judges.

2761. Docket Sheet, *Matheson*, No. 1:03-cv-4170 (E.D.N.Y. Aug. 22, 2003).

early the following week, there was time to remedy a ballot-exclusion error.[2762] Judge Korman and the parties agreed that they would reassemble in two days, after the parties clarified the factual record.[2763] Judge Korman and the parties discussed and debated the facts for a few hours on Friday.[2764]

On September 2, Judge Korman ruled from the bench that the plaintiffs should be granted a preliminary injunction.[2765] As there was only one other candidate for the office at issue in the primary election, an erroneous finding in favor of the plaintiffs could easily be cured by declaring the opposing candidate the victor, which would be the same result as keeping the plaintiffs' candidate off of the ballot.[2766] Determining that the two previous proceedings amounted to a de facto evidentiary hearing, because participants had first-hand knowledge of facts, although no one was sworn, Judge Korman concluded that Brown had filed 901 valid signatures, one more than required.[2767] These included fifty-six signatures that were invalidated because of what Judge Korman concluded was a scrivener's error included when Brown cured a filing error of omitting a cover sheet.[2768] Judge Korman also included sixteen signatures invalidated because of what another judge had previously concluded was an unconstitutional requirement that signature witnesses be members of the party conducting the primary election.[2769] Judge Korman denied a stay pending appeal.[2770] In 2007, the City

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2762. Audio Transcript, *id.* (Aug. 27, 2003).

2763. *Id.*

2764. Audio Transcript, *id.* (Aug. 29, 2003).

2765. Audio Transcript, *id.* (Sept. 2, 2003) [hereinafter Sept. 2, 2003, *Matheson* Audio Transcript]; Order, *id.* (Sept. 5, 2003), D.E. 14.

2766. Sept. 2, 2003, *Matheson* Audio Transcript, *supra* note 2765.

2767. *Id.*

2768. *Id.*

2769. *Id.*; *see* Amended Opinion at 28, Kaloshi v. N.Y. City Bd. of Elections, No. 1:02-cv-4762 (E.D.N.Y. Sept. 13, 2002), D.E. 9, 2002 WL 31051530, *rev'd on other grounds*, Kaloshi v. Spitzer, 69 F. App'x 17 (2d Cir. 2003).

Following a 2008 Supreme Court decision in *New York State Board of Elections v. López Torres*, 552 U.S. 196 (2008), that selecting partisan nominees for judicial offices in New York by primary-election-informed party convention rather than direct primary election did not violate the constitutional rights of potential candidates disfavored by party leaders, the court of appeals ruled that New York could require signature witnesses to be party members, Maslow v. Bd. of Elections, 658 F.3d 291, 294 (2d Cir. 2011), *cert. denied*, 565 U.S. 1275 (2012).

2770. Sept. 2, 2003, *Matheson* Audio Transcript, *supra* note 2765; *see* Order, Matheson v. N.Y. City Bd. of Elections, No. 03-7920 (2d Cir. May 12, 2004) (dismissing an ap-

of New York agreed to pay the plaintiffs' counsel $20,000 in attorney fees.[2771]

An amended complaint filed on May 26, 2006, challenged the constitutionality of New York City's board of elections and how New York's supreme-court judges were selected.[2772] Judge Korman dismissed the complaint on December 18, 2007.[2773]

Eight voters filed a federal complaint and an application for an "Order to showcase" on August 20, 2010, seeking to put Brown on the September 14 Democratic primary-election ballot for state senate.[2774] The voters alleged that disqualification of ballot-petition signatures for the plaintiffs' voter-registration defects violated the National Voter Registration Act and the Help America Vote Act.[2775] Judge Carol B. Amon set the case for hearing before Judge Roslynn R. Mauskopf on September 2.[2776] On August 26, one of the plaintiffs announced that he would proceed pro se.[2777] At the hearing, Judge Mauskopf denied the plaintiffs immediate relief.[2778] Judge Amon signed a stipulated dismissal of the action on February 16, 2011.[2779]

Twenty-four supporters of Brown's candidacy for Queens County's district attorney in the September 13, 2011, Democratic primary election

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peal as moot), *filed as* Order, *Matheson*, No. 1:03-cv-4170 (E.D.N.Y. May 24, 2004), D.E. 23.

2771. Stipulation, *Matheson*, No. 1:03-cv-4170 (E.D.N.Y. Jan. 18, 2007), D.E. 47.

2772. Amended Complaint, *id.* (May 26, 2006), D.E. 36.

2773. Opinion, *id.* (Dec. 18, 2007), D.E. 61.

2774. Complaint, Marchant v. N.Y. City Bd. of Elections, No. 1:10-cv-3847 (E.D.N.Y. Aug. 20, 2010), D.E. 1 [hereinafter 2010 *Marchant* Complaint].

A 1997 election action by Brown was unsuccessful. Docket Sheet, Brown v. Cohen, No. 1:97-cv-6064 (E.D.N.Y. Oct. 21, 1997).

2775. 2010 *Marchant* Complaint, *supra* note 2774; *see* NVRA, Pub. L. No. 103-31, 107 Stat. 77 (1993), *as amended*, 52 U.S.C. §§ 20501–20511; HAVA, Pub. L. No. 107-252, 116 Stat. 1666 (2002), *as amended*, 52 U.S.C. §§ 20901–21145. *See generally* Robert Timothy Reagan, Motor Voter: The National Voter Registration Act (Federal Judicial Center 2014); Marie Leary & Robert Timothy Reagan, The Help America Vote Act (Federal Judicial Center 2012); Symposium, *HAVA @ 10*, 12 Election L.J. 111 (2013).

2776. Order to Show Cause, *Marchant*, No. 1:10-cv-3847 (E.D.N.Y. Aug. 20, 2010), D.E. 3.

Judge Mauskopf became director of the Administrative Office of the U.S. Courts in 2021. FJC Biographical Directory, *supra* note 2760.

2777. Notice, *Marchant*, No. 1:10-cv-3847 (E.D.N.Y. Aug. 26, 2010), D.E. 5.

A 1996 action by the pro se party was resolved by stipulation placing him on the Republican primary-election ballot for state senate. Docket Sheet, McCabe v. Comm'rs of Elections, No. 1:96-cv-4121 (E.D.N.Y. Aug. 20, 1996).

2778. Minutes, *Marchant*, No. 1:10-cv-3847 (E.D.N.Y. Sept. 2, 2010), D.E. 12.

2779. Stipulated Dismissal, *id.* (Feb. 16, 2011), D.E. 17.

filed a pro se federal complaint on August 23, challenging the invalidation of ballot-petition signatures for mismatches between signers' and witnesses' petition addresses and their registration addresses.[2780] Judge Sandra Townes set the case for hearing before Judge Kiyo A. Matsumoto on August 30.[2781]

At the hearing, the first-named plaintiff appeared pro se, and an attorney appeared on behalf of fourteen plaintiffs, but he never filed a notice of appearance.[2782] On September 2, Judge Matsumoto denied the plaintiffs immediate relief.[2783] Judge Matsumoto signed a stipulated dismissal of the case on June 18, 2012.[2784]

Just over one month before the September 10, 2013, Democratic primary election for mayor of New York City, Brown and seven other voters filed a pro se federal complaint in the Southern District of New York seeking to overturn Brown's disqualification from the election for errors and omissions in his ballot application papers.[2785]

On August 7, the day after the complaint was filed, Judge Katherine Polk Failla issued an order to show cause on August 14 why relief should not be granted.[2786] At the conclusion of the August 14 hearing, Judge Failla asked counsel for the board of elections to order a copy of the tran-

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2780. Complaint, Marchant v. N.Y. City Bd. of Elections, No. 1:11-cv-4099 (E.D.N.Y. Aug. 23, 2011), D.E. 1; Marchant v. N.Y. City Bd. of Elections, 815 F. Supp. 2d 568, 571–73 (E.D.N.Y. 2011).

2781. Order to Show Cause, *Marchant*, No. 1:11-cv-4099 (E.D.N.Y. Aug. 25, 2011), D.E. 5; *Marchant*, 815 F. Supp. 2d at 572.

Judge Townes died on February 8, 2018. FJC Biographical Directory, *supra* note 2760.

2782. Transcript at 3–6, *Marchant*, No. 1:11-cv-4099 (E.D.N.Y. Aug. 30, 2011, filed Sept. 14, 2012), D.E. 41; *Marchant*, 815 F. Supp. 2d at 574.

2783. *Marchant*, 815 F. Supp. 2d 568.

On December 3, 2013, Judge Jack B. Weinstein dismissed a pro se complaint filed by Brown on May 3 challenging various ballot-petition requirements preventing Brown's attorney-general candidacy. Opinion, Brown v. N.Y. City Bd. of Elections, No. 1:13-cv-2729 (E.D.N.Y. Dec. 3, 2013), D.E. 21, 2013 WL 6248451; *see* Amended Complaint, *id.* (May 14, 2013), D.E. 7; Complaint, *id.* (May 3, 2013), D.E. 1. Judge Weinstein died on June 15, 2021. FJC Biographical Directory, *supra* note 2760.

2784. Stipulated Dismissal, *Marchant*, No. 1:11-cv-4099 (E.D.N.Y. June 18, 2012), D.E. 39.

An appeal was dismissed for lack of prosecution. Order, Marchant v. N.Y. City Bd. of Elections, No. 11-4453 (2d Cir. May 8, 2012), D.E. 37.

2785. Complaint, Marchant v. N.Y. City Bd. of Elections, 1:13-cv-5493 (S.D.N.Y. Aug. 6, 2013), D.E. 2.

2786. Order, *id.* (Aug. 17, 2013), D.E. 4.

script.[2787] Judge Failla announced that she would review the filings and the transcript and rule within a week.[2788]

On August 16, Judge Failla denied the plaintiffs immediate relief, finding no violations of equal protection or due process in the city's stringent filing requirements.[2789] On September 25, she accepted the plaintiffs' dismissal of the action.[2790]

Meanwhile, four voters filed a federal pro se action on August 13 challenging the exclusion of a candidate from the Democratic primary election for city council.[2791] The court initially referred the case to Judge Failla as possibly related to the mayoral-primary-election case, but three days later the court assigned the case to Judge Jesse M. Furman.[2792] On the day that he got the case, Judge Furman ordered service on the defendant city board of elections and a response from them by August 23.[2793] On August 27, observing no record of service or response, and noting a "reason to believe that Plaintiffs have obtained the relief they were seeking here in a parallel state court action," Judge Furman ordered the plaintiffs to show cause by September 4 why the case should not be dismissed as moot.[2794] Observing no response to this order, Judge Furman dismissed the case on September 9.[2795]

On August 15, a prospective candidate for city council filed a pro se federal complaint challenging her exclusion from the primary-election ballot.[2796] The defendants explained that the candidate was disqualified for filing too few petition signatures.[2797] Judge Paul A. Engelmayer issued an order that defendants show cause on August 23 why relief should not be granted.[2798] At the hearing, he denied the plaintiffs immediate relief.[2799] Be-

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2787. Transcript at 59, *id.* (Aug. 14, 2013, filed May 15, 2014), D.E. 13.

2788. *Id.*

2789. Opinion, *id.* (Aug. 16, 2013), D.E. 9, 2013 WL 4407098.

2790. Order of Discontinuance, *id.* (Sept. 25, 2013), D.E. 12.

2791. Complaint, Escoffery-Bey v. N.Y. City Bd. of Elections, No. 1:13-cv-5656 (S.D.N.Y. Aug. 13, 2013), D.E. 1.

2792. Docket Sheet, *id.* (Aug. 13, 2013).

2793. Order, *id.* (Aug. 16, 2013), D.E. 2.

2794. Order, *id.* (Aug. 27, 2013), D.E. 3; *see* Jennifer H. Cunningham & Denis Slattery, *Off to the Races*, N.Y. Daily News, Sept. 3, 2013, at 28.

2795. Order, *Escoffery-Bey*, No. 1:13-cv-5656 (S.D.N.Y. Sept. 9, 2013), D.E. 4.

2796. Complaint, Keeling v. Sanchez, No. 1:13-cv-5731 (S.D.N.Y. Aug. 15, 2013), D.E. 2.

2797. Defendants' Brief, *id.* (Aug. 22, 2013), D.E. 12.

2798. Order, *id.* (Aug. 15, 2013), D.E. 3.

2799. Order, *id.*(Aug. 23, 2013), D.E. 18.

cause the plaintiff filed nothing further in response to three orders to show cause,[2800] Judge Engelmayer dismissed the case on January 21, 2014.[2801]

A fourth federal pro se complaint filed on August 16, 2013, challenged the exclusion of one of the three plaintiffs from the city-council primary election.[2802] Again, the problem was errors and omissions in the ballot-petition filing.[2803] Judge Ronnie Abrams issued an order that the defendant board of elections show cause why relief should not be granted on August 29.[2804] Later, the hearing was moved to September 6.[2805] At the hearing, Judge Abrams denied the plaintiffs immediate relief.[2806] She dismissed the action on May 23, 2014, for failure to prosecute it, because the plaintiffs did not respond to the board's September 27, 2013, motion to dismiss the complaint.[2807]

Ballot-Access Requirements in Puerto Rico

López-Rutol v. Gracia (Hector M. Laffitte, D.P.R. 3:03-cv-1880)

> A would-be independent candidate for Puerto Rico's senate filed a federal complaint challenging ballot-petition requirements for candidates. The court denied the plaintiff immediate relief. On the one hand, the plaintiffs "waited for the eleventh hour to file the present petition for injunctive relief"; on the other hand, they "erroneously believe[d] that a law imposing any burden upon the right to vote must be subject to strict scrutiny."
>
> *Topics:* Getting on the ballot; laches.

A would-be independent candidate for Puerto Rico's senate and several of his supporters filed a federal complaint in the District of Puerto Rico on August 18, 2003, challenging ballot-petition requirements for candidates.[2808] The complaint sought a temporary restraining order and a preliminary injunction.[2809]

2800. Order, *id.* (Dec. 17, 2013), D.E. 22; Order, *id.* (Nov. 14, 2013), D.E. 21; Order, *id.* (Sept. 30, 2013), D.E. 19.

2801. Order, *id.* (Jan. 21, 2014), D.E. 23.

2802. Complaint, Newsome v. N.Y. City Bd. of Elections, No. 1:13-cv-5787 (S.D.N.Y. Aug. 16, 2013), D.E. 2.

2803. *See* Defendant's Brief, *id.* (Sept. 3, 2013), D.E. 14.

2804. Order, *id.* (Aug. 16, 2013), D.E. 3.

2805. Order, *id.* (Aug. 26, 2013), D.E. 6.

2806. Order, *id.* (Sept. 6, 2013), D.E. 18.

2807. Order, *id.* (May 23, 2014), D.E. 24; *see* Order, *id.* (Apr. 21, 2014), D.E. 23; Order, *id.* (Jan. 6, 2014), D.E. 22; Motion to Dismiss, *id.* (Sept. 27, 2013), D.E. 19.

2808. Docket Sheet, López-Rutol v. Gracia, No. 3:03-cv-1880 (D.P.R. Aug. 18, 2003); Opinion at 1–2 & nn.1–2, *id.* (Sept. 2, 2003), D.E. 12 [hereinafter *López-Rutol* Opinion].

2809. Order to Show Cause, *id.* (Aug. 19, 2003), D.E. 4 [hereinafter *López-Rutol* Order

Judge Hector M. Laffitte issued an order to show cause why injunctive relief should not be granted and set the matter for hearing on August 22.[2810] At the hearing, Judge Laffitte denied the plaintiffs immediate injunctive relief, and he issued an opinion on the matter on September 2.[2811] On the one hand, the plaintiffs "waited for the eleventh hour to file the present petition for injunctive relief"; on the other hand, they "erroneously believe[d] that a law imposing any burden upon the right to vote must be subject to strict scrutiny."[2812] Judge Laffitte found Puerto Rico's ballot-access petition requirements to be reasonable.[2813]

On September 29, Judge Laffitte accepted the plaintiffs' voluntary dismissal.[2814]

Disqualifying Inactive Voters from Candidacy Petitions

Cunningham v. Chicago Board of Election Commissioners (James B. Moran, N.D. Ill. 1:03-cv-1160)

> A February 18, 2003, federal complaint alleged improper disqualification of candidates because of petition signatures by inactive voters. On February 21, the district judge denied the plaintiffs immediate relief because they had not shown that their preferred candidates would be on the ballot but for the disqualification of signatures by inactive voters. The issue was resolved by stipulation in a subsequent case.
>
> *Topic:* Getting on the ballot.

On February 18, 2003, eight voters and five political officials filed a federal complaint in the Northern District of Illinois challenging the disqualification of two candidates for a February 25 election for Chicago's city clerk and fourth ward alderman.[2815] The complaint alleged improper disqualifi-

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to Show Cause].

2810. Order, *id.* (Aug. 20, 2003), D.E. 5; *López-Rutol* Order to Show Cause, *supra* note 2809.

Judge Laffitte retired on February 16, 2007. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

2811. *López-Rutol* Opinion, *supra* note 2808.

2812. *Id.* at 4–5.

2813. *Id.*

2814. Judgment, *López-Rutol*, No. 3:03-cv-1880 (D.P.R. Sept. 29, 2003), D.E. 19.

2815. Complaint, Cunningham v. Chi. Bd. of Election Comm'rs, No. 1:03-cv-1160 (N.D. Ill. Feb. 18, 2003), D.E. 1 [hereinafter *Cunningham* Complaint]; *see* Dave Newbart, *Lawsuit Aims to Block Vote Over City Clerk Ballot*, Chi. Sun-Times, Feb. 19, 2003, at 16; Fran Spielman, *Clerk Candidate, Former Alderman Off the Ballot*, Chi. Sun-Times, Feb. 13, 2003, at 7 (reporting that inactive voters were voters who had not voted in the previous two elections); *Suit Seeks to Delay Election*, Chi. Trib., Feb. 19, 2003, at 5.

cation of petition signatures by inactive voters.[2816] With their complaint, the plaintiffs filed a motion for a preliminary injunction.[2817]

The political plaintiffs were Jesse Jackson, as president of Rainbow Push, and four legislators for legislative districts including the residences of the voter plaintiffs, who were suing on behalf of their "fiduciary responsibility to ensure enforcement of federal and state voting laws and ensuring equal treatment under the law": three members of the U.S. Congress and one member of Illinois's senate.[2818] The plaintiffs named as defendants Chicago's board of election commissioners and its members.[2819]

On February 19, Judge James B. Moran took the plaintiffs' motion under advisement and ordered the plaintiffs to respond by the following day to the defendants' motion to dismiss the action.[2820] On February 21, Judge Moran denied the plaintiffs preliminary relief on concluding that they had not shown that their preferred candidates would be on the ballot but for the complaint's issue respecting inactive voters.[2821]

On April 3, Judge Moran dismissed the action for lack of prosecution.[2822]

On April 30, six of the original voter plaintiffs plus eight others filed another federal complaint charging that the policy of disqualifying candidacy petition signatures by inactive voters had a disparate impact on African American voters.[2823] Judge George W. Lindberg approved a stipulated dismissal of the action on September 9.[2824]

2816. *Cunningham* Complaint, *supra* note 2815, at 2–5.

2817. Preliminary-Injunction Motion, *Cunningham*, No. 1:03-cv-1160 (N.D. Ill. Feb. 18, 2003), D.E. 2.

2818. *Cunningham* Complaint, *supra* note 2815, at 6–7 (describing plaintiffs Jesse Jackson, Jr., Bobby Rush, Danny K. Davis, and James T. Meeks).

2819. *Cunningham* Complaint, *supra* note 2815, at 7–8.

2820. Minutes, *Cunningham*, No. 1:03-cv-1160 (N.D. Ill. Feb. 19, 2003), D.E. 5.

Judge Moran died on April 21, 2009. Federal Judicial Center Biographical Directory of Article III Federal Judges [hereinafter FJC Biographical Directory], www.fjc.gov/history/judges.

2821. Minutes, *Cunningham*, No. 1:03-cv-1160 (N.D. Ill. Feb. 21, 2003), D.E. 7, 2003 WL 444023.

2822. Minutes, *id.* (Apr. 3, 2003), D.E. 8.

2823. Complaint, Peery v. Bd. of Election Comm'rs, No. 1:03-cv-2917 (N.D. Ill. Apr. 30, 2003), D.E. 1.

2824. Minutes, *Peery*, No. 1:03-cv-2917 (N.D. Ill. Apr. 30, 2003), D.E. 10.

Judge Lindberg died on March 19, 2010. FJC Biographical Directory, *supra* note 2820.

Allowing Any Voter to Challenge Primary-Election Ballot Petitions

Queens County Republican Committee ex rel. Maltese v. New York State Board of Elections (Arthur D. Spatt, 2:02-cv-4836) and Soleil v. New York (David G. Trager and Allyne R. Ross, 1:04-cv-3247) (E.D.N.Y.)

> A district judge denied a challenge to election laws that permit persons outside of a political party to challenge primary-election ballot petitions. In a case filed two years later, a different district judge in the same district agreed with the first judge's reasoning and dismissed a complaint alleging that persons not wishing to run should not be able to challenge ballot petitions.
>
> *Topics:* Getting on the ballot; primary election; matters for state courts; case assignment; pro se party; class action; laches; party procedures; recusal.

The sole Republican candidate for a congressional seat in New York, who would be the party's November 5, 2002, general-election candidate because no other candidate qualified for the September 10 Republican Party primary election for the seat, filed a federal complaint in the Eastern District of New York on September 4 seeking to invalidate a challenge to his ballot-petition signatures, arguing that such challenges should be limited to party members.[2825]

Judge Arthur D. Spatt heard the case on September 13[2826] and denied the plaintiffs immediate relief on September 21.[2827] "First, the laws apply equally to all parties, both major and minor."[2828] Further, "non-party challenges assist the state in making sure that a candidate has met the . . . sig-

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2825. Complaint, Queens Cty. Republican Comm. *ex rel.* Maltese v. N.Y. State Bd. of Elections, No. 2:02-cv-4836 (E.D.N.Y. Sept. 4, 2002), D.E. 1; Queens Cty. Republican Comm. *ex rel.* Maltese v. N.Y. State Bd. of Elections, 222 F. Supp. 2d 341, 343–44 (E.D.N.Y. 2002).

2826. Docket Sheet, *Maltese*, No. 2:02-cv-4836 (E.D.N.Y. Sept. 4, 2002) [hereinafter *Maltese* Docket Sheet]; *Maltese*, 222 F. Supp. 2d at 345 ("All parties agreed that the determination of the request for the preliminary injunction is solely a question of law and that no evidentiary hearing is required.").

Judge Spatt died on June 12, 2020. Federal Judicial Center Biographical Directory of Article III Federal Judges [hereinafter FJC Biographical Directory], www.fjc.gov/history/judges.

2827. *Maltese*, 222 F. Supp. 2d 341.

2828. *Id.* at 349.

nature ballot access requirement."[2829] The case was closed by stipulation on October 30.[2830]

A lawyer wishing to run in the September 14, 2004, Democratic primary election for state senate and a voter filed a pro se federal class-action complaint in the Eastern District of New York on July 29, challenging the ability of persons other than competing candidates to challenge ballot petitions.[2831] The court assigned the case to Judge David G. Trager as related to a case filed by the same lawyer in 1998.[2832]

Judge Allyne R. Ross, who was on miscellaneous duty that week, presided over a hearing in the case on August 6 at which she denied the plaintiffs, for the second time, a temporary restraining order.[2833] She stated in court that she did not think the plaintiffs would prevail on their claim that voters should not be able to challenge ballot petitions.[2834] After the complaint was filed, the plaintiffs added a challenge in their papers to the accuracy of the board of elections' review of the plaintiffs' petition signatures, but Judge Ross did not see how the federal court had jurisdiction over that issue.[2835]

A state-court action filed on August 9 was dismissed on the next day because of the lawyer's procedural errors.[2836]

Reviewing an amended complaint filed on August 12, Judge Trager denied the plaintiffs a preliminary injunction on September 2.[2837] The lawyer did not appear on the September 14 primary-election ballot.[2838]

2829. *Id.*

2830. *Maltese* Docket Sheet, *supra* note 2826 (D.E. 17).

2831. Complaint, Soleil v. New York, No. 1:04-cv-3247 (E.D.N.Y. July 29, 2004), D.E. 1; Opinion at 5–6, *id.* (Mar. 22, 2005), D.E. 33 [hereinafter *Soleil* Opinion], 2005 WL 662682.

2832. Notice, *id.* (July 29, 2004), D.E. 2; *see* Docket Sheet, Soleil v. Bd. of Elections, No. 1:98-cv-5976 (E.D.N.Y. Sept. 25, 1998).

Judge Trager died on January 5, 2011. FJC Biographical Directory, *supra* note 2826.

2833. Transcript, *Soleil*, No. 1:04-cv-3247 (E.D.N.Y. Aug. 6, 2004, filed Aug. 9, 2004), D.E. 3 [hereinafter *Soleil* Transcript]; Minutes, *id.* (Aug. 6, 2004), D.E. 12; Order, *id.* (Aug. 2, 2004, filed Aug. 20, 2004), D.E. 22; *Soleil* Opinion, *supra* note 2831, at 6–7.

2834. *Soleil* Transcript, *supra* note 2833, at 7, 10.

2835. *Id.* at 8–18.

2836. *Soleil* Opinion, *supra* note 2831, at 7.

2837. Minutes, *Soleil*, No. 1:04-cv-3247 (E.D.N.Y. Sept. 2, 2004), D.E. 25; *Soleil* Opinion, *supra* note 2831, at 8; *see* Amended Complaint, *Soleil*, No. 1:04-cv-3247 (E.D.N.Y. Aug. 12, 2004), D.E. 8.

On September 7, 2004, the court assigned a related case to Judge Trager: a class action filed that day by a prospective primary-election candidate for the state's assembly and five supporters, Complaint, Bowser v. Bd. of Elections, No. 1:04-cv-3848 (E.D.N.Y. Sept. 7,

On March 22, 2005, Judge Trager dismissed the case.[2839] Agreeing with Judge Spatt's analysis in the 2002 case, Judge Trager concluded that it was constitutional for New York to allow voters to challenge ballot petitions.[2840] Judge Trager also noted the plaintiffs' ultimate concession that New York itself was immune from being a defendant in the case because of the Eleventh Amendment.[2841]

Requirement That Ballot-Petition Witnesses for a Primary Election Be Members of the Party

Kaloshi v. New York City Board of Elections (Sterling Johnson, Jr., 1:02-cv-4762), Brown v. New York City Board of Elections (Raymond J. Dearie, 1:04-cv-3662), and Maslow v. Wilson (Edward R. Korman and Nicholas G. Garaufis, 1:06-cv-3683) (E.D.N.Y.)

> A district judge ordered a candidate's name added to a 2002 primary-election ballot for state senate on a finding that it was unconstitutional to require that ballot-petition signature witnesses be registered members of the party. After the election, the court of appeals vacated the holding, determining that the candidate, who did not prevail in the election, did not have enough signatures to qualify for the ballot after all, even after invalidations for the unconstitutional requirement were taken into account. An action filed in 2004 in the same court challenging the party-membership requirement was unsuccessful, because the second district judge did not agree with the first judge's conclusion. Neither did a district judge presiding over a case filed in 2006, and the court of appeals affirmed the last judge's ruling.
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> *Topics:* Getting on the ballot; primary election; intervention; matters for state courts; case assignment.

On August 28, 2002, six prospective candidates in September Democratic primary elections in New York for state senate, assembly, and party com-

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2004), D.E. 1; *see* Notice of Related Case, *id.* (Sept. 7, 2004), D.E. 2, which was withdrawn by stipulation on September 22, Stipulation, *id.* (Sept. 22, 2004), D.E. 7; *see* Docket Sheet, *id.* (Sept. 7, 2004) (noting the September 9, 2004, denial of a preliminary injunction); Order to Show Cause, *id.* (Sept. 7, 2004), D.E. 8 (setting the case for hearing on September 9).

2838. *Soleil* Opinion, *supra* note 2831, at 8.

2839. *Id.* at 16.

2840. *Id.* at 3–4, 11–16.

2841. *Id.* at 3–4.

mittee filed a federal complaint in the Eastern District of New York seeking an injunction placing their names on the ballot.[2842]

Judge Sterling Johnson, Jr., held a show-cause hearing on September 3 and 4.[2843] Voters and the state's attorney general were permitted to intervene.[2844] On September 6, Judge Johnson ordered one of the plaintiffs on the ballot for state senate.[2845]

The senate candidate needed 1,000 signatures to qualify for the ballot, and he submitted 1,609.[2846] One challenge resulted in a finding of 350 valid signatures.[2847] A second challenge resulted in a finding of 504 valid signatures.[2848] Judge Johnson held unconstitutional a requirement that signature witnesses be registered members of the party.[2849] As a result of the first challenge to the candidate's signatures, 666 signatures were invalidated for the unconstitutional reason, so Judge Johnson determined that the candidate had 350 plus 666 or 1,016 valid signatures.[2850]

Judge Johnson denied relief to candidates left off of their ballots for providing the wrong position sought on their application papers, and he denied relief to an assembly candidate who did not have enough signatures even accounting for the unconstitutional requirement.[2851] Judge Johnson also denied relief for a claimed failure to preclear a change in the dates of signature collection under section 5 of the Voting Rights Act,[2852] on a finding that the change had been precleared.[2853]

2842. Complaint, Kaloshi v. N.Y. City Bd. of Elections, No. 1:02-cv-4762 (E.D.N.Y. Aug. 28, 2002), D.E. 1.

2843. Docket Sheet, *id.* (Aug. 28, 2002) (D.E. 2, 3).

Judge Johnson died on October 10, 2022. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

2844. Order, *Kaloshi*, No. 1:02-cv-4762 (E.D.N.Y. Sept. 9, 2002), D.E. 5; Amended Opinion at 9, *id.* (Sept. 13, 2002), D.E. 9 [hereinafter *Kaloshi* Amended Opinion], 2002 WL 31051530 (observing that the voters' claims would not be precluded by the candidates' unsuccessful actions in state court).

2845. *Kaloshi* Amended Opinion, *supra* note 2844.

2846. *Id.* at 3.

2847. *Id.* at 4.

2848. *Id.*

2849. *Id.* at 28.

2850. *Id.* at 28–29.

2851. *Id.* at 16–18, 29.

2852. Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination).

On June 25, 2013, the Supreme Court declined to hold section 5 unconstitutional, but the Court did hold unconstitutional the criteria for which jurisdictions require section 5

The successful plaintiff came in fifth in a field of five, with 3.2% of the vote.[2854]

On July 1, 2003, the court of appeals vacated the candidate's relief for lack of standing, because the court determined that the candidate's insufficient signatures did not result from the unconstitutional requirement.[2855] The court of appeals found that the signature challenge yielding 504 valid signatures resulted from invalidations having nothing to do with the unconstitutional requirement, so there was no injury.[2856]

Relying on Judge Johnson's 2002 decision, seven voters filed a federal complaint on August 24, 2004, challenging the ballot exclusion of a slate of candidates for Congress, the state assembly, and other offices, alleging, among other things, the unconstitutionality of the requirement that ballot-petition signature witnesses for a primary election be party members.[2857] Judge Raymond J. Dearie set the case for hearing on September 1.[2858]

Defendants were the city's board of elections and its commissioners, who argued in their brief that Judge Johnson's opinion was nonprecedential, because it had been vacated by the court of appeals.[2859] At the hearing, Judge Dearie informed the parties that he did not agree with Judge Johnson's opinion[2860] and concluded, "I do not have any reservation about the constitutionality of the provision in question."[2861] Judge Dearie granted the defendants' motion to dismiss the case.[2862]

A July 27, 2006, federal complaint challenged the party-membership requirement for the September 12 primary-election ballot-petition signature witnesses.[2863] Among the relief sought was an injunction putting one plaintiff on the ballot for state assembly and two other plaintiffs on the ballot for civil-court judge.[2864] The complaint observed that in 2000, Judge

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preclearance. Shelby County v. Holder, 570 U.S. 529 (2013).

2853. *Kaloshi* Amended Opinion, *supra* note 2844, at 18–19.

2854. Kaloshi v. Spitzer, 69 F. App'x 17, 18 n.1 (2d Cir. 2003).

2855. *Id.* at 19.

2856. *Id.*

2857. Complaint, Brown v. N.Y. City Bd. of Elections, No. 1:04-cv-3662 (E.D.N.Y. Aug. 24, 2004), D.E. 1; *id.* at 4 (citing Judge Johnson's ruling).

2858. Order to Show Cause, *id.* (Aug. 24, 2004), D.E. 2.

2859. Defendants' Brief at 11–12, *id.* (Aug. 31, 2004), D.E. 5.

2860. Transcript at 12, *id.* (Sept. 1, 2004, filed Sept. 28, 2004), D.E. 10.

2861. *Id.* at 39.

2862. Order, *id.* (Sept. 1, 2004), D.E. 8; Minutes, *id.* (Sept. 1, 2004), D.E. 11.

2863. Complaint, Maslow v. Wilson, No. 1:06-cv-3683 (E.D.N.Y. July 27, 2006), D.E. 1.

2864. *Id.*

Edward R. Korman found a witness-residence requirement to be an undue burden on First Amendment rights.[2865] The court initially assigned the 2006 case to Judge Korman as related to his case resolved in 2000 and filed in 1999.[2866] The 2006 parties appeared in court on the day that the complaint was filed and stipulated a continuance until August 4, 2006.[2867] On August 10, Judge Korman converted the plaintiffs' motion for a preliminary injunction to a motion for summary judgment.[2868] After the action was filed, it turned out that the two judicial candidates had enough signatures even with the party-membership requirement and the assembly candidate did not have enough signatures even without the party-membership requirement.[2869]

The court reassigned the case to Judge Nicholas G. Garaufis on September 11,[2870] and the plaintiffs filed an amended complaint on October 25.[2871] On May 23, 2008, Judge Garaufis granted the defendants summary judgment.[2872]

The Supreme Court had held, on January 16, 2008, that selecting partisan nominees for judicial offices in New York by a primary-election-informed party convention rather than a direct primary election did not violate the constitutional rights of potential candidates disfavored by party leaders.[2873] Judge Garaufis relied on this opinion: "Simply put, the Court has granted New York State enormous latitude to exclude non-members from participating in the selection of and 'determinin[ing] the candidate

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2865. *Id.* at 11 (citing Molinari v. Powers, 82 F. Supp. 2d 57, 69 (E.D.N.Y. 2000) (holding unconstitutional a requirement that petition signers list their towns of residence according to the board of elections' list for which address is in which town regardless of the signers' understanding of their towns of residence and a residence requirement for witnesses)).

2866. Notice, *id.* (July 27, 2006), D.E. 2; *see* Docket Sheet, Molinari v. Powers, No. 1:99-cv-8447 (Dec. 22, 1999).

2867. Transcript, *Maslow*, No. 1:06-cv-3683 (E.D.N.Y. July 27, 2006, filed July 28, 2006), D.E. 6; Minutes, *id.* (July 27, 2006), D.E. 8; *see* Order to Show Cause, *id.* (July 31, 2006), D.E. 5.

2868. Order, *id.* (Aug. 10, 2006), D.E. 10.

2869. Opinion at 3, *id.* (May 23, 2008), D.E. 69 [hereinafter E.D.N.Y. *Maslow* Opinion], 2008 WL 2185370; *see* Letter, *id.* (Aug. 3, 2006), D.E. 7 (informing Judge Korman that the judicial candidates qualified for the ballot).

2870. Docket Sheet, *id.* (July 27, 2006).

2871. Amended Complaint, *id.* (Oct. 25, 2006), D.E. 14.

2872. E.D.N.Y. *Maslow* Opinion, *supra* note 2869; Maslow v. Bd. of Elections, 658 F.3d 291, 294–95 (2d Cir. 2011).

2873. N.Y. State Bd. of Elections v. López Torres, 552 U.S. 196 (2008).

bearing the party's standard in the general election.'"[2874] "Because Plaintiffs are without a right to have nonparty members participate in a political party's nomination process," the court of appeals, on September 30, 2011, affirmed Judge Garaufis's ruling.[2875]

Greater Ballot Signature Requirement for Presidential Candidates

Nader 2000 Primary Committee v. Cenarrusa (Mikel H. Williams, D. Idaho 1:00-cv-503)

> The Ralph Nader campaign's September 7, 2000, federal complaint alleged that Idaho wrongfully required more ballot qualification signatures for President than it required for other statewide races. At a September 14 hearing, the district court denied the campaign injunctive relief, finding the signature requirement to be reasonable and achievable.
>
> *Topic:* Getting on the ballot.

Presidential candidate Ralph Nader, his campaign committee, and two voters filed a federal complaint in the District of Idaho on September 7, 2000, alleging that Idaho's requirement of more ballot qualification signatures for President than it requires for other statewide races had wrongfully deprived Nader of a place on the November ballot.[2876]

In 2000, Idaho required signatures equal to one percent of the vote cast in the previous election for presidential candidates, 4,917 signatures in this case, but only 1,000 signatures for other statewide candidates.[2877] Nader submitted more than 5,800 signatures, but only 3,578 were determined to be valid.[2878]

With the complaint, the plaintiffs filed a motion for a preliminary injunction.[2879] The parties consented to a magistrate judge's jurisdiction over the case, and Magistrate Judge Mikel H. Williams set the matter for hearing on Thursday, September 14.[2880] At the hearing, Judge Williams denied

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2874. E.D.N.Y. *Maslow* Opinion, *supra* note 2869, at 15 (quoting *López Torres*, 552 U.S. at 203).

2875. *Maslow*, 658 F.3d at 294, *cert. denied*, 565 U.S. 1275 (2012).

2876. Complaint, Nader 2000 Primary Comm., Inc. v. Cenarrusa, No. 1:00-cv-503 (D. Idaho Sept. 7, 2000), D.E. 1.

2877. Opinion at 2, 5, *id.* (Sept. 18, 2000), D.E. 11 [hereinafter *Nader 2000 Primary Comm., Inc.* Opinion].

2878. *Id.* at 2–3, 8.

2879. Preliminary-Injunction Motion, *id.* (Sept. 7, 2000), D.E. 3.

2880. Order, *id.* (Sept. 8, 2000), D.E. 4.

from the bench immediate relief to Nader's campaign, issuing an opinion on Monday.[2881]

"The Court finds that a reasonably diligent candidate can gain access to the ballot under Idaho Code § 34-708A's procedure and that the burdens imposed by the regulation are not severe. Indeed, a number of independent candidates for President have complied with a substantially similar requirement in the past."[2882]

Judge Williams also found a rational basis for the different requirements:

> The presidential election occurs every four years and state elections are held during the off-years. It is logical to set a specific number of required signatures during the off-years and, during presidential elections, to base the required number of signatures on a percentage equal to one percent of the votes cast for President in the previous election year.[2883]

On January 25, 2001, the parties stipulated dismissal of the case as moot.[2884] An appeal[2885] was dismissed for failure to perfect it.[2886]

Improper Change in the Ballot-Petition Signature Requirement During an Election Cycle

Nader 2000 Primary Committee v. Hechler (Charles H. Haden II, S.D. W. Va. 2:00-cv-839)

> Supporters of a presidential candidate challenged his disqualification from the general-election ballot while another candidate qualified by submitting his ballot petition on the day before the number of signatures required to qualify doubled. The district judge granted the plaintiffs a preliminary injunction, also finding that it was probably unconstitutional for the state to require petition circulators to be registered to vote in the state.
>
> *Topics:* Getting on the ballot; attorney fees.

On September 7, 2000, Ralph Nader, his presidential campaign, a West Virginia voter, and an out-of-state supporter filed a federal complaint in the Southern District of West Virginia seeking to overturn Nader's dis-

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2881. *Nader 2000 Primary Comm., Inc.* Opinion, *supra* note 2877, at 1.

2882. *Id.* at 7.

2883. *Id.* at 8.

2884. Stipulation, *Nader 2000 Primary Comm., Inc.*, No. 1:00-cv-503 (D. Idaho Jan. 25, 2001), D.E. 15.

2885. Notice of Appeal, *id.* (Sept. 18, 2000), D.E. 12.

2886. Order, Nader 2000 Primary Comm., Inc. v. Cenarussa, No. 00-35817 (9th Cir. Apr. 23, 2001).

qualification from the November 7 general-election ballot for President.[2887] With their complaint, the plaintiffs filed a motion for a preliminary injunction.[2888]

In 1999, West Virginia doubled the number of ballot-petition signatures required for independent and minor-party candidates from 1% to 2% of the votes cast for the same office in the previous general election.[2889] The Natural Law Party candidate qualified for the 2000 presidential election by submitting his ballot petition on July 10, 1999, the day before the signature-requirement increase went into effect.[2890] Nader submitted his petition later, with enough signatures to satisfy the old rule but not enough to satisfy the new rule.[2891]

On September 12, 2000, Judge Charles H. Haden II set the case for hearing on the following day.[2892] On September 15, Judge Haden ordered Nader's name added to the ballot.[2893] In addition to the inequality of applying different signature requirements to different candidates for the same election, Judge Haden found probably unconstitutional West Virginia's requirement that circulators of ballot petitions be registered voters in West Virginia.[2894]

Judge Haden was not, however, willing to issue a permanent injunction on the local-registration issue without proper briefing, which the plaintiffs did not provide, so Judge Haden dismissed the complaint without prejudice on June 6, 2001.[2895] On September 13, Judge Haden signed an agreed attorney-fee award of $10,000.[2896]

2887. Complaint, Nader 2000 Primary Comm. v. Hechler, No. 2:00-cv-839 (S.D. W. Va. Sept. 7, 2000), D.E. 1; Nader 2000 Primary Comm. v. Hechler, 112 F. Supp. 2d 575, 576 (S.D. W. Va. 2000).

2888. Preliminary-Injunction Motion, *Nader 2000 Primary Comm.*, No. 2:00-cv-839 (S.D. W. Va. Sept. 7, 2000), D.E. 2; *Nader 2000 Primary Comm.*, 112 F. Supp. 2d at 576.

2889. *Nader 2000 Primary Comm.*, 112 F. Supp. 2d at 576–77.

2890. *Id.* at 577.

2891. *Id.*

2892. Order, *Nader 2000 Primary Comm.*, No. 2:00-cv-839 (S.D. W. Va. Sept. 12, 2000), D.E. 6; *see Judge Delays Ballot Ruling*, Charleston Daily Mail, Sept. 14, 2000, at 12A; *Nader Says State Law Hinders Candidates*, Charleston Daily Mail, Sept. 13, 2000, at 4C.

Judge Haden died on March 20, 2004. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

2893. *Nader 2000 Primary Comm.*, 112 F. Supp. 2d 575; *see Nader Wins Ballot Spot*, N.Y. Times, Sept. 16, 2000, at A10; *Nader's Name Must Be Put on State Ballots, Judge Says*, Charleston Daily Mail, Sept. 15, 2000, at 2A.

2894. *Nader 2000 Primary Comm.*, 112 F. Supp. 2d at 580.

2895. Order, *Nader 2000 Primary Comm.*, No. 2:00-cv-839 (S.D. W. Va. June 6, 2001),

Ballot Filing Fee

Belitskus v. Pizzingrilli (A. Richard Caputo, M.D. Pa. 3:00-cv-1300)

Eight days before a filing deadline, a federal complaint objected to a ballot filing fee. The district judge denied immediate relief on the following day and set the matter for hearing two days after that. After the hearing, the judge ordered the commonwealth to provide an alternative to the fee for those unable to pay. The court of appeals affirmed the order.

Topics: Getting on the ballot; equal protection; attorney fees.

Ralph Nader, seven other persons wishing to run for office, two political organizations, and a voter filed a federal complaint in the Middle District of Pennsylvania's Harrisburg courthouse on Monday, July 24, 2000, objecting to Pennsylvania's ballot filing fee.[2897] The filing deadline was August 1.[2898] The complaint was similar to one that had been filed in the Eastern District one week previously, but the plaintiffs agreed to refile the case in the Middle District after the commonwealth moved for a transfer.[2899]

With their complaint, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction.[2900] After an evidentiary hearing on the following day,[2901] Scranton Judge A. Richard Caputo denied the plaintiffs a temporary restraining order and set the preliminary-injunction hearing for July 27.[2902] "I'm not going to grant the Temporary Restraining Order because I don't think that it's ripe at this point. I don't know that there's anything for me to do right now."[2903]

D.E. 18.

2896. Order, *id.* (Sept. 13, 2001), D.E. 22.

2897. Complaint, Belitskus v. Pizzingrilli, No. 3:00-cv-1300 (M.D. Pa. July 24, 2000), D.E. 1; Belitskus v. Pizzingrilli, 343 F.3d 632, 638 (3d Cir. 2003).

2898. Belitskus v. Pizzingrilli, 243 F. Supp. 2d 179, 181 n.1 (M.D. Pa. 2001).

2899. Docket Sheet, Belitskus v. Pizzingrilli, No. 2:00-cv-3603 (E.D. Pa. July 17, 2000); Transcript at 6, *Belitskus*, No. 3:00-cv-1300 (M.D. Pa. July 25, 2000, filed Aug. 30, 2000), D.E. 17 [hereinafter July 25, 2000, *Belitskus* Transcript].

2900. Docket Sheet, *Belitskus*, No. 3:00-cv-1300 (M.D. July 24, 2000) [hereinafter M.D. Pa. *Belitskus* Docket Sheet] (D.E. 2); *see* July 25, 2000, *Belitskus* Transcript, *supra* note 2899, at 5.

2901. July 25, 2000, *Belitskus* Transcript, *supra* note 2899.

2902. M.D. Pa. *Belitskus* Docket Sheet, *supra* note 2900 (D.E. 7); *Belitskus*, 343 F.3d at 638.

Judge Caputo died on March 11, 2020. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

2903. July 25, 2000, *Belitskus* Transcript, *supra* note 2899, at 49.

On July 27, Judge Caputo ordered Pennsylvania to provide an alternative to the $100 filing fee for ballot access to the one plaintiff who showed an inability to pay, and Judge Caputo required the posting of a $100 bond.[2904]

> [T]he United States Supreme Court, in my view, has essentially held that an election law, which does not provide for alternative access to the ballot for those who are unable to pay, violates equal protection of the law in terms of someone's First and Fourteenth Amendment Constitutional Rights and is, therefore, unconstitutional.[2905]

The order was issued on the following day.[2906]

On September 13, two candidates, the voter, and the Green Party remained as plaintiffs, but Ralph Nader and the other plaintiffs voluntarily dismissed their claims.[2907]

On August 20, 2001, Judge Caputo issued a permanent injunction, holding that "absent a reasonable alternative, a filing fee which an indigent candidate cannot afford violates the Fourteenth Amendment."[2908] On September 11, 2003, the court of appeals agreed.[2909]

The parties settled the matter of attorney fees.[2910] The $100 bond was returned on May 13, 2004.[2911]

2904. M.D. Pa. *Belitskus* Docket Sheet, *supra* note 2900 (D.E. 9, 11); Belitskus v. Pizzingrilli, 243 F. Supp. 2d 179, 180–81 (M.D. Pa. 2001); *see* Ryan Dougherty, *Judge Waives Green Party Candidate's Filing Fee*, State College Centre Daily Times, Aug. 10, 2000, at 5A.

2905. Transcript at 64–65, *Belitskus*, No. 3:00-cv-1300 (M.D. Pa. July 27, 2000, filed Aug. 30, 2000), D.E. 18.

2906. M.D. Pa. *Belitskus* Docket Sheet, *supra* note 2900 (D.E. 11); *Belitskus*, 343 F.3d at 638.

2907. Stipulation, *Belitskus*, No. 3:00-cv-1300 (M.D. Pa. Sept. 13, 2000), D.E. 19; *Belitskus*, 343 F.3d at 638 n.4.

2908. *Belitskus*, 243 F. Supp. 2d at 183, *aff'd*, 343 F.3d 632; *see* Elliot Grossman, *State's Fees for Candidates Struck Down*, Allentown Morning Call, Aug. 23, 2001, at A1; *Judge Kills Pa. Candidate Fees*, Lancaster Intelligencer J., Aug. 22, 2001, at 7.

2909. *Belitskus*, 343 F.3d at 647, 651; *see* David B. Caruso, *Pa. Filing Fees Ruled Illegal*, Pittsburgh Post-Gazette, Sept. 12, 2003, at B18.

2910. Notice, *Belitskus*, No. 3:00-cv-1300 (M.D. Pa. Apr. 30, 2004), D.E. 100; Letter, *id.* (Mar. 19, 2004), D.E. 98.

2911. Order, *id.* (May 13, 2004), D.E. 101.

A Disabled Candidate's Challenge to Signature-and-Contribution Statutes

Herschaft v. New York Board of Elections (1:00-cv-2748) and Herschaft v. New York City Campaign Finance Board (1:00-cv-3754) (Jack B. Weinstein and Carol B. Amon, E.D.N.Y.)

> A pro se federal complaint alleged that a six-week period for obtaining ballot-petition signatures failed to adequately accommodate a prospective candidate's history of schizophrenia. A companion complaint challenged contribution-reporting requirements for small contributions. Two district judges denied the plaintiff relief.
>
> *Topics:* Getting on the ballot; campaign finance; pro se party; recusal; case assignment.

A prospective independent candidate for New York's city council filed a pro se federal complaint in the Eastern District of New York on May 16, 2000, challenging the state's requirement that he qualify for the November 2001 ballot by obtaining ballot-petition signatures during a six-week period—from July 10 to August 21, 2001.[2912] The plaintiff sought a year or more to gather the required 1,460 signatures to accommodate his schizophrenia, which was in remission.[2913]

Judge Jack B. Weinstein heard the case two days later.[2914] Judge Weinstein dismissed the case a week after the hearing, finding that the time limitation on collecting ballot-petition signatures violated neither the Americans with Disabilities Act (ADA) nor the Constitution.[2915]

On November 3, 2000, the court of appeals affirmed Judge Weinstein's constitutional ruling but remanded the case for reconsideration of the ADA claim.[2916] The court ordered reconsideration of the claim because of a

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2912. Docket Sheet, Herschaft v. N.Y. Bd. of Elections, No. 1:00-cv-2748 (E.D.N.Y. May 16, 2000) [hereinafter *Herschaft* Signature Docket Sheet] (D.E. 1); A. v. N.Y. Bd. of Elections, 99 F. Supp. 2d 258, 259–60 (E.D.N.Y. 2000).

2913. *A.*, 99 F. Supp. 2d at 259–60.

2914. *Herschaft* Signature Docket Sheet, *supra* note 2912 (D.E. 6).

Judge Weinstein retired in 2020 and died in 2021. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges; *see* Alan Feuer, *At 98, a Judicial Lion Lays Down His Gavel to Pursue New Interests*, N.Y. Times, Feb. 18, 2020, at A19; Laura Mansnerus, *Jack B. Weinstein, Activist Judge Both Revered and Feared, Dies at 99*, N.Y. Times, June 16, 2021, at A22.

2915. *A.*, 99 F. Supp. 2d 258; *see* 52 U.S.C. §§ 12101–12213.

2916. Herschaft v. N.Y. Bd. of Elections, No. 00-7698, 2000 WL 1655036 (2d Cir. Nov. 3, 2000), 234 F.3d 1262 (table), *cert. denied*, 531 U.S. 1078 (2001).

letter from the plaintiff's clinical psychologist filed on Judge Weinstein's invitation at the May 18, 2000, hearing to file additional supporting documents within one month.[2917]

Meanwhile, the plaintiff filed another pro se federal action in the Eastern District of New York on June 26, 2000, seeking relaxation of the city's campaign-contribution reporting requirements for contributions less than ten dollars.[2918] Judge Weinstein held a show-cause hearing three days later and granted the plaintiff's motion for recusal.[2919] The court reassigned both cases to Judge Carol B. Amon.[2920]

Reviewing an amended complaint filed on October 3,[2921] Judge Amon dismissed the case on December 8.[2922] Because the reporting requirements were tied to matching public funding, "The instant provisions are substantially related to significant governmental interests."[2923] The court of appeals affirmed the dismissal on May 17, 2001.[2924]

Reviewing an amended complaint filed in the first case on April 17, 2001,[2925] Judge Amon granted the defendant board of elections summary judgment on August 13:[2926] (1) "These undisputed facts are not sufficient to establish that plaintiff is presently substantially limited in a major life activity."[2927] (2) "At best, . . . whether plaintiff's disability in fact precludes him from participating in the election is speculative."[2928] (3) "It is the Court's opinion that an accommodation that would require a defendant to

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2917. *Id.* at *1.

2918. Docket Sheet, Herschaft v. N.Y. City Campaign Fin. Bd., No. 1:00-cv-3754 (E.D.N.Y. June 26, 2000) [hereinafter *Herschaft* Contribution Docket Sheet] (D.E. 1); Herschaft v. N.Y. City Campaign Fin. Bd., 127 F. Supp. 2d 164, 166–67 (E.D.N.Y. 2000).

2919. *Herschaft* Contribution Docket Sheet, *supra* note 2918 (D.E. 2).

2920. *Id.* (Aug. 3, 2000); *Herschaft* Signature Docket Sheet, *supra* note 2912 (June 29, 2000).

2921. *Herschaft* Contribution Docket Sheet, *supra* note 2918 (D.E. 13).

2922. *Herschaft*, 127 F. Supp. 2d 164; *see* Herschaft v. N.Y. City Campaign Fin. Bd., 139 F. Supp. 2d 282 (E.D.N.Y. 2001) (denying reconsideration).

2923. *Herschaft*, 127 F. Supp. 2d at 168.

2924. Herschaft v. N.Y. City Campaign Fin. Bd., 10 F. App'x 21 (2d Cir.), *cert. denied*, 534 U.S. 888 (2001).

2925. *Herschaft* Signature Docket Sheet, *supra* note 2912 (D.E. 27).

2926. Herschaft v. N.Y. Bd. of Elections, No. 1:00-cv-2748, 2001 WL 940923 (E.D.N.Y. Aug. 13, 2001).

2927. *Id.* at *4.

2928. *Id.* at *5.

violate an otherwise constitutional state law is inherently unreasonable."[2929] The court of appeals affirmed the judgment on May 13, 2002.[2930]

2929. *Id.* at *6 (footnote omitted).

2930. Herschaft v. N.Y. Bd. of Elections, 37 F. App'x 17 (2d Cir.), *cert. denied*, 537 U.S. 825 (2002).

C. Minor-Party, Independent, and Write-In Candidates

Candidates and prospective candidates who are not nominees of the major political parties are virtually by definition at a disadvantage in elections. Whether the disadvantage is improper is sometimes a matter of federal litigation.

Roque "Rocky" De La Fuente Guerra ran for President in 2016. He ran, or tried to run, in several Democratic primary elections, and when primary season was over he got on, or tried to get on, several general-election ballots. His efforts included eight emergency actions in federal courts and fifteen other federal court actions.[2931] Several of his actions were filed pro se, and several of his actions were filed late. In 2018, however, he achieved a victory in Virginia. A consent decree discontinued the collection of Social Security Number digits from ballot-petition signers.[2932]

Other last-minute actions by marginal candidates have been unsuccessful,[2933] including actions filed during the Covid-19 pandemic.[2934] In Michigan, a frequent litigator and write-in candidate was unsuccessful in disqualifying the incumbent in a party's primary election.[2935]

A 2004 federal challenge in Ohio to invalidation of ballot-petition signatures was unsuccessful because the minor party did not show that

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2931. *See* "A Minor Candidate's Suits to Be on Presidential-Election Ballots," *infra* page 412.

2932. Consent Decree, De La Fuente v. Alcorn, No. 1:16-cv-1201 (E.D. Va. Jan. 4, 2018), D.E. 56.

2933. *See, e.g.*, "Seeking Federal Relief for Denial of Certification as a Write-In Candidate After Losing in State Court," *infra* page 440 (write-in candidate unsuccessful in state court); "Ballot Access for a New Party," page 441 (socialist candidate); "Disqualified Presidential Electors," *infra* page 461 (presidential electors for minor party not qualified); "A New Party's Qualification for the Ballot in Texas," *infra* page 464 (Natural Law Party); "Certification as a Write-In Candidate," *infra* page 465 (write-in presidential candidate).

Some cases have involved rival factions of a minor party. *See, e.g.*, "Including on the Ballot Nominees of a Fractured Minor Party," *infra* page 463; "Minor-Party State Faction Opposing the National Nominee," *infra* page 491.

2934. *See, e.g.*, "2020 Ballot-Petition Signature Requirements in West Virginia," *infra* page 404; "Getting a New Party on California's Ballot During a Pandemic," *infra* page 408.

2935. *See* "Unsuccessful Litigation by a Write-In Candidate to Have the Incumbent's Candidacy Declared Illegitimate," *infra* page 396.

Ohio's secretary of state and state courts did not provide appropriate opportunities for review.[2936]

Minor parties sometimes litigate to seek recognition as an established party.[2937] In 2007, one political party in Puerto Rico litigated another party's recognition as a party.[2938] Following the court of appeals' disagreeing with the district court over whether federal action was barred by commonwealth-court decisions,[2939] federal litigation was ultimately dismissed in 2008 as moot.[2940]

Minor parties sometimes complain that they are disadvantaged compared with the major parties.[2941] The United States Court of Appeals for the Sixth Circuit recognized constitutional limits to the combination of how many signatures have to be submitted by a new party and how long before an election.[2942] The Third Circuit's court of appeals affirmed a finding of no violation in Pennsylvania for a combination of more signatures required at an earlier date for minor parties.[2943]

A district judge granted relief to minor political parties from a requirement that they submit party-recognition applications 135 days before a primary election, because the state failed to justify the deadline for plaintiff parties that were not going to use a primary election to select candidates for the general election.[2944] Another judge found that it was not im-

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2936. Opinion, Van Auken v. Blackwell, No. 2:04-cv-891 (S.D. Ohio Sept. 17, 2004), D.E. 4, *as reported in* "Challenging the Invalidation of Ballot-Access Signatures," *infra* page 453.

2937. *See, e.g.*, "Illinois's Ballot-Access Requirements for a New Party," page 429; "Too-Early Ballot-Access Requirement for New Political Parties," *infra* page 445.

2938. *See* "Challenging a Puerto Rico Party's Registration," *infra* page 451.

2939. Puerto Ricans for P.R. Party v. Dalmau, 544 F.3d 58, 64–65, 68–71 (1st Cir. 2008), *rev'g* 517 F. Supp. 2d 601 (D.P.R. 2007).

2940. Judgment, Puerto Ricans for P.R. Party v. Dalmau, No. 3:07-cv-1867 (D.P.R. Nov. 25, 2008), D.E. 80.

2941. *See, e.g.*, "Ballot Access for a Minor Party in a Special Congressional Election," *infra* page 459 (especially difficult ballot-access requirements for a minor party in a special election).

2942. Green Party of Tenn. v. Hargett, 767 F.3d 533, 548–49 (6th Cir. 2014), *as reported in* "Ballot Access for Minor Parties in Tennessee," *infra* page 433; *see* Green Party v. Hargett, 953 F. Supp. 2d 816, 954–55 (M.D. Tenn. 2013).

2943. Baldwin v. Cortes, 378 F. App'x 135 (3d Cir. 2010), *aff'g* Opinion, Baldwin v. Cortés, No. 1:08-cv-1626 (M.D. Pa. Sept. 12, 2008), D.E. 17, 2008 WL 4279874, *as reported in* "Ballot-Petition Deadline for Minor Parties," *infra* page 446.

2944. Minute Opinion, Cal. Justice Comm. v. Bowen, No. 2:12-cv-3956 (C.D. Cal. May 21, 2012), D.E. 19, 2012 WL 2861349, *as reported in* "Too-Early Ballot-Access Requirement for New Political Parties," *infra* page 445.

proper to require signatures from minor parties before major parties selected their candidates.[2945]

Another district judge held unconstitutional a new law that gave only major parties access to voters' party-preference data.[2946]

A federal judge in Illinois expressed skepticism about a requirement for a new party's recognition that it field a full slate of candidates, but because the plaintiff party had met that requirement, there was no occasion for judicial action.[2947]

In 2020, a district judge in Montana denied relief for a minor party's exclusion from the ballot after signers of the party's ballot petition withdrew their support; signatures were collected by agents of a major party and not the minor party.[2948]

Minor-party and independent candidates sometimes litigate whether one or the other is disadvantaged. A district judge in North Carolina found an unconstitutional burden on independent candidates whose signature requirement was 2% of registered voters, compared with new-party candidates whose signature requirement was 2% of actual voters in the most recent gubernatorial election.[2949] Other courts found New Mexico's larger signature requirement for independent candidates, compared with minor-party candidates, to not violate equal protection.[2950]

A district judge in South Dakota determined that the state had not shown a compelling interest in preventing independent candidates for governor from naming a replacement candidate for lieutenant governor, after the original lieutenant governor's withdrawal from the race, when the state permitted party gubernatorial candidates to do that.[2951]

2945. Barr v. Ireland, 575 F. Supp. 2d 747, 751–53 (S.D. W. Va. 2008) (noting that the failure to collect enough signatures resulted from a late start), *as reported in* "Requiring Minor Parties to Qualify for the Ballot in Advance of Major Parties," *infra* page 447.

2946. Green Party of Mich. v. Land, 541 F. Supp. 2d 912, 916–24 (E.D. Mich. 2008), *as reported in* "Providing Election Data Only to Major Parties," *infra* page 448.

2947. Summers v. Smart, 65 F. Supp. 3d 556, 563–69 (N.D. Ill. 2014), *as reported in* "Illinois's Ballot-Access Requirements for a New Party," *infra* page 429.

2948. Davis v. Stapleton, 480 F. Supp. 3d 1099 (D. Mont. 2020), *as reported in* "No Relief from State-Court Judgment Allowing Ballot-Petition Signers to Withdraw Their Signatures," *infra* page 403.

2949. Delaney v. Bartlett, 370 F. Supp. 2d 373 (M.D.N.C. 2004), *as reported in* "Signature Requirements for Independent and New-Party Candidates," *infra* page 454.

2950. Parker v. Winter, 645 F. App'x 632 (10th Cir. 2016), *aff'g* Opinion, Parker v. Duran, No. 1:14-cv-617 (D.N.M. Aug. 7, 2014), D.E. 12, 2014 WL 7653394, *as reported in* "Signature Requirements for an Independent Candidate in New Mexico," *infra* page 432.

2951. Myers v. Gant, 49 F. Supp. 3d 658 (D.S.D. 2014), *as reported in* "Allowing an Independent Gubernatorial Candidate to Name a Replacement Running Mate," *infra* page

Political party is a meaningful designation for a candidate.[2952] Some states have sore-loser statutes that seek to prevent candidates who fail to achieve a party nomination from running against party nominees as independent candidates. Courts have upheld these statutes.[2953] It is also constitutional to deny someone a place on the ballot as an independent candidate if the person even *voted* in the primary election.[2954] In another case, a judge granted relief from a prohibition on a voter registered with a major party from seeking to run for election as a member of a new party.[2955]

A filing deadline for independent candidates set as the same day as the primary election, meant to prevent losers of the primary election from running as independent candidates, was enjoined principally because the new deadline was established with too-short notice.[2956]

Emergency ballot-access litigation over challenges to the major parties' candidates typically combines scrutiny of whether requirements improperly benefit the major parties and scrutiny of whether the plaintiffs unreasonably delayed bringing their cases.

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2952. *See, e.g.*, "Unsuccessful Attempt to Block State-Court Removal of a Candidate from a Ballot," *infra* page 410.

2953. Storer v. Brown, 415 U.S. 724, 736 (1974) (finding constitutional the disqualification of independent candidates who had been affiliated with a political party within a year before the party primary); Libertarian Party of Mich. v. Johnson, 714 F.3d 929 (6th Cir. 2013), *aff'g* 905 F. Supp. 2d 751 (E.D. Mich. 2012), *cert. denied*, 571 U.S. 1110 (2013); De La Fuente v. Cortés, 261 F. Supp. 3d 543, 546 (M.D. Pa. 2017); De La Fuente v. Merrill, 214 F. Supp. 3d 1241 (M.D. Ala. 2016); Kennedy v. Cascos, 214 F. Supp. 3d 559 (W.D. Tex. 2016); *see* Opinion at 2, 4–5, De La Fuente v. North Carolina, No. 1:16-cv-470 (M.D.N.C. Oct. 11, 2016), D.E. 19, 2016 WL 5922314 (noting North Carolina's sore-loser statute); Opinion at 2–3, De La Fuente v. Illinois, No. 1:16-cv-6984 (N.D. Ill. Oct. 3, 2016), D.E. 17, 2016 WL 5720349 (noting Illinois's sore-loser statute); *see also* "A Minor Candidate's Suits to Be on Presidential-Election Ballots," *infra* page 412; "Sore Loser on Ballot," *infra* page 443; "Requirement That a Party's Nominee Be a Member of the Party," *infra* page 475.

2954. *Storer*, 415 U.S. at 728; McClure v. Galvin, 386 F.3d 36, 38, 40 (1st Cir. 2004), *aff'g* Opinion, McClure v. Galvin, No. 1:04-cv-10826 (D. Mass. May 17, 2004), D.E. 9, 2004 WL 1092325, *as reported in* "Disqualification as an Independent Candidate for Voting in a Primary Election," *infra* page 453.

2955. Docket Sheet, Public Interest v. Armstrong Cty. Bd. of Elections, No. 2:01-cv-1616 (W.D. Pa. Aug. 24, 2001) (D.E. 8), *as reported in* "Right to Form a Third Party," *infra* page 460.

2956. Campbell v. Bennett, 212 F. Supp. 2d 1339, 1343–47 (M.D. Ala. 2002), *as reported in* "Last-Minute Change to Ballot-Petition Due Date and Interference with Write-In Votes," *infra* page 456.

Unsuccessful Litigation by a Write-In Candidate to Have the Incumbent's Candidacy Declared Illegitimate

Anders v. Benson (Matthew F. Leitman, 4:20-cv-11991), Davis v. Wayne County Board of Canvassers (Nancy G. Edmunds, 2:20-cv-12127), and Davis v. Benson (Robert H. Cleland, 3:20-cv-12130) (E.D. Mich.)

> Three district judges managed frequent filings by a write-in candidate in a primary election seeking to prove illegitimate the incumbent's inclusion on another party's ballot. The candidate was unsuccessful in obtaining relief.
>
> *Topics:* Campaign materials; getting on the ballot; laches; matters for state courts; write-in candidate; primary election; recusal; case assignment; absentee ballots; pro se party.

Litigation before three district judges and a court of appeals arose from an allegation by a county-prosecuting-attorney write-in candidate in a primary election that the incumbent—a candidate in another party's primary election—should not have been on the ballot. The write-in candidate was unsuccessful in obtaining relief.

Judge Leitman's Case

On Sunday, July 26, 2020, a write-in Republican candidate for Wayne County's prosecuting attorney in Michigan's August 4 primary election filed a federal complaint in the Eastern District of Michigan against state and county election officials and the incumbent, alleging that it was not lawful to include the incumbent on the Democratic Party's primary-election ballot.[2957]

On the next day, the plaintiff filed a motion for a temporary restraining order or a preliminary injunction enabling the plaintiff to circulate anonymous campaign materials against the incumbent.[2958] Judge Sean F. Cox recused himself, and the court assigned the case to Judge Matthew F. Leitman.[2959] Judge Leitman ordered service of the complaint and the motion on defendants by the end of the following day and set the case for an afternoon attorneys-only status conference by video on the case's fourth day.[2960]

2957. Complaint, Anders v. Benson, No. 4:20-cv-11991 (E.D. Mich. July 26, 2020), D.E. 1.

2958. Motion, *id.* (July 27, 2020), D.E. 5.

2959. Notice, *id.* (July 27, 2020), D.E. 4.

Tim Reagan interviewed Judge Leitman for this report by telephone on September 18, 2020.

2960. Order, *Anders*, No. 4:20-cv-11991 (E.D. Mich. July 27, 2020), D.E. 6; Notice, *id.* (July 27, 2020), D.E. 7.

Judge Leitman also ordered the plaintiff to show cause why the court should not decline jurisdiction over the complaint's state claims.[2961] At the conference, Judge Leitman made clear that he was not inclined to accept supplemental jurisdiction over the state claims, and he wanted to give the plaintiff ample time to bring them in state court if the plaintiff regarded them as time sensitive.[2962]

Judge Leitman came to strongly prefer conferences by video rather than by audio alone, because video afforded a greater opportunity for meaningful connections.[2963] At the beginning of the conference, Judge Leitman asked one of the attorneys to switch from still photo to live video.[2964]

Before the videoconference, the plaintiff moved for partial summary judgment[2965] and expedited briefing.[2966] Following the conference, Judge Leitman set the case for an August 11 hearing on the injunction motion.[2967]

> The Court concludes that this schedule fairly balances the need to adjudicate [the plaintiff's] motion on an accelerated basis, while also providing sufficient time for [the defendants] to respond to the motion. In addition, given the numerous other cases on the Court's docket, including other emergency matters, the schedule will provide the Court a full opportunity to review and consider the parties' submissions in advance of the hearing.[2968]

Although the plaintiff wanted a ruling before the primary election, Judge Leitman pointed out, "No chance. . . . [T]his is the classic self-created emergency."[2969] Contact information for the hearing by videoconference was posted in the public record.[2970]

Before the hearing, the plaintiff filed an amended complaint, adding three voters as plaintiffs and adding Detroit election officials as defendants.[2971] As the amended complaint excluded the claims on which the

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2961. Order, *id.* (July 28, 2020), D.E. 12.

2962. Transcript at 9–10, *id.* (July 29, 2020, filed July 31, 2020), D.E. 30 [hereinafter July 29, 2020, *Anders* Transcript].

2963. Interview with Judge Matthew F. Leitman, Sept. 18, 2020.

2964. July 29, 2020, *Anders* Transcript, *supra* note 2962, at 6–7.

2965. Motion, *Anders*, No. 4:20-cv-11991 (E.D. Mich. July 28, 2020), D.E. 11.

2966. Motion, *id.* (July 28, 2020), D.E. 9.

2967. Order, *id.* (July 29, 2020), D.E. 27.

2968. *Id.* at 2.

2969. July 29, 2020, *Anders* Transcript, *supra* note 2962, at 8 (recording Judge Leitman's allowing the defendants a week to respond).

2970. Notice, *Anders*, No. 4:20-cv-11991 (E.D. Mich. July 29, 2020), D.E. 28.

2971. Amended Complaint, *id.* (Aug. 6, 2020), D.E. 34.

plaintiff had sought summary judgment, Judge Leitman terminated that motion as moot and again ordered a showing of cause why the court should take jurisdiction over state claims.[2972] Judge Leitman also ordered a showing of why the new plaintiffs and defendants were properly joined to the original complaint.[2973] The new plaintiffs promptly and voluntarily dismissed their claims.[2974]

At the hearing, Judge Leitman admonished the plaintiff against excessive last-minute filings characterized as emergencies:

> Every . . . filing in this case by you with only a couple of exceptions is designated an emergency and is dropped on me mere moments before I have to deal with them. I've got to tell you, I cannot do business like that. No judge on this Court can. I worked my rear end off to get prepared for this hearing and then I think at 16 minutes before the hearing, I get a new brief. None of the defendants have had an opportunity to respond to it. It's impossible to litigate a case in that fashion.[2975]

Judge Edmunds's Case

On the day that the three voters voluntarily dismissed their claims in Judge Leitman's case—three days after the August 4 primary election—the voters filed a separate federal complaint in the Eastern District against Wayne County's board of canvassers, alleging that the plaintiffs' votes for the incumbent county prosecutor's challenger in the Democratic primary election would be unconstitutionally diluted by the board's counting votes for the incumbent, whom the plaintiffs alleged was improperly on the ballot.[2976] Five days later, the plaintiffs filed an emergency motion for a temporary restraining order or a preliminary injunction.[2977]

Judge Cleland's Case

One of the voters in the second case filed a separate federal complaint in the Eastern District on August 9, alleging that he voted against the incumbent in the Democratic primary election, did not believe that the incumbent was validly on the ballot, supported the original plaintiff in Judge Leitman's case in the general election, and wished to circulate anonymous

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2972. Order, *id.* (Aug. 7, 2020), D.E. 36.

2973. Order, *id.* (Aug. 7, 2020), D.E. 38.

2974. Notices, *id.* (Aug. 7, 2020), D.E. 39 to 43.

2975. Transcript, at 9, *id.* (Aug. 11, 2020, filed Aug. 17, 2020), D.E. 55 [hereinafter Aug. 11, 2020, *Anders* Transcript].

2976. Complaint, Davis v. Wayne Cty. Bd. of Canvassers, No. 2:20-cv-12127 (E.D. Mich. Aug. 7, 2020), D.E. 1.

2977. Motion, *id.* (Aug. 12, 2020), D.E. 6.

political literature critical of the incumbent.[2978] The court assigned the new case to Judge Mark A. Goldsmith.[2979]

After a conversation with Judge Goldsmith, Judge Leitman determined that one count in Judge Goldsmith's case was related to Judge Leitman's case and one count was not.[2980] At his August 11 hearing, Judge Leitman instructed the plaintiff's attorney to amend the complaint before Judge Leitman to add the voter's claim and not the other claim to the complaint before Judge Leitman.[2981] Judge Leitman received an amended complaint on August 12.[2982] Judge Goldsmith received on August 17 an amended complaint omitting the transferred claim and adding a couple of others.[2983] One of the added claims challenged the mailing of unsolicited absentee-voter applications,[2984] so the court assigned the case to Judge Robert H. Cleland as similar to an August 9 case before him.[2985] On August 20, Judge Cleland ordered the plaintiffs to show cause by August 27 why the case transferred from Judge Goldsmith should not be stayed pending resolution of related actions in state court.[2986]

On September 14, Judge Cleland declined jurisdiction over the voter plaintiff's state-law claims and dismissed the claim for unsolicited absentee-ballot applications as redundant with pending state-court actions.[2987]

The defendant county clerk moved on October 6 to dismiss the remaining claim, a claim that the defendant's office was not kept open all day on the day of the primary election, a claim that the defendant argued was not true.[2988] The plaintiff's response was due three weeks later, but it

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2978. Complaint, Davis v. Benson, No. 3:20-cv-12130 (E.D. Mich. Aug. 9, 2020), D.E. 1.

2979. *See* Reassignment Order, *id.* (Aug. 17, 2020), D.E. 38 [hereinafter *Davis v. Benson* Reassignment Order].

2980. Aug. 11, 2020, *Anders* Transcript, *supra* note 2975, at 7.

2981. *Id.* at 7–8.

2982. Second Amended Complaint, Anders v. Benson, No. 4:20-cv-11991 (E.D. Mich. Aug. 12, 2020), D.E. 48.

2983. Amended Complaint, *Davis*, No. 3:20-cv-12130 (E.D. Mich. Aug. 17, 2020), D.E. 9.

2984. *Id.* at 19–21.

2985. *Davis v. Benson* Reassignment Order, *supra* note 2979; *see* Docket Sheet, Reed-Pratt v. Winfred, No. 3:20-v-12129 (E.D. Mich. Aug. 9, 2020) (case concerning mailing out unsolicited absentee-ballot applications), *as reported in* "Challenging Absentee-Ballot Procedures in Detroit During an Infectious Pandemic," *infra* page 765.

2986. Order, *Davis*, No. 3:20-cv-12130 (E.D. Mich. Aug. 20, 2020), D.E. 11.

2987. Opinion, *id.* (Sept. 14, 2020), D.E. 19, 2020 WL 5514136.

2988. Dismissal Motion, *id.* (Oct. 6, 2020), D.E. 21.

was filed a week late—the day of the general election—with an emergency motion to excuse the delay.[2989]

"Plaintiff and his attorneys' explanation for their failure to comply with the court's deadlines is their involvement in other cases. The court is not persuaded that this amounts to excusable neglect."[2990] Even on the merits, "Plaintiff has no legally cognizable interest under the Due Process Clause in having the Clerk's Office open on election day."[2991]

Judge Leitman's Case Again

Following the August 11 hearing by videoconference,[2992] Judge Leitman ruled on August 13 that the candidate was not entitled to violate campaign-disclosure requirements and criticize the incumbent anonymously.[2993] On August 17, Judge Leitman dismissed the amended complaint's state-law claim.[2994]

On September 17, Judge Leitman granted the voter's request to file electronically in the case as a pro se litigant, terminating representation by counsel.[2995] The original candidate plaintiff voluntarily dismissed his claims on September 27.[2996]

At an October 1 video status conference, Judge Leitman again scolded the plaintiff attorney's filing behavior:

> I'm having déjà vu to the last case you and I had together where you filed a complaint, we had a fire drill by a bunch of emergency filings. You then filed a notice of voluntary dismissal in which you were very careful to inform me and everybody else that that divested us of jurisdiction to proceed with the merits. I then reminded you that it didn't divest me of the authority to sanction you. And then I did sanction you, the only time I've imposed sanctions in six and a half years on this job.
>
> I've got to say, this pattern of conduct that we have here raises similar red flags. You came in here with guns blazing, sought a [temporary restraining order], filed a bunch of amended stuff, a bunch of emergency stuff, and then wa-lah, we've got a voluntary dismissal.
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> . . .

2989. Dismissal Response, *id.* (Nov. 3, 2020), D.E. 23; Extension Motion, *id.* (Nov. 3, 2020), D.E. 24.

2990. Davis v. Garrett, 500 F. Supp. 3d 644, 647 (E.D. Mich. 2020).

2991. *Id.* at 647.

2992. Docket Sheet, Anders v. Benson, No. 4:20-cv-11991 (E.D. Mich. July 26, 2020) (minutes, Aug. 11, 2020).

2993. Opinion, *id.* (Aug. 13, 2020), D.E. 51, 2020 WL 4700793.

2994. Opinion, *id.* (Aug. 17, 2020), D.E. 54, 2020 WL 4799254.

2995. Order, *id.* (Sept. 17, 2020), D.E. 64; *see* Motion, *id.* (Sept. 8, 2020), D.E. 57.

2996. Notice, *id.* (Sept. 27, 2020), D.E. 67.

> I am not comfortable with the way generally that these cases proceed and I want to make that crystal clear. So keep that in mind. You do whatever you're going to do but I want to—I want you to have a heads up before you do whatever you do that I have concerns. And if you go down that route and if I conclude that this is just not an appropriate way to use the judicial system, it will be the second time in my career that I impose sanctions.[2997]

On August 18, 2021, the pro se plaintiff stipulated dismissal of a third amended complaint.[2998]

Judge Edmunds's Case Again

On August 14, 2020, in the case by three voters, Judge Denise Page Hood recused herself, and the court reassigned the case to Judge Nancy G. Edmunds.[2999] Judge Hood promptly let Judge Edmunds know of the reassignment.[3000]

The lead plaintiff—the plaintiff in Judge Cleland's case—was known to the court as a frequent filer, and a few of his cases proved to have merit.[3001]

Judge Edmunds denied the plaintiffs a temporary restraining order on August 17 and set the case for a September 16 hearing.[3002] In addition to her finding no clear violation of the plaintiffs' legal rights, Judge Edmunds noted that their theory of the incumbent's improper inclusion on the ballot was based on facts they had known for many months.[3003]

An amended complaint filed on September 4 named as plaintiffs the voter plaintiff in Judge Cleland's case and the candidate plaintiff in Judge Leitman's case.[3004] Four days later, the candidate filed a replacement motion for a temporary restraining order or a preliminary injunction[3005] and a

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2997. Transcript at 6–8, *id.* (Oct. 1, 2020, filed Oct. 6, 2020), D.E. 75.

2998. Stipulation, *id.* (Aug. 18, 2021), D.E. 97; *see* Third Amended Complaint, *id.* (Nov. 9, 2020), D.E. 84; Opinion, *id.* (Nov. 2, 2020), D.E. 83, 2020 WL 8771477 (granting with limits permission to file a third amended complaint); Transcript, *id.* (Oct. 23, 2020, filed Nov. 25, 2020), D.E. 85 (hearing on the motion to file a third amended complaint).

2999. Order, Davis v. Wayne Cty. Bd. of Canvassers, No. 2:20-cv-12127 (E.D. Mich. Aug. 14, 2020), D.E. 11.

Tim Reagan interviewed Judge Edmunds for this report by telephone on September 24, 2020.

3000. Interview with Judge Nancy G. Edmunds, Sept. 24, 2020.

3001. *Id.*

3002. Order, *Davis*, No. 2:20-cv-12127 (E.D. Mich. Aug. 17, 2020), D.E. 12.

3003. *Id.*

3004. Amended Complaint, *id.* (Sept. 4, 2020), D.E. 21.

3005. Motion, *id.* (Sept. 8, 2020), D.E. 25; *see* Notice, *id.* (Sept. 3), D.E. 17 (withdrawing the previous injunction motion).

motion to expedite resolution of the injunction motion by the following day, "which is the date in which the Wayne County Election Commission is scheduled to convene and meet to approve the printing of the ballots for the November 3, 2020 general election."[3006] On the day that the motions were filed, Judge Edmunds denied the motion to expedite consideration of the injunction.[3007]

Three days later, the candidate filed with the court of appeals a petition for a writ of mandamus requiring Judge Edmunds to expedite consideration of his injunction motion.[3008]

On September 15, Judge Edmunds responded to the petition, noting, among other things, "that Plaintiffs have not demonstrated respect for this Court's time or for the time of other parties in this case."[3009] It was a very rare event for Judge Edmunds to brief the court of appeals about one of her cases, but the circumstances of this writ petition were unusual.[3010] Judge Edmunds wanted to make sure the court of appeals was aware of the details of the case's procedural history.[3011]

The court of appeals denied the writ on the following day, noting that the petitioner "is nowhere near qualifying for nomination with only eleven votes."[3012]

On September 21, Judge Edmunds denied a motion to enjoin the destruction of ballots, finding that the defendant was not in possession of the ballots, which the law required the City of Dearborn to keep for twenty-two months.[3013] Judge Edmund granted a motion by the county prosecutor to intervene as a defendant on October 28.[3014]

On August 29, 2021, Judge Edmunds dismissed the action, finding no merit to the claims.[3015]

3006. Motion at 2, *id.* (Sept. 8, 2020), D.E. 23.

3007. Docket Sheet, *id.* (Aug. 7, 2020) (docket-text order, Sept. 8, 2020).

3008. Mandamus Petition, *In re* Anders, No. 20-1880 (6th Cir. Sept. 11, 2020), D.E. 1.

3009. Edmunds Response at 6, *id.* (Sept. 15, 2020), D.E. 5.

3010. Interview with Judge Nancy G. Edmunds, Sept. 24, 2020.

3011. *Id.*

3012. Opinion at 3, *Anders*, No. 20-1880 (6th Cir. Sept. 16, 2020), D.E. 7.

3013. Order, Davis v. Wayne Cty. Bd. of Canvassers, No. 2:20-cv-12127 (E.D. Mich. Sept. 21, 2020), D.E. 46.

3014. Opinion, *id.* (Oct. 28, 2020), D.E. 66; *see* Amended Intervention Motion, *id.* (Sept. 18, 2020), D.E. 45; Intervention Motion, *id.* (Aug. 21, 2020), D.E. 15.

3015. Opinion, *id.* (Aug. 29, 2021), D.E. 67, 2021 WL 3860949.

No Relief from State-Court Judgment Allowing Ballot-Petition Signers to Withdraw Their Signatures

Davis v. Stapleton (Dana L. Christensen, D. Mont. 6:20-cv-62)

> A state court vacated certification of a minor political party for a general-election ballot after ballot-petition signers withdrew their signatures when they found out that they were collected by a different political party. Ostensible minor-party candidates and voters were denied relief in federal court from the state-court judgment, because allowing signers to withdraw their signatures was not obviously improper.
>
> *Topics:* Enjoining certification; getting on the ballot; matters for state courts; party procedures; primary election; intervention; interlocutory appeal; Covid-19.

An August 11, 2020, federal complaint filed in the District of Montana by two Green Party candidates and two Green Party primary-election voters challenged an August 7 state-court ruling vacating Montana's March 6 qualification of the Green Party for the November 3 general-election ballot on a finding that enough signers of the party's ballot petition had withdrawn their support to yield an insufficient number of remaining signatures.[3016] With their complaint, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction.[3017]

On the following day, Judge Dana L. Christensen ordered a response to the motion by August 17.[3018]

The state's Democratic Party, the plaintiff in the state-court action, moved to intervene in the federal case on Thursday, August 13.[3019] Judge Christensen granted the motion on the next day.[3020] On Monday, Judge Christensen granted a motion by the Republican Party to appear as an amicus curiae.[3021]

Judge Christensen denied the plaintiffs immediate relief on August 19.[3022] He found that the signatures were collected by agents of the Repub-

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3016. Complaint, Davis v. Stapleton, No. 6:20-cv-62 (D. Mont. Aug. 11, 2020), D.E. 1; Davis v. Stapleton, 480 F. Supp. 3d 1099, 1102 (D. Mont. 2020).

3017. Motion, *Davis*, No. 6:20-cv-62 (D. Mont. Aug. 11, 2020), D.E. 3; *Davis*, 480 F. Supp. 3d at 1102.

3018. Order, *Davis*, No. 6:20-cv-62 (D. Mont. Aug. 12, 2020), D.E. 6.

3019. Intervention Motion, *id.* (Aug. 13, 2020), D.E. 8; *Davis*, 480 F. Supp. 3d at 1102.

3020. Order, *Davis*, No. 6:20-cv-62 (D. Mont. Aug. 14, 2020), D.E. 11; *Davis*, 480 F. Supp. 3d at 1102.

3021. Order, *Davis*, No. 6:20-cv-62 (D. Mont. Aug. 17, 2020), D.E. 13; *see* Motion, *id.* (Aug. 17, 2020), D.E. 12; *see Davis*, 480 F. Supp. 3d at 1102.

3022. *Davis*, 480 F. Supp. 3d 1099.

lican Party and not the Green Party.[3023] Allowing voters to withdraw their signatures was not obviously improper:

> Before this case, there was no clear procedure by which signers supporting ballot access could withdraw their signatures, likely because there was no precedent for a situation in which signers would seek to withdraw their signatures *en masse*. Voters did not reasonably rely on the absence of a procedure for signature withdrawal as decisive proof that signatures cannot be withdrawn.[3024]

Both Judge Christensen[3025] and the court of appeals[3026] denied the plaintiffs an injunction pending appeal. The court of appeals ordered briefing complete as late as November 4.[3027] By the end of September, both courts had granted the plaintiffs voluntary dismissals.[3028]

2020 Ballot-Petition Signature Requirements in West Virginia

Wilson v. Justice (Thomas E. Johnston, 2:20-cv-526) and West v. Warner (Irene C. Berger, 2:20-cv-570) (S.D. W. Va.)

> Southern District of West Virginia district judges denied 2020 independent candidates relief from West Virginia's ballot-petition signature requirements. Independent candidates for President and governor argued that the requirements were too onerous, especially during a global infectious pandemic.
>
> *Topics:* Getting on the ballot; Covid-19; laches; interlocutory appeal; case assignment.

Prospective independent candidates in the 2020 general election were unsuccessful in persuading judges in the Southern District of West Virginia to relax West Virginia's ballot-petition signature requirements.

Gubernatorial Candidate

A prospective independent candidate for governor filed in the Southern District of West Virginia a federal complaint against West Virginia's governor and its secretary of state on August 4, 2020, challenging West Virginia's ballot-petition signature requirements for independent candidates in light of social distancing made necessary by a global Covid-19 infectious

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3023. *Id.* at 1104–05.

3024. *Id.* at 1107–08.

3025. Order, *Davis*, No. 6:20-cv-62 (D. Mont. Aug. 20, 2020), D.E. 24.

3026. Order, Davis v. Stapleton, No. 20-35734 (9th Cir. Sept. 22, 2020), D.E. 20.

3027. *Id.*

3028. Order, *id.* (Aug. 22, 2020), D.E. 20; Order, *Davis*, No. 6:20-cv-62 (D. Mont. Sept. 18, 2020), D.E. 32.

pandemic.[3029] Nearly two weeks later, the plaintiff filed a motion for a temporary restraining order and a preliminary injunction.[3030]

On the next day, Chief Judge Thomas E. Johnston set the case for a telephonic status conference on Friday, August 21.[3031] At the five-minute conference, Judge Johnston set the case for a hearing on Monday.[3032]

The courthouse was mostly closed in the spring because of the pandemic, but it was mostly open in August.[3033] Because Chief Judge Johnston observed evidence of community transmission, he mostly closed the courthouse again in September.[3034] Because the hearing in this case was in August, however, it could be held in the courtroom.[3035] The hearing was open to the public, but it was not attended by very many members of the public.[3036] Participants were required to wear masks, except when speaking.[3037]

Following a brief recess at the end of the hearing, Judge Johnston denied the plaintiff immediate relief.[3038] The primary basis for Judge Johnston's ruling was laches, but Judge Johnston found other reasons that the requested relief would cause the state hardship and be detrimental to the public:

> Plaintiff has proffered no reasonable justification for waiting to file suit and seeking emergency relief until August.
>
> . . . Plaintiff's delay, in bringing this suit at the eleventh hour and only after not satisfying the ballot access requirements[,] is inexcusable and unreasonable.
>
> . . .
>
> [It] threatens to disrupt the remaining election process. . . .

3029. Complaint, Wilson v. Justice, No. 2:20-cv-526 (S.D. W. Va. Aug. 4, 2020), D.E. 1.

3030. Motion, *id.* (Aug. 17, 2020), D.E. 4.

3031. Order, *id.* (Aug. 18, 2020), D.E. 5.

Tim Reagan interviewed Judge Johnston for this report by telephone on November 4, 2020.

3032. Order, *Wilson*, No. 2:20-cv-526 (S.D. W. Va. Aug. 21, 2020), D.E. 11; Minutes, *id.* (Aug. 21, 2020), D.E. 10.

3033. Interview with Judge Thomas E. Johnston, Nov. 4, 2020.

3034. *Id.*

3035. *Id.*

3036. *Id.*

3037. *Id.*; *see* Transcript at 3, *Wilson*, No. 2:20-cv-526 (S.D. W. Va. Aug. 24, 2020, filed Sept. 1, 2020), D.E. 16 [hereinafter *Wilson* Transcript] ("THE COURT: You can remove your mask when you're speaking. I know it makes it difficult.").

3038. Order, *id.* (Aug. 24, 2020), D.E. 15; Minutes, *id.* (Aug. 24, 2020), D.E. 14; *Wilson* Transcript, *supra* note 3037, at 44–61.

> . . .
>
> Now, even though the doctrine of laches resolves Plaintiff's motion for preliminary injunction, the Court nonetheless finds that Plaintiff would not be entitled to preliminary injunctive relief.
>
> . . .
>
> The Court agrees with Defendants that the ballot access requirements imposed only modest burdens on the Plaintiff and, thus, intermediate scrutiny applies. . . .
>
> . . .
>
> Defendants have offered several justifications for enforcing the ballot access laws. . . .
>
> . . .
>
> Even if plaintiff had shown a likelihood of success on the merits, a preliminary injunction would not be appropriate because a modification of these election laws, at least at this juncture, would cause the government significant hardship and would be detrimental to the public. . . .
>
> Issuing Plaintiff's proposed injunction would not permit sufficient time for county boards of ballot commissioners to prepare ballots for printing and meet the September 18, 2020 ballot mailing deadline. Moreover, reducing the number of valid signatures at this stage could expand the pool of independent candidates and require more signature verification efforts on the . . . part of county officials. Finally, placing Plaintiff on the ballot would deprive the public of proper enforcement of West Virginia's election laws and potentially result in disparate treatment of other prospective candidates who did not satisfy the signature gathering and deadline requirements.[3039]

Presidential Candidate

On Friday, August 28, Kanye West, a prospective independent candidate for President, filed in the Southern District a complaint against West Virginia's secretary of state challenging his disqualification for the ballot as a result of the invalidation of about half of his ballot-petition signatures.[3040] On Monday, West filed a motion for a preliminary injunction.[3041]

Judge Irene C. Berger issued an order on Monday requiring prompt service on the secretary and a response to West's motion by September 8.[3042]

3039. *Wilson* Transcript, *supra* note 3037, at 49, 51, 53, 57, 59–61.

3040. Complaint, West v. Warner, No. 2:20-cv-570 (S.D. W. Va. Aug. 28, 2020), D.E. 1.

3041. Preliminary-Injunction Motion, *id.* (Aug. 31, 2020), D.E. 4.

3042. Order, *id.* (Aug. 31, 2020), D.E. 7.

Tim Reagan interviewed Judge Berger for this report by telephone on October 29, 2020.

Unsuccessful Consolidation

On September 3, the governor and the secretary moved to consolidate the two cases or transfer the second case to Judge Johnston.[3043] Judge Berger had made consideration of the preliminary-injunction motion a priority, but the consolidation motion created a small delay.[3044] Judge Berger declined consolidation six days later.[3045] The first case arose because an insufficient number of signatures were collected; the second case arose because an insufficient number of signatures were deemed valid.[3046] In addition, because Judge Johnston had already ruled on an injunction motion in his case, the cases were in different procedural postures.[3047]

Judge Berger's Decision

Because the facts were not in dispute, a hearing on West's injunction motion was not necessary.[3048] Even if the pandemic had not made proceedings challenging, Judge Berger probably would not have deemed a hearing necessary.[3049] She denied West a preliminary injunction on September 14, finding reasonable West Virginia's methods for validating ballot-petition signatures.[3050]

West filed on September 15 a notice of appeal[3051] and on September 16 a motion to stay his claims for declaratory relief pending interlocutory appeal.[3052] On October 18, the court of appeals denied a motion to expedite the appeal.[3053] On September 21, Judge Berger denied the stay motion, finding that appellate review of the injunction decision would be unlikely to affect the merits of the remaining claims.[3054]

3043. Consolidation Motion, *West*, No. 2:20-cv-570 (S.D. W. Va. Sept. 3, 2020), D.E. 12; Consolidation Motion, *Wilson*, No. 2:20-cv-526 (S.D. W. Va. Sept. 3, 2020), D.E. 17.

3044. Interview with Judge Irene C. Berger, Oct. 29, 2020.

3045. Opinion, *West*, No. 2:20-cv-570 (S.D. W. Va. Sept. 9, 2020), D.E. 19, 2020 WL 5414354.

3046. *Id.*

3047. *Id.* at 3.

3048. Interview with Judge Irene C. Berger, Oct. 29, 2020.

3049. *Id.*

3050. *See* Amended Opinion, *West*, No. 2:20-cv-570 (S.D. W. Va. Sept. 15, 2020), D.E. 24, 2020 WL 5524868; *see also* Lacie Pierson, *Federal Judge Denies Kanye West's Bid to Get on Ballot in WV*, Huntington Herald-Dispatch, Sept. 15, 2020, at A2.

3051. Notice of Appeal, *West*, No. 2:20-cv-570 (S.D. W. Va. Sept. 15, 2020), D.E. 25.

3052. Stay Motion, *id.* (Sept. 16, 2020), D.E. 27.

3053. Order, West v. Warner, No. 20-1994 (4th Cir. Sept. 18, 2020), D.E. 14.

3054. Opinion, *West*, No. 2:20-cv-570 (S.D. W. Va. Sept. 21, 2020), D.E. 29; *see* Scheduling Order, *id.* (Sept. 22, 2020), D.E. 30 (provisionally setting a scheduling conference for November 10).

On September 28, the court of appeals granted West's voluntary dismissal of the appeal,[3055] and Judge Berger granted his voluntary dismissal of the case.[3056]

Voluntary Dismissal of Judge Johnston's Case

Following Judge Berger's lead, Judge Johnston denied the consolidation motion on September 23.[3057] Judge Johnston granted a voluntary dismissal on October 14.[3058]

Getting a New Party on California's Ballot During a Pandemic

Kishore v. Newsom (Dolly M. Gee, C.D. Cal. 2:20-cv-5859)

> A complaint challenged the signature requirements to get a new party on the ballot during an infectious pandemic. Because gathering signatures was not the only way to get on the ballot, the district court denied the party relief. Voters could register as members of the new party, and registrations could be recruited by email or social media.
>
> *Topics:* Getting on the ballot; Covid-19; laches; interlocutory appeal.

A minor party's candidates for President and Vice President filed a federal complaint in the Central District of California on June 30, 2020, seeking relaxation of California's ballot-petition signature requirements to become independent candidates in the November 3 general election in light of social distancing made necessary by the global Covid-19 infectious pandemic.[3059] With their complaint, the candidates filed an application for a temporary restraining order and a preliminary injunction.[3060]

The court assigned the case to Judge Dolly M. Gee,[3061] who denied the plaintiffs a temporary restraining order on the day that they requested one for want of proper service on the defendants.[3062] On July 6, Judge Gee denied a properly served July 1 application for a temporary restraining or-

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3055. Order, *West*, No. 20-1994 (4th Cir. Sept. 28, 2020), D.E. 16.

3056. Order, *West*, No. 2:20-cv-570 (S.D. W. Va. Sept. 28, 2020), D.E. 32.

3057. Order, Wilson v. Justice, No. 2:20-cv-526 (S.D. W. Va. Sept. 23, 2020), D.E. 20.

3058. Order, *id.* (Oct. 14, 2020), D.E. 23.

3059. Complaint, Kishore v. Newsom, No. 2:20-cv-5859 (C.D. Cal. June 30, 2020), D.E. 1.

3060. Application, *id.* (June 30, 2020), D.E. 4.

3061. Notice, *id.* (June 30, 2020), D.E. 5.

Tim Reagan interviewed Judge Gee for this report by telephone on October 8, 2020.

3062. Minutes, *Kishore*, No. 2:20-cv-5859 (C.D. Cal. June 30, 2020), D.E. 9.

der[3063] so that she could afford "Defendants the chance to fully brief the issues that Plaintiffs raise."[3064] Judge Gee set the case for a hearing by videoconference on July 21,[3065] later moved to July 20.[3066]

The hearing was open to the public, including news media.[3067] During the pandemic, if the courthouse was open to the public, videoconference proceedings could be observed in the court's ceremonial courtroom.[3068] When the courthouse was closed to the public because of a pandemic surge, members of the public, including the news media, could obtain from the clerk's office contact information for the videoconference.[3069]

After the hearing, Judge Gee issued a written opinion denying the plaintiffs immediate relief.[3070] Gathering signatures was not the only way to get on the ballot; the candidates could have qualified by having a sufficient number of voters register as members of their party.[3071] "There are many ways to drum up voter registration, several of which do not require in-person contact, appearing in public, leaving the home, or the use of the mails, which Plaintiffs decry as prohibitively expensive."[3072]

Judge Gee quoted a June 26 opinion by Eastern District of California Judge Morrison C. England, Jr., who presided over a case seeking relief from the voter-registration requirements for a different new party to appear on the November general-election ballot.[3073] Denying immediate relief, Judge England observed that email and social media provided ways for parties to recruit new registrants.[3074]

Judge England's case was not as fast paced as Judge Gee's. The political party filed its complaint on May 29.[3075] It did not seek a temporary restraining order or a preliminary injunction until nearly a week later.[3076]

3063. Renewed Application, *id.* (July 1, 2020), D.E. 11.

3064. Minutes, *id.* (July 6, 2020), D.E. 13.

3065. *Id.*

3066. Order, *id.* (July 8, 2020), D.E. 15; *see* Minutes, *id.* (July 20, 2020), D.E. 21.

3067. Interview with Judge Dolly M. Gee, Oct. 8, 2020.

3068. *Id.*

3069. *Id.*

3070. Opinion, *Kishore*, No. 2:20-cv-5859 (C.D. Cal. July 20, 2020), D.E. 22, 2020 WL 5983922.

3071. *Id.* at 4–5.

3072. *Id.* at 5.

3073. *Id.*

3074. Common Sense Party v. Padilla, 469 F. Supp. 3d 951, 954 (E.D. Cal. 2020).

3075. Complaint, Common Sense Party v. Padilla, No. 2:20-cv-1091 (E.D. Cal. May 29, 2020), D.E. 1; *Common Sense Party*, 469 F. Supp. 3d at 953.

3076. Motion, *Common Sense Party*, No. 2:20-cv-1091 (E.D. Cal. June 4, 2020), D.E. 5; *Common Sense Party*, 469 F. Supp. 3d at 953.

Judge England ordered the matter briefed by June 19, to be followed by a possible videoconference hearing on June 25.[3077] Judge England determined on June 22 that a hearing was not necessary.[3078]

In Judge England's case, the court of appeals denied the plaintiffs mandamus relief on July 2.[3079] On January 21, 2021, the court of appeals dismissed an interlocutory appeal as moot.[3080] The plaintiffs dismissed their action voluntarily on March 19.[3081]

The court of appeals denied a motion to expedite an appeal in Judge Gee's case on July 27, 2020,[3082] and it denied reconsideration of that decision on August 5.[3083] The plaintiffs dismissed their appeal and their complaint voluntarily on August 7.[3084]

Unsuccessful Attempt to Block State-Court Removal of a Candidate from a Ballot

Libertarian Party of Maryland v. Maryland State Board of Elections (George L. Russell III, D. Md. 1:18-cv-2825)

> A federal district judge declined to block a state court's removal of a minor political party's nomination because the nomination violated party rules against nominating members of other parties.
>
> *Topics:* Getting on the ballot; matters for state courts; party procedures.

A minor political party was unsuccessful in its effort to get a federal court to overturn a state court's removal of the party's candidate for a state judge position from the general-election ballot.[3085] The party filed its federal

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3077. Docket Sheet, *Common Sense Party*, No. 2:20-cv-1091 (E.D. Cal. May 29, 2020) (D.E. 6).

3078. *Id.* (D.E. 18).

3079. Order, Common Sense Party v. U.S. Dis. Ct. E.D. Cal. (Padilla), No. 20-71888 (9th Cir. July 2, 2020).

3080. Common Sense Party v. Padilla, 834 F. App'x 335 (9th Cir. 2021).

3081. Notice, *Common Sense Party*, No. 2:20-cv-1091 (E.D. Cal. Mar. 19, 2021), D.E. 33.

3082. Order, Kishore v. Newsom, No. 20-55748 (9th Cir. July 27, 2020), D.E. 4.

3083. Order, *id.* (Aug. 5, 2020), D.E. 12.

3084. Order, *id.* (Mar. 1, 2021), D.E. 14; Voluntary Dismissal, *id.* (Aug. 7, 2020), D.E. 13; Voluntary Dismissal, Kishore v. Newsom, No. 2:20-cv-5859 (C.D. Cal. June 30, 2020), D.E. 30.

3085. Order, Libertarian Party of Md. v. Md. State Bd. of Elections, No. 1:18-cv-2825 (D. Md. Sept. 20, 2018), D.E. 14 [hereinafter *Libertarian Party of Md.* Order]; Docket Sheet, *id.* (Sept. 11, 2018); Complaint, *id.* (Sept. 11, 2018), D.E. 1 [hereinafter *Libertarian Party of Md.* Complaint].

complaint against Maryland election officials in the District of Maryland on September 11, 2018.[3086]

A state judge determined on August 24 that the candidate's nomination violated party rules because the candidate was a member of a different party, so the state judge issued a preliminary injunction against inclusion of the candidate on the general-election ballot.[3087] On September 7, state election officials certified a general-election ballot with the candidate omitted.[3088]

With its federal complaint, the party filed a motion to stay state-court proceedings and stay the preliminary injunction.[3089] The next day, in a motion to amend the stay motion, the party informed the court, "Today in the state court proceedings, Assistant Attorney General Andrea Trento stated to the Circuit Court that the final day for the State Board of Elections to restore Plaintiff's nominee to the general election ballot is close of business Friday, September 14, 2018."[3090]

Election officials responded on September 14 that as compliance with the preliminary injunction was already complete it could not be stayed, and the party's request for additional interference with state-court proceedings was not justified.[3091] Two days later, the party filed a federal motion for a temporary restraining order restoring its candidate to the general-election ballot.[3092]

On a Monday, September 17, telephone conference, Judge George L. Russell III and the litigants agreed to schedule a hearing three days later.[3093] Following the hearing, Judge Russell denied the plaintiff party immediate relief "for reasons stated on the record, including but not limited to that the Party fails to demonstrate a clear likelihood of success on the merits."[3094]

3086. *Libertarian Party of Md.* Complaint, *supra* note 3085.

3087. *See Libertarian Party of Md.* Complaint, *supra* note 3085, at 5; Defendants' Brief at 4–5, *Libertarian Party of Md.*, No. 1:18-cv-2825 (Sept. 14, 2018), D.E. 8 [hereinafter *Libertarian Party of Md.* Defendants' Brief].

3088. *See Libertarian Party of Md.* Complaint, *supra* note 3085, at 5; *Libertarian Party of Md.* Defendants' Brief, *supra* note 3087, at 5.

3089. Stay Motion, *Libertarian Party of Md.*, No. 1:18-cv-2825 (Sept. 11, 2018), D.E. 2.

3090. Amendment Motion at 2, *id.* (Sept. 12, 2018), D.E. 6.

3091. *Libertarian Party of Md.* Defendants' Brief, *supra* note 3087.

3092. Temporary-Restraining-Order Motion, *Libertarian Party of Md.*, No. 1:18-cv-2825 (Sept. 16, 2018), D.E. 9.

3093. Memorandum, *id.* (Sept. 17, 2018), D.E. 10.

3094. *Libertarian Party of Md.* Order, *supra* note 3085.

The case was dismissed voluntarily on November 5.[3095]

A Minor Candidate's Suits to Be on Presidential-Election Ballots

De La Fuente Guerra v. Democratic Party of Florida (Robert L. Hinkle, N.D. Fla. 4:16-cv-26), De La Fuente v. Kemp (Richard W. Story, 1:16-cv-256) and De La Fuente v. Kemp (Mark H. Cohen, 1:16-cv-2937) (N.D. Ga.), De La Fuente v. South Carolina Democratic Party (Cameron McGowan Currie, D.S.C. 3:16-cv-322), De La Fuente Guerra v. Winter (Robert C. Brack, D.N.M. 1:16-cv-393), De La Fuente v. Krebs (Roberto A. Lange, D.S.D. 3:16-cv-3035), De La Fuente v. Cortés (John E. Jones III, M.D. Pa. 1:16-cv-1696), De La Fuente v. Wyman (Benjamin H. Settle, W.D. Wash. 3:16-cv-5801), De La Fuente v. Alcorn (Liam O'Grady, E.D. Va. 1:16-cv-1201), and Alliance Party v. District of Columbia Board of Elections (James E. Boasberg, D.D.C. 1:20-cv-2319)

> A prospective candidate for president in 2016 filed federal complaints challenging his exclusion from primary-election and general-election ballots in several states. In 2018, the candidate achieved a change to ballot-access rules in Virginia. Litigation by the candidate for the 2020 election was largely unsuccessful.
>
> *Topics:* Getting on the ballot; pro se party; laches; primary election; matters for state courts; Electoral College; absentee ballots; interlocutory appeal; attorney fees.

A minor candidate for President of the United States initiated federal litigation in several states, often pro se, to get on both primary-election and general-election ballots in 2016. The candidate achieved ballot-access rules victories in Virginia in 2018.[3096]

The candidate's federal actions in 2020 were unsuccessful, although one was mooted by the success of other plaintiffs in state court.

The 2016 Presidential Election

Florida

A prospective candidate for the Democratic nomination for President and seven voters filed a federal complaint in the Northern District of Florida on January 15, 2016, challenging the state Democratic Party's exclusion of the candidate from the March 15 primary election.[3097] Three days later, the

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3095. Dismissal, *Libertarian Party of Md.*, No. 1:18-cv-2825 (Nov. 5, 2018), D.E. 19; Dismissal Notice, *id.* (Nov. 5, 2018), D.E. 18.

3096. Consent Decree, De La Fuente v. Alcorn, No. 1:16-cv-1201 (E.D. Va. Jan. 4, 2018), D.E. 56.

3097. Complaint, De La Fuente Guerra v. Democratic Party of Fla., No. 4:16-cv-26

plaintiffs filed motions for preliminary injunctive relief[3098] and expedited consideration.[3099]

On January 23, Judge Robert L. Hinkle denied the plaintiffs a preliminary injunction without prejudice: "The plaintiffs have tendered no evidence that Mr. De La Fuente has any support at all beyond the seven voters who are plaintiffs in this action."[3100] On April 18, following the primary election in which the prospective candidate did not appear on the ballot, Judge Hinkle dismissed the case as moot.[3101] A March 29 complaint challenged as unconstitutionally burdensome Florida's requirement that independent candidates in the general election submit signatures from one percent of eligible voters.[3102] On June 26, Judge Hinkle issued an order to show cause why the second case should not be dismissed for lack of prosecution.[3103] The case concluded on August 1 by voluntary dismissal.[3104] The candidate qualified for the general-election ballot in Florida as a nominee of the Reform Party.[3105]

Georgia

On January 28, the prospective candidate and three Georgia voters filed a federal complaint in the Northern District of Georgia against Georgia's secretary of state and the state Democratic Party challenging the national party's exclusion of the prospective candidate from its list of candidates for the state primary election.[3106] On the following day, the plaintiffs filed a motion for a preliminary injunction and a permanent injunction.[3107]

(N.D. Fla. Jan. 15, 2016), D.E. 1.

3098. Motion, *id.* (N.D. Fla. Jan. 18, 2016), D.E. 3.

3099. Motion, *id.* (N.D. Fla. Jan. 18, 2016), D.E. 4.

3100. Opinion, *id.* (N.D. Fla. Jan. 23, 2016), D.E. 7; *see* Order, *id.* (Feb. 6, 2016), D.E. 15 (denying reconsideration).

3101. Order, *id.* (Apr. 18, 2016), D.E. 23 (allowing an amended complaint).

3102. Complaint, De La Fuente Guerra v. Florida, No. 4:16-cv-196 (N.D. Fla. Mar. 29, 2016), D.E. 1.

3103. Order, *id.* (June 26, 2016), D.E. 11.

3104. Judgment, *id.* (Aug. 1, 2016), D.E. 18; *see* Notice of Voluntary Dismissal, *id.* (July 28, 2016), D.E. 16.

3105. *See* George Bennett, *Four Minor Parties on Florida Presidential Ballot*, Palm Beach Post, Oct. 22, 2016, at 10A; Anthony Man, *Third Parties Wield Influence*, Ft. Lauderdale Sun-Sentinel, Oct. 23, 2016, at A1.

3106. Complaint, De La Fuente v. Kemp, No. 1:16-cv-256 (N.D. Ga. Jan. 28, 2016), D.E. 1.

3107. Motion, *id.* (Jan. 29, 2016), D.E. 2.

Judge Richard W. Story heard the case on February 4 and denied the plaintiffs injunctive relief because of laches.[3108] The plaintiffs waited over sixty days from when they knew that the prospective candidate would be excluded from the ballot to file the complaint, and some overseas ballots had already been distributed.[3109]

As it happened, the plaintiffs' candidate was included on the Georgia ballot after all.[3110] An appeal was voluntarily dismissed.[3111]

On August 12, the candidate filed a second federal complaint challenging the validity of Georgia's July 1 deadline for a presidential candidate in the general election to file a slate of Electoral College electors, because the candidate thought the July 12 deadline for filing ballot-petition signatures also applied to filing the slate of electors.[3112] Among other things, the complaint asked for emergency mandamus relief.[3113]

Reviewing the complaint on the day that it was filed, Judge Mark H. Cohen ordered the candidate to serve Georgia's attorney general with the complaint alleging a statute to be unconstitutional.[3114] Four days later, Judge Cohen observed by order that the complaint sought emergency relief, but no motion for such relief had been presented to the court.[3115] On the next day, the candidate filed such a motion.[3116] Judge Cohen gave Georgia's secretary of state six days to respond[3117] and set the case for hearing on August 26.[3118]

3108. Opinion, *id.* (Feb. 4, 2016), D.E. 8 [hereinafter Story *De La Fuente* Opinion]; Transcript at 19, *id.* (Feb. 4, 2016, filed Feb. 26, 2016), D.E. 19 ("I'm going to deny the relief certainly on the laches because I just don't think I can disrupt this election when you've waited this long to seek relief."); Minutes, *id.* (Feb. 4, 2016), D.E. 9.

3109. Story *De La Fuente* Opinion, *supra* note 3108, at 4; *see* Opinion, *De La Fuente*, No. 1:16-cv-256 (N.D. Ga. Mar. 7, 2016), D.E. 21 (denying reconsideration).

3110. *See* Cy Wood, *Super Tuesday Vote Includes Local Races*, West Point Times-News, Feb. 29, 2016, at 1.

3111. Order, De La Fuente v. Secretary, No. 16-10713 (11th Cir. Apr. 1, 2016), D.E. 24; *see also* Stipulated Dismissal, *De La Fuente*, No. 1:16-cv-256 (N.D. Ga. Apr. 22, 2016), D.E. 26.

3112. Complaint, De La Fuente v. Kemp, No. 1:16-cv-2937 (N.D. Ga. Aug. 12, 2016), D.E. 1.

3113. *Id.* at 8.

3114. Order, *id.* (Aug. 12, 2016), D.E. 4.

3115. Order, *id.* (Aug. 16, 2016), D.E. 8.

3116. Motion, *id.* (Aug. 17, 2016), D.E. 9.

3117. Order, *id.* (Aug. 17, 2016), D.E. 10.

3118. Amended Order, *id.* (Aug. 22, 2016), D.E. 15; *see* Minutes, *id.* (Aug. 26, 2016), D.E. 19.

At the hearing, Judge Cohen noted that there was a question about the adequacy of the candidate's ballot-petition signatures, and Judge Cohen asked whether he should defer ruling on constitutional questions until that matter was settled.[3119] The candidate's attorney responded, "if we don't prevail on the constitutional argument here, I'm not certain that we would—that my client would actually spend the money to validate the signatures in the first place."[3120]

On August 30, Judge Cohen concluded, "Although the Court might agree that the two different deadlines may be illogical or ill-advised, this does not make the imposition of either deadline an undue burden on an independent candidate."[3121] Judge Cohen provisionally granted the secretary a dismissal on March 17, 2017,[3122] and seven months later denied a motion to amend the complaint.[3123]

South Carolina

District of South Carolina Judge Cameron McGowan Currie, on February 25, 2016, denied the prospective candidate a preliminary injunction to either put him on South Carolina's primary-election ballot or reschedule the election.[3124] Judge Currie found no apparent constitutional infirmity in the state party's conclusion that the candidate was not generally acknowledged in news media as a viable candidate.[3125] The candidate filed his pro se complaint on February 2, twenty-five days before the primary election and

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3119. Transcript at 3–4, *id.* (Aug. 26, 2016, filed Sept. 21, 2016), D.E. 28 [hereinafter N.D. Ga. *De La Fuente* Transcript].

3120. *Id.* at 4.

3121. Opinion, *id.* (Aug. 30, 2016), D.E. 21; *see* N.D. Ga. *De La Fuente* Transcript *supra* note 3119, at 32 (noting that the general assembly has "a right to be dumb; they just don't have a right to do something that's unconstitutional"); *see also* De La Fuente v. Kemp, 300 Ga. 79, 793 S.E.2d 89 (2016) (affirming the superior court's not reviewing rejection of the candidate's ballot petition for too few signatures because the candidate had not timely filed a proposed slate of electors).

On February 15, 2017, the court of appeals determined that because the 2016 election was over and the 2020 election was far enough in the future the candidate had not shown a current need for a preliminary injunction. De La Fuente v. Kemp, 679 F. App'x 932 (11th Cir. 2017); *see* Order, De La Fuente v. Kemp, No. 16-15880 (11th Cir. Oct. 7, 2016), D.E. 16 (denying an injunction pending appeal).

3122. Opinion, *De La Fuente*, No. 1:16-cv-2937 (N.D. Ga. Mar. 17, 2017), D.E. 41, 2017 WL 2289307 (allowing the candidate two weeks to file a promised motion to amend the complaint).

3123. Opinion, *id.* (Oct. 13, 2017), D.E. 48.

3124. De La Fuente v. S.C. Democratic Party, 164 F. Supp. 3d 794 (D.S.C. 2016) ("Plaintiff has already been accepted on the ballot in over forty states and territories").

3125. *Id.* at 800–03.

fifty-two days after his exclusion from the ballot.[3126] He filed a motion for a preliminary injunction on February 22.[3127] Judge Currie found an "inexcusable lack of diligence" in his pursuit of federal court relief.[3128]

On November 9, however, she denied the state party's eighty-eight-word October 3 motion for summary judgment because no brief or evidence was filed in support of the motion.[3129] She granted summary judgment to the party on July 20, 2017, noting that "it is undisputed Plaintiff had no actual, non-electronic presence in South Carolina."[3130]

New Mexico

District of New Mexico Judge Robert C. Brack denied the pro se prospective candidate immediate relief on June 3, 2016.[3131] "As of the date of this order, the docket reflects no service on the [state's] Secretary [of State]. . . . The motion is unsigned and lacks verification. The memorandum was filed with a copied signature."[3132] As to the merits of the May 6 complaint, "Plaintiff has cited no precedent to support its requested remedy to halt an ongoing election."[3133]

> Here, according to the complaint, the State notified the Plaintiff that he would not be on the ballot on March 28, 2016, over a month before early voting was scheduled to begin. The Plaintiff brought suit only four days before early voting began. The Plaintiff did not file this motion for a preliminary injunction until three days before the actual date of the primary [June 7].[3134]

The candidate qualified for New Mexico's general-election ballot as the nominee of the American Delta Party, which the candidate founded.[3135]

3126. Complaint, De La Fuente v. S.C. Democratic Party, No. 3:16-cv-322 (D.S.C. Feb. 22, 2016), D.E. 1; *see* Second Amended Complaint, *id.* (Apr. 20, 2016), D.E. 58; First Amended Complaint, *id.* (Feb. 24, 2016), D.E. 29.

3127. Preliminary-Injunction Motion, *id.* (Feb. 22, 2016), D.E. 17 [hereinafter D.S.C. *De La Fuente* Preliminary-Injunction Motion]; *De La Fuente*, 164 F. Supp. 3d at 797, 804–05.

3128. *De La Fuente*, 164 F. Supp. 3d at 805.

3129. Opinion, *De La Fuente*, No. 3:16-cv-322 (D.S.C. Nov. 9, 2016), D.E. 76; *see* Motion, *id.* (Oct. 3, 2016), D.E. 68.

3130. Opinion at 7, *id.* (July 20, 2017), D.E. 128, 2017 WL 3085750; *see* Opinion, *id.* (Oct. 12, 2017), D.E. 134 (denying reconsideration).

3131. Opinion, De La Fuente Guerra v. Winter, No. 1:16-cv-393 (D.N.M. June 3, 2016), D.E. 7.

3132. *Id.* at 1–2.

3133. *Id.* at 4.

3134. *Id.*; *see* Motion, *id.* (June 3, 2016), D.E. 5; Complaint, *id.* (May 6, 2016), D.E. 1; *see also Candidate Wants on Ballot*, Albuquerque J., May 11, 2016, at C2.

3135. *See* Deborah Baker, *Rejected PRC Hopeful*, Albuquerque J., July 9, 2016, at C1;

Later reviewing the merits of the complaint, Judge Brack dismissed the action on May 19, 2017, finding New Mexico's ballot-access requirements to be constitutional.[3136] The court of appeals affirmed the dismissal without oral argument.[3137]

Pennsylvania

On September 14, Middle District of Pennsylvania Judge John E. Jones III decided to abstain from resolution of an August 15 counseled action by the candidate challenging Pennsylvania's sore loser statute keeping the candidate off of the general-election ballot because of his defeat in the primary election.[3138] Pursuant to *Railroad Commission v. Pullman Co.*,[3139] Judge Jones decided that application of the sore loser statute to the candidate's case should be resolved first by the commonwealth courts.[3140] Following an unsuccessful state-court action,[3141] Judge Jones determined on August 21, 2017, that the sore-loser statute was constitutional and that it was constitutional for a political party to restrict gatherers of primary-election ballot-petition signatures to members of the party.[3142] On August 7, 2018, the court of appeals affirmed dismissal of the case.[3143]

Dianne L. Stallings, *Dates and Information to Note for Fall Election*, Ruidoso News, Oct. 12, 2016, at A6.

3136. Opinion, *De La Fuente Guerra*, No. 1:16-cv-393 (D.N.M. May 19, 2017), D.E. 53, 2017 WL 3172788; *see* Opinion, *id.* (Dec. 8, 2017), D.E. 58, 2017 WL 6271254 (denying reconsideration).

3137. De La Fuente Guerra v. Toulouse-Oliver, 752 F. App'x 579 (10th Cir. 2018).

3138. De La Fuente v. Cortés, 207 F. Supp. 3d 441 (M.D. Pa. 2016); De La Fuente v. Cortés, 261 F. Supp. 3d 543, 546 (M.D. Pa. 2017); *see* Amended Complaint, De La Fuente v. Cortés, No. 1:16-cv-1696 (M.D. Pa. Aug. 18, 2016), D.E. 4; Complaint, *id.* (Aug. 15, 2016), D.E. 1; *see also* John Latimer, *Lebanon Dems Prepare for Fall*, Lebanon Daily News, Apr. 28, 2016, at A7 (reporting that the candidate received 14,200 primary-election votes in Pennsylvania).

Judge Jones retired on August 1, 2021. Federal Judicial Center Biographical Directory of Article III Federal Judges [hereinafter FJC Biographical Directory], www.fjc.gov/history/judges.

3139. 312 U.S. 496 (1941) (holding that if resolution of an uncertain state-law matter might moot a federal constitutional question, "In the absence of any showing that . . . methods for securing a definitive ruling in the state courts cannot be pursued with full protection of the constitutional claim, the district court should exercise its wise discretion by staying its hands.").

3140. *De La Fuente*, 207 F. Supp. 3d 441 (M.D. Pa. 2016).

3141. Opinion, De La Fuente v. Cortes, No. 518 M.D. 2016 (Pa. Commw. Ct. Oct. 12, 2016), *attached to* Joint Status Report, *De La Fuente*, No. 1:16-cv-1696 (M.D. Pa. Nov. 14, 2016), D.E. 16.

3142. *De La Fuente*, 261 F. Supp. 3d 543; Opinion, *De La Fuente*, No. 1:16-cv-1696 (M.D. Pa. Nov. 20, 2017), D.E. 47 (denying amendment of the judgment); *see* Second

South Dakota

The candidate filed a counseled complaint in the District of South Dakota on August 24, 2016, challenging the state's ballot-petition signature requirements as excessively strict as to form and notarization requirements.[3144] On the following day, Judge Roberto A. Lange set the case for hearing five days after that.[3145] On August 26, the candidate filed a motion for emergency preliminary injunctive relief.[3146] At the end of the hearing, Judge Lange denied the candidate relief for reasons explained at the hearing.[3147] A transcript of the hearing was not filed.[3148]

Virginia

A September 21, 2016, pro se complaint filed in the Eastern District of Virginia challenged Virginia's requirement that the candidate's Electoral College nominees disclose their Social Security numbers.[3149] With his complaint, the candidate filed a motion for emergency preliminary injunctive relief placing his name on the general-election ballot.[3150] That day, Judge Liam O'Grady set the case for hearing on September 23.[3151] He allowed the filing of posthearing briefs by September 27.[3152] On September 30, he decided, "Though plaintiff raises some interesting questions of law, his complaint does not meet the high standard for a preliminary injunction, and his motion must therefore be DENIED."[3153] On November 18, Judge O'Grady granted a motion to amend the complaint following retention of counsel.[3154]

Amended Complaint, *id.* (May 14, 2017), D.E. 33.

3143. De La Fuente v. Cortés, 751 F. App'x 269 (3d Cir. 2018) (amended Oct. 26, 2018).

3144. Complaint, De La Fuente v. Krebs, No. 3:16-cv-3035 (D.S.D. Aug. 24, 2016), D.E. 1.

3145. Order, *id.* (Aug. 25, 2016), D.E. 8.

3146. Motion, *id.* (Aug. 26, 2016), D.E. 10.

3147. Order, *id.* (Aug. 31, 2016), D.E. 22; Minutes, *id.* (Aug. 30, 2016), D.E. 19; *see* Summary Judgment, *id.* (Aug. 31, 2016), D.E. 23.

3148. Docket Sheet, *id.* (Aug. 24, 2016).

3149. Complaint, De La Fuente v. Alcorn, No. 1:16-cv-1201 (E.D. Va. Sept. 21, 2016), D.E. 1.

3150. Motion, *id.* (Sept. 21, 2016), D.E. 3.

3151. Order, *id.* (Sept. 21, 2016), D.E. 5; *see* Transcript, *id.* (Sept. 23, 2016, filed Sept. 29, 2016), D.E. 16.

3152. Minutes, *id.* (Sept. 23, 2016), D.E. 9.

3153. Opinion, *id.* (Sept. 30, 2016), D.E. 17.

3154. Order, *id.* (Nov. 18, 2016), D.E. 29; *see* Amended Complaint, *id.* (Dec. 29, 2016), D.E. 30; *see also* Order, *id.* (Mar. 29, 2017), D.E. 39 (denying a motion to dismiss the amended complaint and requiring the defendants to answer).

Washington

Seeking relief from Washington's requirement of public notice ten days before ballot-petition signatures are collected, the candidate filed a federal complaint in the Western District of Washington on September 19, 2016.[3155] The candidate filed a motion for a temporary restraining order two days later.[3156] Five days after that, Judge Benjamin H. Settle heard the case and denied the motion "for the reasons stated on the record."[3157] A transcript of the hearing was not filed.[3158] The case continued, because the candidate intended to run again in 2020.[3159]

On February 22, 2018, Judge Settle held unconstitutional Washington's requirement of newspaper notice ten days before local nominating conventions for minor-party candidates.[3160] Failing to satisfy an easy hurdle, Washington was not able to explain why a candidate who collected a sufficient number of ballot-petition signatures to qualify for the ballot should be excluded from the ballot for failure to sufficiently inform the public that the candidate was collecting signatures from others.[3161]

The court of appeals acknowledged, "It may be that Washington's requirement is somewhat antiquated, and that publishing newspaper notices does little in this day and age to alert Washington's voters to ongoing political activity."[3162] But "requiring notice about independent candidate and minor party conventions provides voters with the opportunity to participate and potentially learn about less well-publicized candidates."[3163] "In this case, Washington's notice requirement imposes only a minimal burden on independent and minor-party candidates' free speech rights."[3164] So the court of appeals ordered summary judgment for Washington.[3165]

3155. Complaint, De La Fuente v. Wyman, No. 3:16-cv-5801 (W.D. Wash. Sept. 19, 2016), D.E. 1.

3156. Temporary-Restraining-Order Motion, *id.* (Sept. 21, 2016), D.E. 9.

3157. Docket Sheet, *id.* (Sept. 19, 2016) (D.E. 18).

3158. *Id.*

3159. Opinion, *id.* (Jan. 31, 2018), D.E. 41, 2018 WL 646958 (narrowing summary judgment issues).

3160. Opinion, *id.* (Wash. Feb. 22, 2018), D.E. 43, 2018 WL 1014545.

3161. *Id.* at 10–13.

3162. De La Fuente v. Wyman, 773 F. App'x 868, 870 (9th Cir. 2019).

3163. *Id.* at 869–70.

3164. *Id.* at 869.

3165. *Id.* at 870.

Litigation in Other States

The candidate was on the presidential primary and caucus ballots in several states.[3166] In other litigation, with somewhat less time pressure, the candidate challenged exclusion from both primary and general elections.

Iowa. On May 10, 2016, Southern District of Iowa Judge Stephanie M. Rose dismissed a pro se action filed by the candidate on February 5 in Iowa, complaining that he was excluded from the February 1 Iowa presidential nomination caucuses because of contractual breaches that Judge Rose determined were purely state-law claims.[3167] The court of appeals affirmed the dismissal on February 27, 2017.[3168]

3166. *See* Dan Arestia, *Kasich, Clinton Win in Darien, but Trump Takes State GOP Vote*, Darien Times, Apr. 28, 2016, at A1 (Connecticut); Peter Becker, *Trump Wins in Pike, Wayne; Sanders, Clinton Split*, Hawley News Eagle, Apr. 30, 2016, at 1 (Pennsylvania); Matt Bittle, *Clinton Swept 40 State Legislative Districts, Trump Won in 39*, Del. State News, Apr. 28, 2016, at 10 (Delaware); Trevor Brown, *Cheyenne Democrats Prepare for Record Turnout*, Laramie Boomerang, Apr. 8, 2016, at A6 (Wyoming); Nate Cohn, *Where Democrats Like Clinton the Least*, N.Y. Times, May 10, 2016, at A3 (Oklahoma); *Election Results*, St. Louis Post-Dispatch, Mar. 16, 2016, at A7 (Missouri); Jean Gordon, *March Primary Elections Is Tuesday*, Forest City Daily Courier, Mar. 13, 2016, at A6 (North Carolina); Randy Ludlow, *Buckeye State Picks Clinton Again*, Columbus Dispatch, Mar. 16, 2016, at 1A (Ohio); Ron Maxey, *Mississippi Voters Take to Polls, Cast Ballots*, Commercial Appeal, Mar. 8, 2016, at 5 (Mississippi); Chris Mayhew, *N. Ky. Primary Ballot a Mix of Races*, Cincinnati Enquirer, May 12, 2016, at A2 (Kentucky); *Presidential Primary Results; Maryland 2016*, Balt. Sun, Apr. 27, 2016, at A12 (Maryland); Kaitlyn Schwers, *Early Voting Starts Tuesday in Arkansas*, Baxter Bull., Feb. 13, 2016, at A10 (Arkansas); Jeff Selle, *Democrats Double Down*, Coeur d'Alene Press, Mar. 21, 2016, at A1 (Idaho); Richard Sharkey, *Cruz Won Rapides, but Trump Led Cenla Overall*, Alexandria Daily Town Talk, Mar. 7, 2016, at A6 (Louisiana); Brian Smith, *Primaries See High Turnout, Clerk Says*, Maple Valley News, Mar. 12, 2016, at 2 (Michigan); Gerry Tuoti, *Five Things to Know About the Presidential Primary*, Concord J., Feb. 25, 2016, at 5 (Massachusetts); Jamie Willey, *Sanders Earns Five Delegates at Indy*, Parsons Sun, Mar. 8, 2016, at 1 (Kansas); Phil Willon, *They're Out of the Race but Still on the Ballot*, L.A. Times, Mar. 21, 2016, at B1 (California); Cy Wood, *Super Tuesday Vote Includes Local Races*, Valley Times-News, Feb. 29, 2016, at 1 (Alabama); *see also* D.S.C. *De La Fuente* Preliminary-Injunction Motion, *supra* note 3127, at 6; Complaint, De La Fuente v. Iowa Democratic Party, No. 4:16-cv-31 (S.D. Iowa Feb. 5, 2016), D.E. 1 [hereinafter S.D. Iowa *De La Fuente* Complaint] (claiming that the "Plaintiff has been accepted into the Presidential Primary Ballot in twenty-four states and one territory [*sic*] (Alabama, Alaska, Arizona, Arkansas, Colorado, Democrats Abroad, Hawaii, Idaho, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, North Carolina, Ohio, Oklahoma, Texas, Utah, Vermont, and West Virginia)").

3167. Opinion, *De La Fuente*, No. 4:16-cv-31 (S.D. Iowa May 10, 2016), D.E. 17; *see* S.D. Iowa *De La Fuente* Complaint, *supra* note 3166.

3168. De La Fuente v. Iowa Democratic Party, 678 F. App'x 450 (8th Cir. 2017).

Oklahoma. Western District of Oklahoma Judge Stephen P. Friot dismissed a June 14, 2016, pro se action on July 29, granting a motion to dismiss to which the candidate did not respond.[3169] Judge Friot dismissed a subsequent counseled action by the candidate and the Green Party's presidential nominee challenging requirements for the general-election ballot: "Plaintiffs have not alleged or otherwise identified any material changes in Oklahoma law, or any other changed circumstances, which would suggest that this action is not precluded under the logic and rulings of existing decisions which hold that Oklahoma's ballot-access laws are constitutional."[3170] An appeal was dismissed by stipulation.[3171]

California. The candidate's counseled motion for injunctive relief against California's signature requirement for independent candidates in the November 2016 presidential general election[3172] was denied by Central District of California Judge Michael W. Fitzgerald on August 12.[3173] Following the election, an appeal was dismissed as moot.[3174] Judge Fitzgerald dismissed the action on October 4, 2017, concluding that a requirement of signatures from one percent of registered voters—178,039 in 2016—was not a severe burden, and it bore a reasonable relationship to a legitimate interest in maintaining an uncluttered and manageable ballot.[3175] On July 19, 2019, the court of appeals agreed.[3176]

Sore-Loser Statutes. In September and October 2016, Western District of Texas Judge Robert Pitman,[3177] Middle District of Alabama Judge W.

3169. Opinion, De La Fuente v. Oklahoma, No. 5:16-cv-583 (W.D. Okla. July 29, 2016), D.E. 10; *see* Motion to Dismiss, *id.* (July 6, 2016), D.E. 9; Amended Complaint, *id.* (June 14, 2016), D.E. 5; Complaint, *id.* (May 31, 2016), D.E. 1.

3170. Opinion at 6, De La Fuente v. Ziriax, No. 5:16-cv-914 (W.D. Okla. Dec. 13, 2016), D.E. 9, 2016 WL 10537015; Complaint, *id.* (Aug. 9, 2016), D.E. 1.

3171. Order, De La Fuente v. Ziriax, No. 17-6010 (10th Cir. May 10, 2017).

3172. Motion, De La Fuente v. California, No. 2:16-cv-3242 (C.D. Cal. Aug. 9, 2016), D.E. 16.

3173. Opinion, *id.* (Aug. 12, 2016), D.E. 18, 2016 WL 5340551; De La Fuente v. Padilla, 686 F. App'x 383, 383 (9th Cir. 2017) (noting ample time to resolve a challenge to the signature requirement for the 2020 election); *see* Complaint, *De La Fuente*, No. 2:16-cv-3242 (C.D. Cal. May 11, 2016), D.E. 1; *see also* Amended Complaint, *id.* (Nov. 3, 2016), D.E. 30.

3174. *De La Fuente*, 686 F. App'x 383; *see* Order, De La Fuente v. Padilla, No. 16-56261 (9th Cir. Sept. 23, 2016), D.E. 7 (denying the candidate's motion to expedite the appeal).

3175. De La Fuente v. California, 278 F. Supp. 3d 1146 (C.D. Cal. 2017).

3176. De La Fuente v. Padilla, 930 F.3d 1101 (9th Cir. 2019).

3177. Kennedy v. Cascos, 214 F. Supp. 3d 559 (W.D. Tex. 2016) (explaining Judge Pitman's September 28, 2016, oral ruling); *see* Motion, Kennedy v. Cascos, No. 1:16-cv-

Keith Watkins,[3178] Northern District of Illinois Judge Amy J. St. Eve,[3179] and Middle District of North Carolina Judge Thomas D. Schroeder[3180] denied the candidate's challenges to sore-loser statutes, which prevented the candidate from being on the November 8, 2016, general-election ballots because he had been on the states' primary-election ballots.

Tennessee. A pro se action in the Middle District of Tennessee was dismissed on December 20, 2016.[3181]

Arizona. On January 9, 2017, District of Arizona Magistrate Judge John Z. Boyle denied the candidate's November 2, 2016, motion to amend[3182] his July 20 pro se complaint:[3183] "appearing to acknowledge that his case would not be litigated in time for him to appear on the 2016 presidential ballot, [he sought] to amend his Complaint to add a claim for compensatory damages,"[3184] but such a claim is barred by the Eleventh Amendment.[3185] Moreover, although the election had passed and the can-

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1047 (W.D. Tex. Sept. 8, 2016), D.E. 3; Complaint, *id.* (Sept. 8, 2016), D.E. 1 (counseled complaint by the candidate, a voter, and the American Delta Party, for which the candidate was the presidential nominee); *see also* Jamie Lovegrove, *Independent Candidate Sues for Ballot Spot*, Dallas Morning News, Sept. 20, 2016, at B3.

After further briefing, Judge Pitman dismissed the action on May 18, 2017, and he denied a motion to amend the complaint with claims pertaining to the 2020 election, because he found the candidate's 2020 campaign plans to be too speculative. Opinion, Kennedy v. Cascos, No. 1:16-cv-1047 (W.D. Tex. May 18, 2017), D.E. 44, 2017 WL 2223056.

3178. De La Fuente v. Merrill, 214 F. Supp. 3d 1241 (M.D. Ala. 2016); Order, De La Fuente v. Merrill, No. 2:16-cv-755 (M.D. Ala. Sept. 30, 2016), D.E. 23; *see* Opinion, *id.* (Aug. 30, 2017), D.E. 35, 2017 WL 3765744 (dismissing the action); Amended Complaint, *id.* (Sept. 14, 2016), D.E. 7 (counseled complaint by the candidate and a voter); Complaint, *id.* (Sept. 12, 2016), D.E. 1 (same).

3179. Opinion, De La Fuente v. Illinois, No. 1:16-cv-6984 (N.D. Ill. Oct. 3, 2016), D.E. 17, 2016 WL 5720349; *see* Complaint, *id.* (July 5, 2016), D.E. 1 (pro se).

Judge St. Eve was elevated to the court of appeals on May 23, 2018. FJC Biographical Directory, *supra* note 3138.

3180. Opinion, De La Fuente v. North Carolina, No. 1:16-cv-470 (M.D.N.C. Oct. 11, 2016), D.E. 19, 2016 WL 5922314; *see* Amended Complaint, *id.* (June 15, 2016), D.E. 5; Complaint, *id.* (May 16, 2016), D.E. 1 (counseled).

3181. Order, De La Fuente v. Democratic Party of Tenn., No. 3:16-cv-189 (M.D. Tenn. Dec. 20, 2016), D.E. 28, 2016 WL 7386490, *adopting because no objection was filed* Report and Recommendation, *id.* (Oct. 24, 2016), D.E. 25, 2016 WL 7395797; *see* Amended Complaint, *id.* (Apr. 1, 2016), D.E. 14; Complaint, *id.* (Feb. 5, 2016), D.E. 1.

3182. Amendment Motion, De La Fuente v. Arizona, No. 2:16-cv-2419 (D. Ariz. Nov. 2, 2016), D.E. 11.

3183. Complaint, *id.* (July 20, 2016), D.E. 1.

3184. Opinion at 2, *id.* (Jan. 9, 2017), D.E. 18, 2017 WL 75846.

3185. *Id.* at 3.

didate's claim for injunctive relief was moot, Judge Boyle also determined that the claim was barred by laches because it was filed four months after the deadline for filing a petition for new party recognition and not served for another six weeks.[3186] Judge Boyle dismissed remaining claims on June 11, 2019, finding Arizona's interests sufficient to justify the candidate's burdens in getting on Arizona's ballot.[3187] An appeal was dismissed for lack of prosecution.[3188]

Hawaii. On March 28, 2017, District of Hawaii Judge Leslie E. Kobayashi dismissed the candidate's July 19, 2016, pro se action alleging that the Hawaii election statutes make "it impossible for voters to respond to current political developments by forming a new party during an election year."[3189] Judge Kobayashi decided that Hawaii's early deadline for establishing a new party did not violate the First Amendment, and the signature requirement was not discriminatory.[3190] "Although unlikely, it is arguably possible that Plaintiff's claims—insofar as they seek prospective declaratory relief—can be cured by amendment."[3191] In June 2017, the plaintiffs withdrew a May motion to amend the complaint,[3192] and Judge Kobayashi dismissed the action with prejudice in July.[3193]

Maryland. District of Maryland Judge Ellen Lipton Hollander dismissed the candidate's August 2, 2016, pro se complaint on June 5, 2017, as moot.[3194] The Tuesday complaint was filed one day after the deadline for an independent candidate to file ballot-petition signatures for the November election.[3195] At the end of the previous week, another federal suit by an independent candidate for the U.S. Senate was settled with a temporary

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3186. *Id.* at 4–5.

3187. Opinion, *id.* (June 11, 2019), D.E. 89, 2019 WL 2437300; *see* Second Amended Complaint, *id.* (Oct. 17, 2018), D.E. 54.

3188. Order, De La Fuente v. Hobbs, No. 19-16868 (9th Cir. Jan. 9, 2020), D.E. 9.

3189. Opinion, De La Fuente v. Nago, No. 1:16-cv-398 (D. Haw. Mar. 28, 2017), D.E. 25 [hereinafter D. Haw. *De La Fuente* Opinion], 2017 WL 1159094; Complaint at 1, *id.* (July 19, 2016), D.E. 1.

3190. D. Haw. *De La Fuente* Opinion, *supra* note 3189.

3191. *Id.* at 18.

3192. Motion to Withdraw, *De La Fuente*, No. 1:16-cv-398 (D. Haw. June 7, 2017), D.E. 31; *see* Docket Sheet, *id.* (July 19, 2016) (order granting a motion to withdraw a motion to amend the complaint, D.E. 32); Motion to Amend, *id.* (May 9, 2017), D.E. 28.

3193. Order, *id.* (July 7, 2017), D.E. 33.

3194. Opinion, De La Fuente v. Lamone, No. 1:16-cv-2743 (D. Md. June 5, 2017), D.E. 14 [hereinafter D. Md. *De La Fuente* Opinion], 2017 WL 2439143; Complaint, *id.* (Aug. 2, 2016), D.E. 1 (alleging a desire "to have his name put on the 2016 Presidential ballot in Arizona").

3195. D. Md. *De La Fuente* Opinion, *supra* note 3194, at 1–2 & n.1.

drop in the number of signatures required to get on the ballot from approximately 38,000 to 10,000.[3196] The relevant statute was amended in 2017 to state that 10,000 signatures would thereafter be sufficient.[3197]

Indiana. On November 9, 2017, Southern District of Indiana Magistrate Judge Debra McVicker Lynch recommended dismissal with prejudice of the candidate's July 5, 2016, pro se action "because of the plaintiff's consistent failure to meet deadlines and to prosecute his claims."[3198] On November 16, District Judge Tanya Walton Pratt concluded, "Because the claims are moot, the Court need not address the Magistrate Judge's Recommendation. However, if the case were not dismissed for lack of jurisdiction, it would be dismissed with prejudice based on De La Fuente's failure to litigate."[3199]

Victory

The Virginia case was resolved on January 4, 2018, by a consent decree requiring Virginia to stop asking signers of ballot petitions to provide the last four digits of their Social Security numbers and providing for a payment of $43,409.78 to the candidate in attorney fees.[3200]

Unsuccessful Suit for Damages

On April 23, 2019, Judge Rudolph Contreras, in the district court for the District of Columbia, dismissed without prejudice to amend a February 20, 2018, pro se complaint by De La Fuente against the Democratic Party that sought damages for allegedly thwarting his presidential campaign.[3201] As an opportunity to seek leave to amend the complaint remained, the court of appeals determined on December 29, 2020, that it did not have jurisdic-

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3196. *Id.* at 3–5; *see* Stipulated Dismissal, Dorsey v. Lamone, No. 1:15-cv-2170 (D. Md. Sept. 28, 2016), D.E. 22; *see also* Complaint, *id.* (July 24, 2015), D.E. 1.

3197. D. Md. *De La Fuente* Opinion, *supra* note 3194, at 5–6.

3198. Opinion, De La Fuente v. Indiana, No. 1:16-cv-1789 (S.D. Ind. Nov. 9, 2017), D.E. 29; Complaint, *id.* (July 5, 2016), D.E. 1 (alleging "a significant modicum of support nationally and in the State of Indiana").

Judge Lynch retired on October 31, 2022. Press Release, www.insd.uscourts.gov/sites/insd/files/Press%20Release%20-%20Lynch%20Retirement%20Event.pdf.

3199. Opinion, *De La Fuente*, No. 1:16-cv-1789 (S.D. Ind. Nov. 16, 2017), D.E. 30.

3200. Consent Decree, De La Fuente v. Alcorn, No. 1:16-cv-1201 (E.D. Va. Jan. 4, 2018), D.E. 56.

3201. Opinion, De La Fuente v. DNC Services Corp., No. 1:18-cv-336 (D.D.C. Apr. 23, 2019), D.E. 21, 2019 WL 1778948; *see* Opinion, *id.* (Aug. 2, 2019), D.E. 28, 2019 WL 3536612 (denying a motion to amend the judgment); *see also* Complaint, *id.* (Feb. 20, 2018), D.E. 1.

tion over a filed appeal.[3202] De La Fuente made no attempt to amend the complaint.[3203]

The 2020 Presidential Election

De La Fuente's lawsuits regarding the 2020 presidential election included one unsuccessful emergency case and a few other cases that were not emergencies.

The District of Columbia's Presidential Election

De La Fuente and the Alliance Party filed a federal complaint in the district court for the District of Columbia on August 21, 2020, complaining that—in a move prompted by social distancing made necessary by the global Covid-19 infectious pandemic—the district's reduction in the number of signatures required to get on the general-election ballot as an independent or minor-party candidate did not go into effect until one day after the August 5 due date to submit the signatures.[3204] Five days later, the plaintiffs filed a corrected complaint.[3205] Two days after that, the plaintiffs filed a motion for a temporary restraining order or a preliminary injunction.[3206]

Judge James E. Boasberg set the case for a telephonic hearing on September 3.[3207] At the hearing, Judge Boasberg denied the plaintiffs immediate relief.[3208] He dismissed the action on December 7 for failure to respond to a motion to dismiss it.[3209]

Ballot-Petition Signature Requirement in Arizona and Virginia

De La Fuente and the Alliance Party had filed a federal complaint in the District of Arizona on June 29 seeking judicial relief from Arizona's signature requirements for independent and minor-party presidential candidates, including among their requested forms of relief a temporary restraining order or a preliminary injunction.[3210] On the day that the complaint was filed, Judge Michael T. Liburdi issued in the docket sheet an or-

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3202. De La Fuente v. DNC Services Corp., 832 F. App'x 2 (D.C. Cir. 2020).

3203. Docket Sheet, *De La Fuente*, No. 1:18-cv-336 (D.D.C. Feb. 20, 2018).

3204. Complaint, Alliance Party v. D.C. Bd. of Elections, No. 1:20-cv-2319 (D.D.C. Aug. 21, 2020), D.E. 1.

3205. Corrected Complaint, *id.* (Aug. 26, 2020), D.E. 2.

3206. Motion, *id.* (Aug. 28, 2020), D.E. 4.

3207. Docket Sheet, *id.* (Aug. 21, 2020).

3208. *Id.*

3209. *Id.*

3210. Complaint, De La Fuente v. Hobbs, No. 2:20-cv-1276 (D. Ariz. June 29, 2020), D.E. 1.

der that immediate injunctive relief would not be considered without a motion.[3211] Judge Liburdi approved a voluntary dismissal on October 2.[3212]

In 2021, Eastern District of Virginia Judge O'Grady dismissed a similar July 9, 2020, complaint for failure to effect service of process.[3213]

California's Attempt to Require Tax Returns for Presidential Candidates

On July 30, 2019, California enacted the Presidential Tax Transparency and Accountability Act, which would require presidential primary-election candidates to publicly disclose their tax returns for the previous five years.[3214] De La Fuente challenged the statute in the Southern District of California on the day that the statute was enacted as a violation of the federal Constitution and as a violation of the confidentiality of federal tax returns.[3215] California's secretary of state persuaded Judge William Q. Hayes to transfer the case to the Eastern District, which includes the capital and where four similar actions were pending:[3216] an action filed on August 1 by four voters[3217] and three actions filed on August 6[3218] by President Trump,[3219] the Republican Party and three voters,[3220] and another voter.[3221] An action filed on August 19 was dismissed voluntarily a few days later.[3222]

3211. Docket Sheet, *id.* (June 29, 2020) (D.E. 6).

3212. Order, *id.* (Oct. 2, 2020), D.E. 9.

3213. Order, Alliance Party v. Va. State Bd. of Elections, No. 1:20-cv-774 (E.D. Va. Apr. 20, 2021), D.E. 5; Complaint, *id.* (July 9, 2020), D.E. 1.

3214. Griffin v. Padilla, 408 F. Supp. 3d 1169, 1172–73 (E.D. Cal. 2019); *see* Patterson v. Padilla, 8 Cal. 5th 220, 451 P.3d 1171, 254 Cal. Rptr. 3d 816 (2019); *see also* Jennifer Medina & Annie Karni, *Want to Be on Ballot? Tax Returns Are Needed*, N.Y. Times, July 31, 2019, at A20.

3215. Complaint, De La Fuente v. Padilla, No. 3:19-cv-1433 (S.D. Cal. July 30, 2019), D.E. 1.

3216. Order, *id.* (Aug. 20, 2019), D.E. 20-1; *see* Docket Sheet, De La Fuente v. Padilla, No. 2:19-cv-1659 (E.D. Cal. Aug. 26, 2019).

3217. Complaint, Griffin v. Padilla, No. 2:19-cv-1477 (E.D. Cal. Aug. 1, 2019), D.E. 1.

3218. *See* Annie Karni, *Trump Campaign Challenges California's Tax Returns Law*, N.Y. Times, Aug. 7, 2019, at A18; John Myers, *Trump Sues State to Keep Tax Returns Out of View*, L.A. Times, Aug. 7, 2019, at B1; John Wagner, *Trump, RNC Challenge Calif. Law on Tax Returns*, Wash. Post, Aug. 7, 2019, at A18.

3219. Complaint, Trump v. Padilla, No. 2:19-cv-1501 (E.D. Cal. Aug. 6, 2019), D.E. 1.

3220. Complaint, Melendez v. Newsom, No. 2:19-cv-1506 (E.D. Cal. Aug. 6, 2019), D.E. 1.

3221. Complaint, Koenig v. Newsom, No. 2:19-cv-1507 (E.D. Cal. Aug. 6, 2019), D.E. 1.

3222. Order, Raths v. Newsom, No. 2:19-cv-1604 (E.D. Cal. Aug. 19, 2019), D.E. 12; Complaint, *id.* (Aug. 19, 2019), D.E. 1; *see* Voluntary Dismissal Motion, *id.* (Aug. 22, 2019), D.E. 9.

Judge Morrison C. England, Jr., issued a preliminary injunction on October 1 against enforcement of the act as an unconstitutional attempt by a state to impose a qualification criterion on the federal office of President.[3223] The court of appeals vacated the ruling and dismissed an appeal as moot in light of a decision by California's supreme court.[3224]

California's supreme court held on November 21, 2019, that the statute requiring presidential primary-election candidates to publicly disclose their tax returns was inconsistent with California's constitutional requirement that the ballot include all "recognized candidates throughout the nation or throughout California for the office of President of the United States."[3225]

Challenges to Exclusion from Republican Primary-Election Ballots

Challenges to the Republican Party's exclusion of De La Fuente from two presidential primary-election ballots were unsuccessful. Northern District of Georgia Judge J.P. Boulee denied De La Fuente a preliminary injunction on January 16, 2020,[3226] and dismissed the complaint on July 2.[3227] On April 24, District of Minnesota Judge David S. Doty dismissed De La Fuente's complaint as moot because although the complaint was filed on November 26, 2019, the case was not set for hearing until after the March 3, 2020, election, and De La Fuente had not sought an earlier hearing.[3228]

A December 16, 2019, action filed in the district court for the District of Columbia against President Trump, the Republican National Committee, and the Republican parties of seventeen states, including Georgia, Minnesota, and Washington, was dismissed voluntarily in response to an order to show cause why it should not be dismissed for failure to serve defendants.[3229]

3223. Griffin v. Padilla, 408 F. Supp. 3d 1169 (E.D. Cal. 2019); *see* John Myers, *State to Appeal After Trump Wins Tax Return Ruling*, L.A. Times, Oct. 3, 2019, at B1.

3224. Order, Griffin v. Padilla, No. 19-17000 (9th Cir. Dec. 16, 2019), D.E. 22, 2019 WL 7557783.

3225. Patterson v. Padilla, 8 Cal. 5th 220, 441 P.3d 1171, 254 Cal. Rptr. 816 (2019); *see* Maura Dolan & John Myers, *Justices Block Effort for Trump Tax Filings*, L.A. Times, Nov. 22, 2019, at A1.

3226. Opinion, De La Fuente v. Raffensperger, No. 1:19-cv-5323 (N.D. Ga. Jan. 16, 2020), D.E. 20; *see* Complaint, *id.* (Nov. 22, 2019), D.E. 1.

3227. Opinion, *id.* (July 2, 2020), D.E. 28.

3228. Opinion, De La Fuente v. Simon, No. 0:19-cv-2995 (D. Minn. Apr. 24, 2020), D.E. 18; *see* Complaint, *id.* (Nov. 26, 2019), D.E. 1; Docket Sheet, *id.* (Nov. 26, 2019).

3229. Voluntary Dismissal, De La Fuente v. Trump, No. 1:19-cv-3753 (D.D.C. Apr. 24, 2020), D.E. 6; *see* Docket Sheet, *id.* (Dec. 16, 2019) (minute order, Apr. 13, 2020); Complaint, *id.* (Dec. 16, 2019), D.E. 1.

An action filed in the Western District of Washington on January 17, 2020, began as an effort to get De La Fuente on the Republican Party's March 10 primary-election ballot.[3230] An amended complaint filed on March 26 added the American Delta Party as a plaintiff and sought to get De La Fuente on Washington's general-election ballot in November.[3231] Judge Settle granted Washington's secretary of state summary judgment on September 18.[3232]

Allowing an Independent Gubernatorial Candidate to Name a Replacement Running Mate

Myers v. Gant (Lawrence L. Piersol, D.S.D. 4:14-cv-4121)

> An independent candidate for governor challenged South Dakota's allowing a major-party candidate—but not an independent candidate—to name a substitute candidate for lieutenant governor. The district judge ruled the proscription unconstitutional and issued a preliminary injunction in the candidate's favor.
>
> *Topics:* Getting on the ballot; attorney fees.

On August 4, 2014, an independent candidate for governor of South Dakota filed a federal complaint in the District of South Dakota challenging the secretary of state's denial of the candidate's naming a replacement candidate for lieutenant governor following the original lieutenant governor's withdrawal from the race.[3233] The complaint alleged that it was unfair to deny an independent gubernatorial candidate's certifying a replacement candidate for lieutenant governor but allow a party candidate's doing so, until August 12.[3234] The lieutenant governor's name "was not required to and did not appear on the [plaintiff's] nominating petition."[3235]

On the day that the complaint was filed, Judge Lawrence L. Piersol ordered the clerk of court to electronically serve the complaint on the defendant secretary of state and on South Dakota's attorney general.[3236] Two days later, the candidate filed a motion for a preliminary injunction put-

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3230. Complaint, De La Fuente v. Wyman, No. 3:20-cv-5045 (W.D. Wash. Jan. 17, 2020), D.E. 1.

3231. Amended Complaint, Am. Delta Party v. Wyman, *id.* (Mar. 26, 2020), D.E. 21; Am. Delta Party v. Wyman, 488 F. Supp. 3d 1018, 1021 (W.D. Wash. 2020).

3232. *Am. Delta Party*, 488 F. Supp. 3d 1018.

An appeal was voluntarily dismissed. Order, Am. Delta Party v. Wyman, No. 20-35893 (9th Cir. Dec. 10, 2020), D.E. 8.

3233. Complaint, Myers v. Gant, No. 4:14-cv-4121 (D.S.D. Aug. 4, 2014), D.E. 1.

3234. *Id.*; *see* Myers v. Gant, 49 F. Supp. 3d 658, 662 (D.S.D. 2014).

3235. *Myers*, 49 F. Supp. 3d at 661.

3236. Order, *Myers*, No. 4:14-cv-4121 (D.S.D. Aug. 4, 2014), D.E. 5.

ting his choice for lieutenant governor on the ballot.[3237] Judge Piersol set the case for hearing on August 11.[3238] To accommodate a scheduling conflict, the parties consented to a postponement of the hearing until August 18.[3239] The candidate amended his complaint on August 14.[3240]

At the hearing, Judge Piersol ordered the candidate's substitute lieutenant governor candidate placed on the ballot.[3241]

> South Dakota's statutory scheme excluding [the plaintiff's] true running mate from the general election ballot restricts the ability of [the plaintiff] and his supporters to choose a lieutenant governor candidate, to place the candidate on the ballot, and to vote for that candidate in the election. It is a severe burden on the associational rights of [the plaintiff] and South Dakota voters. This burden is magnified by the discriminatory effect of the scheme on non-party candidates. Thus, the State must show an interest of compelling importance to justify the heavy burden of meeting strict scrutiny analysis.
>
> . . .
>
> . . . Because the State has not shown that a compelling state interest is advanced by restricting the ability of non-party candidates such as [the plaintiff] from replacing a running mate, the law violates the Constitution.[3242]

In the election, the plaintiff received 4% of the vote.[3243]

On May 27, 2015, Judge Piersol awarded the plaintiff $10,265.95 in attorney fees and costs.[3244]

Illinois's Ballot-Access Requirements for a New Party

Summers v. Smart (John J. Tharp, Jr., and John Robert Blakey, N.D. Ill. 1:14-cv-5398) and Tripp v. Smart (Michael J. Reagan, S.D. Ill. 3:14-cv-890)

> After failing to obtain enough signatures to appear on the 2014 general-election ballot, a minor party filed a federal complaint in the Northern District of Illinois challenging ballot-signature requirements for new parties. The district judge denied the party immediate relief, because the party had met the constitutionally suspect criteria. A district judge similarly denied immediate relief

3237. Motion, *id.* (Aug. 6, 2014), D.E. 9.

3238. Order, *id.* (Aug. 7, 2014), D.E. 11.

3239. Order, *id.* (Aug. 8, 2014), D.E. 18.

3240. Amended Complaint, *id.* (Aug. 14, 2014), D.E. 25.

3241. Order, *id.* (Aug. 18, 2014), D.E. 27; Minutes, *id.* (Aug. 18, 2014), D.E. 26.

3242. Myers v. Gant, 49 F. Supp. 3d 658, 667–68 (D.S.D. 2014).

3243. *See Final Election Results*, Sioux Falls Argus Leader, Nov. 6, 2014, at A5.

3244. Opinion, *Myers*, No. 4:14-cv-4121 (D.S.D. May 27, 2015), D.E. 35, 2015 WL 3419403.

> in a Southern District case. A new judge in the Northern District later dismissed the case there as precluded by an earlier result in state court. The federal court of appeals later concluded that the ballot-access requirements were constitutional.
>
> *Topics:* Getting on the ballot; laches; recusal; case assignment; matters for state courts.

On July 15, 2014, the Green Party, seven of its prospective candidates in the November 4 general election, and a voter filed a federal complaint in the Northern District of Illinois against members of the state board of elections challenging qualifying rules for new political parties.[3245] The court assigned the case to Judge John J. Tharp, Jr.[3246] On July 18, the plaintiffs filed a motion for a preliminary injunction placing them on the November ballot.[3247]

The Green Party in Illinois was considered an established party from 2006 through 2010, but in 2010 its support failed to meet statutory criteria to retain that status.[3248] After a challenge to its signatures for the 2014 ballot, the party had fewer than the 25,000 valid signatures required.[3249]

Judge Tharp heard the case on July 22[3250] and set a second hearing for August 13.[3251] Following the second hearing, Judge Tharp promised a decision on August 21.[3252]

Two Green Party candidates and four party members filed a similar action in the Southern District of Illinois on August 13.[3253] Because of Judge J. Phil Gilbert's recusal, the court reassigned the case to Judge Michael J. Reagan.[3254] On August 18, the plaintiffs filed a motion for a preliminary

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3245. Complaint, Summers v. Smart, No. 1:14-cv-5398 (N.D. Ill. July 15, 2014), D.E. 1; Summers v. Smart, 65 F. Supp. 3d 556, 560–61 (N.D. Ill. 2014).

3246. Docket Sheet, *Summers*, No. 1:14-cv-5398 (N.D. Ill. July 15, 2014).

3247. Preliminary-Injunction Motion, *id.* (July 18, 2014), D.E. 5; *Summers*, 65 F. Supp. 3d at 561.

3248. *Summers*, 65 F. Supp. 3d at 559; *see* Kurt Erickson, *Green Party to Miss Ballot*, Bloomington Pantagraph, Aug. 22, 2014, at A1 ("Eight years after its candidate for governor received more than 10 percent of the vote, the Illinois Green Party likely will find itself on the sidelines in the November election.").

3249. *Summers*, 65 F. Supp. 3d at 559–60.

3250. Minutes, *Summers*, No. 1:14-cv-5398 (N.D. Ill. July 22, 2014), D.E. 9.

3251. Minutes, *id.* (July 23, 2014), D.E. 10.

3252. Minutes, *id.* (Aug. 13, 2014), D.E. 25.

3253. Complaint, Tripp v. Smart, No. 3:14-cv-890 (S.D. Ill. Aug. 13, 2014), D.E. 2; Tripp v. Scholz, 872 F.3d 857, 859–60 (7th Cir. 2017); *see* Amended Complaint, *Tripp*, No. 3:14-cv-890 (S.D. Ill. Aug. 14, 2014), D.E. 4 (adding as plaintiffs the party and another voter).

3254. Order, *Tripp*, No. 3:14-cv-890 (S.D. Ill. Aug. 14, 2014), D.E. 3.

injunction.[3255] On the following day, Judge Reagan decided that he should await the imminent decision in the Northern District, and he ordered the plaintiffs to file a notice within four hours of the Northern District ruling of the effect of the ruling on Judge Reagan's case.[3256]

Judge Tharp denied the Northern District plaintiffs immediate relief.[3257] Judge Tharp was skeptical of the constitutionality of certain requirements, such as Illinois's requirement that a new party run a full slate of candidates and the requirement that submissions of ballot signatures be notarized, but because the Green Party had complied with those requirements they were not good candidates for immediate relief.[3258] The party made no showing that their insufficient signatures arose from improper requirements, which the party did not challenge until after the signature-collection period was over.[3259]

On August 22, Judge Reagan denied the Southern District plaintiffs emergency relief.[3260] "Plaintiffs have had since at least March 2014 to bring their constitutional concerns regarding Illinois ballot procedures to a federal forum. That Plaintiffs waited to sue until nine days before ballot certification (and filed the instant motion *one day* before ballot certification) does not mean notice was impossible, it means they should have sued earlier."[3261]

Judge Reagan retired on March 31, 2019. Federal Judicial Center Biographical Directory of Article III Federal Judges [hereinafter FJC Biographical Directory], www.fjc.gov/history/judges.

3255. Preliminary-Injunction Motion, *Tripp*, No. 3:14-cv-890 (S.D. Ill. Aug. 18, 2014), D.E. 16.

3256. Docket Sheet, *id.* (Aug. 13, 2014) [hereinafter S.D. Ill. *Tripp* Docket Sheet] (D.E. 18); *see* Notice, *id.* (Aug. 21, 2014), D.E. 19.

3257. Summers v. Smart, 65 F. Supp. 3d 556 (N.D. Ill. 2014); Minutes, *Summers*, No. 1:14-cv-5398 (N.D. Ill. Aug. 21, 2014), D.E. 27; *see* Kevin P. Craver, *Judge Rejects Green Party Lawsuit Over Ballot Access*, N.W. Herald, Aug. 21, 2014.

3258. *Summers*, 65 F. Supp. 3d at 563–69.

The court of appeals determined in other litigation on September 22, 2017, that the full-slate requirement was unconstitutional. Libertarian Party of Ill. v. Scholz, 872 F.3d 518 (7th Cir. 2017) ("For a minor party and its nominees, Illinois's full-slate requirement extinguishes [the fundamental right to political association] unless the party fields candidates in races it may want no part of.").

3259. *Summers*, 65 F. Supp. 3d at 568–69.

3260. Opinion, *Tripp*, No. 3:14-cv-890 (S.D. Ill. Aug. 22, 2014), D.E. 22, 2014 WL 4179840.

3261. *Id.* at 5–6 (noting also "the heavy tipping of the balance of equities in favor of Defendants and the public").

Following an evidentiary hearing on September 2 and 4,[3262] Judge Reagan decided on September 10 to deny the plaintiffs a preliminary injunction.[3263] Judge Reagan shared Judge Tharp's skepticism about the constitutionality of Illinois's notarization requirement, but Judge Reagan concluded that the equities disfavored putting Green Party candidates on the November ballot who had obtained an insufficient number of petition signatures.[3264] Following additional discovery and briefing, Judge Reagan issued a summary judgment against the plaintiffs on August 17, 2016, finding that "the restrictions the plaintiffs complain about here don't severely burden their ballot access rights."[3265]

On January 15, 2015, the Northern District case was transferred to new District Judge John Robert Blakey.[3266] On July 25, 2016, Judge Blakey dismissed the case as precluded by a September 11, 2014, defeat in state court.[3267]

The court of appeals affirmed Judge Reagan's summary judgment on October 6, 2017: "Although each circulator must notarize each of their petition signature sheets, nothing prevents a circulator from notarizing all of their sheets at the same time, before the same notary."[3268]

Signature Requirements for an Independent Candidate in New Mexico

Parker v. Duran (Martha Vázquez, D.N.M. 1:14-cv-617)

> An independent candidate who did not collect enough signatures to appear on the general-election ballot filed a federal complaint challenging the signature requirement as improperly greater than the requirement for minor-party candidates. The district court

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3262. Transcript, *id.* (Sept. 4, 2014, filed May 21, 2015), D.E. 47; Minutes, *id.* (Sept. 2 and 4, 2014), D.E. 28, 31.

3263. Opinion, *id.* (Sept. 10, 2014), D.E. 32 [hereinafter Sept. 10, 2014, S.D. Ill. *Tripp* Opinion], 2014 WL 4457200; Tripp v. Scholz, 872 F.3d 857, 862 (7th Cir. 2017).

3264. Sept. 10, 2014, S.D. Ill. *Tripp* Opinion, *supra* note 3263.

3265. Opinion at 10, *Tripp*, No. 3:14-cv-890 (S.D. Ill. Aug. 17, 2016), D.E. 81, 2016 WL 4379876; *see Tripp*, 872 F.3d at 862; S.D. Ill. *Tripp* Docket Sheet, *supra* note 3256 (taxing costs of $767.85 against the plaintiffs).

3266. Order, Summers v. Smart, No. 1:14-cv-5398 (N.D. Ill. Jan. 15, 2015), D.E. 34 (transferring 306 cases from twenty-nine judges).

Judge Blakey joined the bench on December 19, 2014. FJC Biographical Directory, *supra* note 3254.

3267. Opinion, *Summers*, No. 1:14-cv-5398 (N.D. Ill. July 25, 2016), D.E. 86, 2016 WL 3977012.

3268. *Tripp*, 872 F.3d at 871, *cert. denied*, 584 U.S. ___, 138 S. Ct. 1447 (2018).

denied the plaintiff relief, and the court of appeals affirmed dismissal of the case.

Topics: Getting on the ballot; equal protection; intervention.

One week after a timely filing of insufficient ballot-petition signatures, an independent candidate for New Mexico's public-education commission filed a federal complaint in the District of New Mexico against New Mexico's secretary of state complaining that the signature requirement for independent candidates was improperly greater than the requirement for minor-party candidates.[3269] With his complaint, he filed a motion for a temporary restraining order and a preliminary injunction.[3270]

Six days after the complaint was filed, Judge Martha Vázquez ruled that the plaintiff had not satisfied the criteria for an ex parte temporary restraining order.[3271] One week later, New Mexico's attorney general moved to intervene on behalf of the state,[3272] a motion Judge Vázquez ultimately granted.[3273]

Five weeks after the complaint was filed, on August 7, 2014, Judge Vázquez denied the plaintiff relief: "Plaintiff, as a prospective independent candidate, is not similarly situated to a prospective minor-party candidate . . . ."[3274] Judge Vázquez dismissed the action on April 30, 2015.[3275] The court of appeals affirmed the dismissal on April 12, 2016.[3276]

Ballot Access for Minor Parties in Tennessee

Tomasik v. Goins (William J. Haynes, Jr., M.D. Tenn. 3:13-cv-1118)

A federal complaint filed on October 9, 2013, alleged that ballot-access rules were so onerous that the Libertarian Party was unable to qualify for a November 21 special election for a state house seat. After an October 31 hearing, the district judge granted the plaintiffs relief, based in part on his rulings in previous related cases. He awarded the plaintiffs $26,091 in attorney fees and costs.

Topics: Getting on the ballot; case assignment; attorney fees; early voting.

3269. Complaint, Parker v. Duran, No. 1:14-cv-617 (D.N.M. July 3, 2014), D.E. 1.
3270. Motion, *id.* (July 3, 2014), D.E. 2.
3271. Order, *id.* (July 9, 2014), D.E. 4.
3272. Intervention Motion, *id.* (July 16, 2014), D.E. 8.
3273. Docket Sheet, *id.* (July 3, 2014) (D.E. 14).
3274. Opinion at 11, *id.* (Aug. 7, 2014), D.E. 12, 2014 WL 7653394.
3275. Opinion, *id.* (Apr. 30, 2015), D.E. 17.
3276. Parker v. Winter, 645 F. App'x 632 (10th Cir. 2016).

On October 9, 2013, the Libertarian Party filed a federal complaint in the Middle District of Tennessee's Nashville courthouse alleging that Tennessee's ballot-access rules were so unconstitutionally onerous that the party's candidate was unable to qualify for a November 21 special election to fill a state house seat.[3277] The Green Party and the Constitution Party filed a related complaint on October 10, seeking preservation of their status as established minor parties.[3278] Both cases were transferred to Judge William J. Haynes, Jr., who had presided over related 2008 and 2011 cases.[3279]

The 2008 case was filed on January 23 by the Libertarian Party, the Green Party, the Constitution Party, and three voters; it alleged that because of unconstitutional ballot-access requirements, "it has been 40 years since a new political party was recognized by the State of Tennessee."[3280] In awarding the plaintiffs summary judgment on September 20, 2010, Judge Haynes agreed that "the requirement of 2.5% of the total vote in the last gubernatorial election for recognition as a statewide political party and the Defendants' policy setting a deadline for party recognition petitions of 120 days before the primary election, effectively bar minor political parties from ballot access in Tennessee elections."[3281] "Given the Plaintiffs' failure to seek preliminary injunctive relief or an expedited ruling, this injunction obtains after the upcoming 2010 elections."[3282] Tennessee did not appeal.[3283]

3277. Complaint, Tomasik v. Goins, No. 3:13-cv-1118 (M.D. Tenn. Oct. 9, 2013), D.E. 1; *see* Amended Complaint, *id.* (Oct. 24, 2013), D.E. 17.

3278. Complaint, Green Party of Tenn. v. Hargett, No. 3:13-cv-1128 (M.D. Tenn. Oct. 10, 2013), D.E. 1; Green Party of Tenn. v. Hargett, 791 F.3d 684, 690 (6th Cir. 2015).

3279. Transfer Order, *Tomasik*, No. 3:13-cv-1118 (M.D. Tenn. Oct. 22, 2013), D.E. 13; Transfer Order, *Green Party of Tenn.*, No. 3:13-cv-1128 (M.D. Tenn. Oct. 11, 2013), D.E. 5.

Judge Haynes retired on January 16, 2017. Biographical Directory of Article III Federal Judges [hereinafter FJC Biographical Directory], www.fjc.gov/history/judges.

3280. Complaint at 8, Libertarian Party v. Thompson, No. 3:08-cv-63 (M.D. Tenn. Jan. 23, 2008), D.E. 1; *see* Libertarian Party v. Goins, 793 F. Supp. 2d 1064, 1067 (M.D. Tenn. 2010) ("Plaintiffs did not seek any preliminary injunctive relief, nor did Plaintiffs request an expedited ruling.").

3281. *Libertarian Party*, 793 F. Supp. 2d at 1067, 1089–90.

3282. Order, *Libertarian Party*, No. 3:08-cv-63 (M.D. Tenn. Sept. 20, 2010), D.E. 44; *see 3rd Parties Win More Access to TN Ballots*, Nashville Tennessean, Sept. 23, 2010.

Judge Haynes awarded the plaintiffs $28,105.69 in attorney fees and expenses, Order, *Libertarian Party*, No. 3:08-cv-63 (M.D. Tenn. Nov. 29, 2010), D.E. 51, and the court awarded the plaintiffs $1,101.65 in costs, Bill of Costs, *id.* (Nov. 4, 2010), D.E. 50.

3283. Green Party v. Hargett, 882 F. Supp. 2d 959, 966 (M.D. Tenn. 2012).

The Green Party and the Constitution Party filed an action challenging the constitutionality of Tennessee's ballot-access rules for minor parties on July 20, 2011.[3284] The court assigned the case to Judge John T. Nixon, who agreed to transfer it to Judge Haynes as related to the 2008 case.[3285] Among the constitutional infirmities found by Judge Haynes on February 3, 2012, was that "Tennessee's 2.5% requirement and 119 day deadline for ballot access as a 'Recognized minor party' and its candidates violate Plaintiffs' First Amendment rights to associate and Tennessee voters' rights to vote for such parties' candidates."[3286]

> As to the appropriate relief, based upon the precedents in *Blackwell*, the Court deems any deadline in excess of sixty (60) days prior to the August primary for the filing of petitions for recognition as a political party is unenforceable. As to the number of signatures required for recognition as a political party, given the State's acceptance of 25 signatures for candidates for Governor and 275 signatures for President of the United States, the Court deems [the Green Party's] past electoral support of almost [20,000] votes and [the Constitution Party's] almost 10,000 signatories to constitute a significant showing of support to justify their recognition as political parties and to have their parties' names next to their candidates on the general election ballot. The Defendants shall be required to conduct a public random drawing for the order of placement of the political parties' candidates' names on the general election ballot.
>
> The Defendants are enjoined from enforcement of the state statutes requiring Plaintiffs to select their nominees by primary, awarding ballot preference to the majority party and [proscribing] the use of "Independent or Nonpartisan" in a political party's name. The Defendants must re-

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3284. Complaint, Green Party v. Hargett, No. 3:11-cv-692 (M.D. Tenn. July 20, 2011), D.E. 1; Green Party of Tenn. v. Hargett, 767 F.3d 533, 540 (6th Cir. 2014); Green Party v. Hargett, 953 F. Supp. 2d 816, 819 (M.D. Tenn. 2013); *see* Amended Complaint, *Green Party*, No. 3:11-cv-692 (M.D. Tenn. Nov. 29, 2014), D.E. 116; *see also Parties Sue Over Ballot Access*, Nashville Tennessean, July 28, 2011 ("Only one minor party, George Wallace's American Party, has appeared on ballots in Tennessee since the law was enacted—most recently in 1972.").

3285. Order, *Green Party*, No. 3:11-cv-692 (M.D. Tenn. Aug. 25, 2011), D.E. 9.

Judge Nixon died on December 19, 2019. FJC Biographical Directory, *supra* note 3279.

3286. *Green Party*, 882 F. Supp. 2d at 1019; *see Green Party of Tenn.*, 767 F.3d at 540.

"Under these requirements, a minor party would have had to submit a petition containing at least 40,039 valid signatures by April 5, 2012 in order to qualify for Tennessee's November 2012 general-election ballot." Green Party v. Hargett, 700 F.3d 816, 820 (6th Cir. 2012).

> vise the "Nomination Petition" to delete the reference that the signatory is a member of the party.[3287]

While the case was on appeal, Tennessee's legislature amended its election statutes to provide an alternative method for minor parties to get on the ballot: if they used methods other than a primary election to select their nominees, they could submit their 2.5% petitions as late as ninety days before the general election.[3288]

On August 9, approximately two weeks after the appeal was argued, the court of appeals stayed the random-order requirement.[3289] "The record in the present case contains no state-specific evidence as to whether Tennessee's party-order provision creates an impermissible 'voting cue.'"[3290] In resolving the appeal, the court decided that a facial challenge to the order provision failed because the plaintiffs had not presented sufficient Tennessee-specific evidence of impermissible cuing.[3291]

The court declined to stay a different part of Judge Haynes's injunction: "we find that the State has not met its burden with respect to the part of the district court's judgment ordering the placement of the plaintiffs' names next to their respective candidates on the November 2012 ballot . . . ."[3292]

On November 30, the court of appeals reversed Judge Haynes's decision in light of the statutory amendment.[3293] The court also concluded that the parties did not have standing to challenge the proscription on the use of the words "independent" or "nonpartisan" in their names, because they had no intention to do so.[3294]

On June 18, 2013, on remand, Judge Haynes again awarded the plaintiffs summary judgment:

> [A]lthough the 2012 amendments create an alternative for a minority party's recognition petition within 90 days of the general election, Tennessee retains the 2.5% signature requirement based upon the most re-

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3287. *Green Party*, 882 F. Supp. 2d at 1019–20 (citing Libertarian Party v. Blackwell, 462 F.3d 579 (6th Cir. 2006)).

On November 14, Judge Haynes awarded the plaintiffs $65,180.91 in attorney fees and costs. Opinion, *Green Party*, No. 3:11-cv-692 (M.D. Tenn. Nov. 14, 2012), D.E. 65, 2011 WL 5511224.

3288. *Green Party*, 700 F.3d at 822; *Green Party of Tenn.*, 767 F.3d at 541.

3289. Green Party v. Hargett, 493 F. App'x 686, 687, 690–91 (6th Cir. 2012).

3290. *Id.* at 690.

3291. *Green Party*, 700 F.3d at 826–27.

3292. *Green Party*, 493 F. App'x at 689.

3293. *Green Party*, 700 F.3d at 822–24; *Green Party of Tenn.*, 767 F.3d at 538, 541–42.

3294. *Green Party*, 700 F.3d at 827–29.

> cent gubernatorial election. The effect of this retention imposes an unjustified and unduly burdensome requirement that violates Plaintiffs' First Amendment right to associate as a political party and Tennessee voters' rights of the opportunity to vote for such parties. For the same reasons, the Court again concludes that the same signature requirement for the 2012 amendment's 90 day filing deadline before a general election violates Plaintiffs' First Amendment rights and Tennessee voters' rights of the opportunity to vote for such parties.[3295]

As to ballot order, Judge Haynes considered additional evidence and again concluded that always listing the legislature's controlling party first violated equal protection.[3296]

Six days after filing its 2013 complaint, the Libertarian Party moved for a preliminary injunction.[3297] On October 23, eight days later, the party informed Judge Haynes that "early ballots have not yet been printed, but that early voting will begin in one week."[3298] On the following day, Judge Haynes set the case for hearing on October 31.[3299]

At the conclusion of the October 31 hearing, Judge Haynes announced a ruling in the plaintiffs' favor: "Given the Court's prior findings that the state statutes that are challenged here violate minor political parties' First Amendment right to ballot access, the Court believes that the plaintiff has shown a likelihood of success on the merits here."[3300] Judge Haynes issued an order on November 5 placing the Libertarian Party's candidate on the November 21 special-election ballot as a Libertarian Party candidate.[3301]

Another candidate won the election with 89% of the vote.[3302] On January 27, 2014, Judge Haynes awarded the Libertarian Party plaintiffs $26,091 in attorney fees and costs.[3303]

3295. Green Party v. Hargett, 953 F. Supp. 2d 816, 854–55 (M.D. Tenn. 2013); *see Green Party of Tenn.*, 767 F.3d at 538–39.

3296. *Green Party*, 953 F. Supp. 2d at 855–60.

Judge Haynes also awarded the plaintiffs an additional $15,587.50 in attorney fees and costs. Order, Green Party v. Hargett, No. 3:11-cv-692 (M.D. Tenn. Aug. 26, 2013), D.E. 106, 2013 WL 4510803.

3297. Preliminary-Injunction Motion, Tomasik v. Goins, No. 3:13-cv-1118 (M.D. Tenn. Oct. 15, 2013), D.E. 11.

3298. Motion to Ascertain Status of Case, *id.* (Oct. 23, 2013), D.E. 14.

3299. Order, *id.* (Oct. 24, 2013), D.E. 16.

3300. Transcript at 5, *id.* (Oct. 31, 2013, filed Nov. 1, 2013), D.E. 26.

3301. Order, *id.* (Nov. 5, 2013), D.E. 30; *see Candidate May Be ID'd as Libertarian*, Nashville Tennessean, Nov. 1, 2013, at B2.

On December 13, the court awarded the plaintiffs $475 in costs. Order, *Tomasik*, No. 3:13-cv-1118 (M.D. Tenn. Dec. 13, 2013), D.E. 38.

3302. *See* Samantha Bryson, *Akbari wins in Dist. 91*, Memphis Commercial Appeal,

Judge Haynes awarded the Green Party and the Constitution Party summary judgment in their 2013 action on March 14, 2014.[3304] "Because Plaintiffs' candidates did not receive at least 5% of the total vote in the 2012 election to qualify as 'Statewide political party', Plaintiffs lost their right to continued ballot access."[3305] Judge Haynes held this result unconstitutional and ordered ballot positions for the parties "for at least three calendar years from the November 2012 election."[3306]

The court of appeals resolved appeals in the 2011 case on August 22, 2014, by vacating the award to plaintiffs of summary judgment and remanding the case for more factual development.[3307]

> Under Tennessee's new laws, a minor party must still obtain signatures before the primary election, but it is no longer required to complete its petitioning process months before the general election. By setting a later deadline, Tennessee has alleviated the burden of its ballot-access requirements to at least some extent, but we cannot say how much. . . .
>
> . . .
>
> As a final point, we agree with the district court that the defendants have not, at least at this point, put forth compelling interests to support a signature requirement of 2.5%, rather than something lower.[3308]

With respect to the ballot-ordering claim, "Given that this case is at the summary judgment stage, the district court erred in reaching its conclusion on the basis of conflicting evidence and cases from other jurisdictions."[3309]

The court of appeals affirmed Judge Haynes's summary-judgment award to the Green Party and the Constitution Party in their 2013 case on July 2, 2015: Tennessee's ballot-access rules violated minor parties' equal-protection rights, an unenforced requirement that minor parties disclaim

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Nov. 22, 2013, at 1.

3303. Order, *Tomasik*, No. 3:13-cv-1118 (M.D. Tenn. Jan. 27, 2014), D.E. 42.

3304. Green Party of Tenn. v. Hargett, 7 F. Supp. 3d 772 (M.D. Tenn. 2014), *aff'd*, 791 F.3d 684 (6th Cir. 2015).

3305. *Id.* at 779.

3306. Order, Green Party of Tenn. v. Hargett, No. 3:13-cv-1128 (M.D. Tenn. Mar. 14, 2014), D.E. 31.

Judge Haynes awarded the plaintiffs $15,925 in attorney fees and $625 in costs. Order, *id.* (Apr. 10, 2014), D.E. 35.

3307. Green Party of Tenn. v. Hargett, 767 F.3d 533 (6th Cir. 2014).

3308. *Id.* at 548–49.

3309. *Id.* at 551.

The court of appeals also remanded the case for a recalculation of the award of attorney fees. *Id.* at 551–54.

the violent overthrow of the government violated First Amendment rights, and an award of attorney fees was within Judge Haynes's discretion.[3310]

On January 20, 2016, Judge Haynes consolidated the Green Party and Constitution Party's 2011 and 2013 cases with a 2014 Green Party challenge to voter photo-identification requirements.[3311] The 2014 case was filed on June 9[3312] and transferred to Judge Haynes as related to the minor-party-status cases.[3313] On July 23, 2014, Judge Haynes determined that the Middle District identification challenge was not barred by an unsuccessful Eastern District identification challenge filed in 2013.[3314] Judge Haynes determined that because Eastern District Judge J. Ronnie Greer found that the Green Party did not have standing to pursue many of its claims, Judge Greer's negative statements about the merits of those claims were not binding on later litigation.[3315] On February 3, 2016, in light of representations that pending legislation could resolve issues remaining in the older cases, Judge Haynes closed them.[3316]

Judge Haynes, who had assumed senior status on December 1, 2014,[3317] recused himself from the 2014 case on March 28, 2016,[3318] and the court assigned the case to Judge Todd J. Campbell.[3319] The court reassigned all three pending cases to Judge Waverly D. Crenshaw, Jr., in April and May, 2016;[3320] Judge Crenshaw joined the bench on April 12.[3321]

3310. Green Party of Tenn. v. Hargett, 791 F.3d 684 (6th Cir. 2015).

3311. Order, Green Party v. Hargett, No. 3:11-cv-692 (M.D. Tenn. Jan. 20, 2016), D.E. 188; *see* Docket Sheet, Green Party v. Hargett, No. 3:14-cv-1274 (M.D. Tenn. June 9, 2014); Docket Sheet, Green Party of Tenn. v. Hargett, No. 3:13-cv-1128 (M.D. Tenn. Oct. 10, 2013).

3312. Complaint, *Green Party*, No. 3:14-cv-1274 (M.D. Tenn. June 9, 2014), D.E. 1.

3313. Order, *id.* (June 12, 2014), D.E. 8.

3314. Opinion, *id.* (July 23, 2014), D.E. 29 [hereinafter *Green Party* Res Judicata Opinion], 2014 WL 3672127; *see* Order, *id.* (Jan. 19, 2016), D.E. 88 (determining that the case was not suitable for summary judgment).

3315. *Green Party* Res Judicata Opinion, *supra* note 3314; *see* Opinion, Green Party v. Hargett, No. 2:13-cv-224 (E.D. Tenn. Feb. 20, 2014), D.E. 18.

3316. Order, *Green Party*, No. 3:11-cv-692 (M.D. Tenn. Feb. 3, 2016), D.E. 202.

3317. FJC Biographical Directory, *supra* note 3279.

3318. Order, *Green Party*, No. 3:14-cv-1274 (M.D. Tenn. Mar. 28, 2016), D.E. 97.

3319. Order, *id.* (Mar. 28, 2016), D.E. 98.

Judge Campbell assumed senior status because of certified disability on December 1, 2016, and died on April 11, 2021. FJC Biographical Directory, *supra* note 3279.

3320. Order, Green Party of Tenn. v. Hargett, No. 3:13-cv-1128 (M.D. Tenn. May 5, 2016), D.E. 47; Order, *Green Party*, No. 3:11-cv-692 (M.D. Tenn. Apr. 20, 2016), D.E. 205; Order, *Green Party*, No. 3:14-cv-1274 (M.D. Tenn. Apr. 12, 2016), D.E. 102; *see* Motion, *id.* (June 9, 2016), D.E. 120 (defendant's summary-judgment motion).

On June 8, Judge Crenshaw denied a motion to reopen the 2013 case by the Green Party and the Constitution Party in light of recent statutory enactments.[3322] On August 17, following a two-day bench trial,[3323] Judge Crenshaw ruled against the parties in their 2011 case,[3324] a decision that the court of appeals affirmed on May 11, 2017.[3325]

Seeking Federal Relief for Denial of Certification as a Write-In Candidate After Losing in State Court

Bonds v. Orr (Robert M. Dow, Jr., N.D. Ill. 1:13-cv-2610)

> At approximately 1:00 p.m. on the day before an election for a high-school-district board of education, a federal district-court judge received a complaint seeking the plaintiff's listing as a write-in candidate. After a 3:30 hearing, the judge determined that because the plaintiff's claims had already been pursued unsuccessfully in state court, they were barred by the *Rooker-Feldman* doctrine, which states that among federal courts only the Supreme Court has appellate jurisdiction over state-court proceedings.
>
> *Topics:* Getting on the ballot; matters for state courts; pro se party.

A plaintiff wishing to be listed as a write-in candidate for a high-school-district board of education in Cook County, Illinois, filed a federal complaint in the Northern District of Illinois on April 8, 2013, the day before the election.[3326] With her complaint, the plaintiff filed an application to proceed in forma pauperis.[3327] She also filed the court's form motion for attorney assistance.[3328]

3321. FJC Biographical Directory, *supra* note 3279.

3322. Order, *Green Party*, No. 3:13-cv-1128 (M.D. Tenn. June 8, 2016), D.E. 51; *see* Opinion at 9, *Green Party*, No. 3:11-cv-692 (M.D. Tenn. Aug. 17, 2016), D.E. 265 [hereinafter Verdict Opinion in 2011 *Green Party* Case], 2016 WL 4379150.

3323. Transcript, *Green Party*, No. 3:11-cv-692 (M.D. Tenn. July 12–13, 2016, filed July 25, 2016), D.E. 261.

3324. Verdict Opinion in 2011 *Green Party* Case, *supra* note 3322.

On March 17, 2017, Judge Crenshaw awarded the parties $59,773.49 in attorney fees and costs for their partial successes in the litigation. Opinion, *Green Party*, No. 3:11-cv-692 (M.D. Tenn. Mar. 17, 2017), D.E. 276.

3325. Opinion, Green Party of Tenn. v. Hargett, No. 16-6299 (6th Cir. May 11, 2017), D.E. 31, 2017 WL 4011854.

3326. Complaint, Bonds v. Orr, No. 1:13-cv-2610 (N.D. Ill. Apr. 8, 2013), D.E. 1.

3327. In Forma Pauperis Application, *id.* (Apr. 8, 2013), D.E. 3.

3328. Attorney Assistance Motion, *id.* (Apr. 8, 2013), D.E. 4.

Judge Robert M. Dow, Jr., received the complaint at approximately 1:00 p.m. and set the matter for hearing at 3:30, instructing the plaintiff to serve the complaint on the county clerk defendant.[3329] After the hearing, at which the plaintiff appeared pro se, Judge Dow determined that because the plaintiff had already unsuccessfully sought relief for her federal claims in state courts, federal relief from the federal district court was barred by the *Rooker-Feldman* doctrine, which states that among federal courts only the Supreme Court has appellate jurisdiction over state-court proceedings.[3330]

Ballot Access for a New Party

Erard v. Johnson (Stephen J. Murphy III and Laurie J. Michelson, E.D. Mich. 2:12-cv-13627)

> A socialist candidate for Congress filed a pro se federal complaint on August 15, 2012, challenging the state's criteria for listing new political parties' candidates on the ballot. The district court denied the candidate relief, and the court of appeals affirmed the denial.
>
> *Topics:* Getting on the ballot; pro se party; laches; case assignment.

On August 15, 2012, Matt Erard, a socialist candidate for Congress, filed a pro se federal complaint in the Eastern District of Michigan challenging the state's criteria for new political parties' listing their candidates on the ballot.[3331]

Two days later, Judge Stephen J. Murphy III referred the case to Magistrate Judge Laurie J. Michelson for pretrial proceedings.[3332] On August 20, Judge Michelson struck the candidate's motion for a preliminary injunc-

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3329. Amended Minute Order, *id.* (Apr. 29, 2013), D.E. 13 [hereinafter *Bonds* Amended Minute Order].

Judge Dow became Chief Justice John G. Roberts, Jr.'s counselor in October 2022. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges; Press Release, Oct. 3, 2022, www.supremecourt.gov/publicinfo/press/pressreleases/ pr_10-03-22.

3330. *Bonds* Amended Minute Order, *supra* note 3329; *see* D.C. Ct. App. v. Feldman, 460 U.S. 462 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923); *see also* Martin A. Schwartz, Section 1983 Litigation 21–24 (Federal Judicial Center 3d ed. 2014).

3331. Complaint, Erard v. Johnson, No. 2:12-cv-13627 (E.D. Mich. Aug. 15, 2012), D.E. 1; Erard v. Johnson, 905 F. Supp. 2d 782, 790 (E.D. Mich. 2012).

3332. Order, *Erard*, No. 2:12-cv-13627 (E.D. Mich. Aug. 17, 2012), D.E. 6.

Judge Michelson became a district judge on March 14, 2014. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

tion for defect of service.[3333] On September 6, three days before Michigan certified the November 6 ballot, the candidate filed a second motion for a preliminary injunction that also sought a temporary restraining order.[3334] On September 12, Judge Michelson recommended denial of a temporary restraining order because the candidate had not shown service on the defendants and because there was no showing that a preliminary injunction would not provide any relief due.[3335]

Judge Michelson heard the preliminary-injunction motion on September 19 and recommended its denial on the following day.[3336] Judge Murphy adopted Judge Michelson's reports and recommendations on October 29.[3337] "Erard has failed to show that he is entitled to this extraordinary remedy. He delayed in filing this action . . . ."[3338]

The candidate filed an amended complaint on February 25, 2013.[3339] On May 14, 2014, Judge Murphy dismissed the complaint, adopting in part a January 9, 2014, report and recommendation by Judge Michelson.[3340] Judge Murphy disagreed with Judge Michelson's conclusion that the plaintiff might be able to prove a First Amendment violation with respect to petition language suggesting that persons signing the party's ballot-access petition promised to join or support the party.[3341] After Judge Michelson issued her report and recommendation, Michigan amended its election law so that petition circulators for new political parties no longer had to be eligible to vote in Michigan.[3342]

3333. Order, *Erard*, No. 2:12-cv-13627 (E.D. Mich. Aug. 20, 2012), D.E. 11; *Erard*, 905 F. Supp. 2d at 790.

3334. Motion, *Erard*, No. 2:12-cv-13627 (E.D. Mich. Sept. 6, 2012), D.E. 12; *Erard*, 905 F. Supp. 2d at 789–90.

3335. *Erard*, 905 F. Supp. 2d at 790–94.

3336. *Id.* at 794–814; Docket Sheet, *Erard*, No. 2:12-cv-13627 (E.D. Mich. Aug. 15, 2012).

3337. *Erard*, 905 F. Supp. 2d at 787–90.

3338. *Id.* at 789.

3339. Amended Complaint, *Erard*, No. 2:12-cv-13627 (E.D. Mich. Feb. 25, 2013), D.E. 44.

3340. Opinion, *id.* (May 14, 2014), D.E. 72 [hereinafter E.D. Mich. *Erard* Opinion]; *see* Report and Recommendation, *id.* (Jan. 9, 2014), D.E. 55 [hereinafter *Erard* Report and Recommendation], 2014 WL 1922770.

3341. E.D. Mich. *Erard* Opinion, *supra* note 3340, at 19–20; *see Erard* Report and Recommendation, *supra* note 3340, at 44–48.

3342. E.D. Mich. *Erard* Opinion, *supra* note 3340, at 20–21; *see Erard* Report and Recommendation, *supra* note 3340, at 48–52; *see also* Michigan Secretary of State Ruth Johnson, Enactment of Legislation Regarding Non-Resident Petition Circulators (Apr. 3, 2014), www.michigan.gov/documents/sos/2014PA94_452731_7.pdf, *archived at* web.

In an unpublished opinion without oral argument, the court of appeals affirmed dismissal of the action on May 20, 2015.[3343]

Sore Loser on Ballot

Libertarian Party of Michigan v. Johnson (Paul D. Borman, E.D. Mich. 2:12-cv-12782)

> On June 25, 2012, the Libertarian candidate for President filed a federal complaint challenging application of Michigan's sore-loser statute to disqualify him from the general-election ballot because he withdrew from the Republican primary election three minutes late. After Michigan responded to the complaint with a motion to dismiss it, the candidate filed a motion for summary judgment. He filed a motion to expedite judgment on August 19. Observing that the candidate had known since May that he would be excluded from the ballot, the district court also concluded that the complaint should be dismissed on the merits. In 2013, the court of appeals agreed.
>
> *Topics:* Getting on the ballot; intervention; laches.

On June 25, 2012, the Libertarian candidate for President filed a federal complaint in the Eastern District of Michigan seeking an injunction placing him on the general-election ballot.[3344] He alleged that his missing by three minutes the deadline to withdraw his name from the Republican primary-election ballot and improper enforcement of Michigan's sore-loser statute by Michigan's secretary of state would deprive him of his place on the ballot.[3345] The party and its chair also were plaintiffs.[3346]

The secretary filed a motion to dismiss the complaint on July 31.[3347] Two days later, the plaintiffs filed a motion for summary judgment.[3348] On

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archive.org/web/20150210093849/http://www.michigan.gov/documents/sos/2014PA94_452731_7.pdf.

3343. Opinion, Erard v. Johnson, No. 14-1873 (6th Cir. May 20, 2015), D.E. 29.

3344. Complaint, Libertarian Party of Mich. v. Johnson, No. 2:12-cv-12782 (E.D. Mich. June 25, 2012), D.E. 1 [hereinafter *Libertarian Party of Mich.* Complaint].

3345. *Id.* at 3–7; *see* Mich. Comp. Laws § 168.695 ("No person whose name was printed or placed on the primary ballots or voting machines as a candidate for nomination on the primary ballots of 1 political party shall be eligible as a candidate of any other political party at the election following that primary."); *see also* Libertarian Party of Mich. v. Johnson, 714 F.3d 929, 930 (6th Cir. 2013); Libertarian Party of Mich. v. Johnson, 905 F. Supp. 2d 751, 755 (E.D. Mich. 2012) ("Gary Johnson never challenged, or took any legal action to reverse the Secretary of State's decision refusing his untimely request to remove his name from the Michigan primary ballot as a Republican party presidential candidate.").

3346. *Libertarian Party of Mich.* Complaint, *supra* note 3344, at 1–3.

3347. Motion to Dismiss, *Libertarian Party of Mich.*, No. 2:12-cv-12782 (E.D. Mich.

August 19, the plaintiffs filed a motion to expedite summary judgment.[3349] Ten days later, Judge Paul D. Borman set a telephone conference for the following day.[3350] Judge Borman then decided to hear the pending motions on September 6.[3351]

On September 4, the Republican Party moved to intervene in opposition to the complaint.[3352] Judge Borman granted intervention on September 5.[3353] In a twenty-five-page opinion issued on September 7, he granted motions to dismiss the complaint, concluding that although the statute's burden on associational rights was not trivial, neither was it severe.[3354]

> Plaintiffs' dilatory conduct in this action has put the Court and the Defendant Secretary of State in an unnecessarily haste-driven position. The Court put on the record at the September 6, 2012 hearing on this matter its findings regarding Defendant Ruth Johnson's claim that Plaintiffs' motion for an expedited hearing on the merits of this matter should have been denied on the basis of laches. Although the Court has decided, given the importance of the issue to reach the merits, Plaintiffs' failure to act with any sense of urgency in this matter until August 19, 2012 is reprehensible. Plaintiffs were well aware, as early as May 3, 2012, that [the candidate] would be denied general election ballot access in Michigan, but waited until June 25, 2012 to file their Complaint, further waited until July 18, 2012 to serve the Defendant, further waited until August 2, 2012 to file their non-emergency motion for summary judgment, and vexatiously waited until August 19, 2012 to apprise the Court that their motion was of an urgent nature.[3355]

July 31, 2012), D.E. 4.

3348. Summary Judgment Motion, *id.* (Aug. 2, 2012), D.E. 6.

3349. Motion to Expedite, *id.* (Aug. 19, 2012), D.E. 9.

3350. Transcript, *id.* (Aug. 30, 2012, filed Sept. 4, 2012), D.E. 18; Docket Sheet, *id.* (June 25, 2012).

Tim Reagan interviewed Judge Borman for this report by telephone on November 9, 2012.

3351. Notice, *Libertarian Party of Mich.*, No. 2:12-cv-12782 (E.D. Mich. Aug. 30, 2012), D.E. 15.

3352. Intervention Motion, *id.* (Sept. 4, 2012), D.E. 20; Motion to Dismiss, *id.* (Sept. 4, 2012), D.E. 21.

3353. Order, *id.* (Sept. 5, 2012), D.E. 23.

3354. *Id.* at 12, 23–24; Libertarian Party of Mich. v. Johnson, 714 F.3d 929, 931 (6th Cir. 2013).

3355. Libertarian Party of Mich. v. Johnson, 905 F. Supp. 2d 751, 754 n.2 (E.D. Mich. 2012).

Research on other states' sore-loser statutes was an important factor in the demands on the court's time. Interview with Judge Paul D. Borman, Nov. 9, 2012.

On September 12, the court of appeals denied the plaintiffs an emergency injunction.[3356] On September 19, the Supreme Court also denied the plaintiffs an injunction.[3357] The court of appeals affirmed Judge Borman's ruling on May 1, 2013.[3358]

Too-Early Ballot-Access Requirement for New Political Parties

California Justice Committee v. Bowen (Percy Anderson, C.D. Cal. 2:12-cv-3956)

> A month before a primary election, and six months before the general election, minor parties filed a federal complaint challenging the state's ballot-access law for new political parties. The district judge issued a preliminary injunction without argument two weeks later. The state had not justified requiring ballot-petition signatures for the general election to be submitted 135 days before the primary election. Following a later bench trial, the judge issued a permanent injunction.
>
> *Topic:* Getting on the ballot.

On May 7, 2012, one month before California's primary election and six months before the general election, the Justice Party and the Constitution Party filed a federal complaint in the Central District of California challenging California's ballot-access law for new political parties.[3359] With their complaint, the plaintiffs filed an unopposed ex parte application for a preliminary-injunction hearing only two weeks later.[3360]

Judge Percy Anderson agreed to hear the case on May 21 at 1:30 p.m.[3361] On that day, however, Judge Anderson issued a preliminary in-

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3356. Order, Libertarian Party of Mich. v. Johnson, No. 12-2153 (6th Cir. Sept. 12, 2012); *Libertarian Party of Mich.*, 714 F.3d at 931.

3357. Libertarian Party of Mich. v. Johnson, 567 U.S. 966 (2012).

3358. *Libertarian Party of Mich.*, 714 F.3d 929, *cert. denied*, 571 U.S. 1110 (2013).

> The district court thoroughly and correctly evaluated the arguments of the parties on the merits. After reviewing the record, the parties' briefs, and the applicable law, we determine that no jurisprudential purpose would be served by a panel opinion on the merits. Therefore, we affirm the district court's judgment for the reasons stated in its September 10, 2012 opinion and order.

Id. at 932.

3359. Complaint, Cal. Justice Comm. v. Bowen, No. 2:12-cv-3956 (C.D. Cal. May 7, 2012), D.E. 1.

3360. Ex Parte Application, *id.* (May 7, 2012), D.E. 2; *see* Preliminary-Injunction Motion, *id.* (May 7, 2012), D.E. 16.

3361. Order, *id.* (May 7, 2012), D.E. 13.

junction without argument.[3362] California's elections code required petition signatures or voter registrations supporting certification of a new party to be submitted 135 days before the primary election.[3363] Judge Anderson concluded, however, that "the Secretary of State has failed to explain why it is reasonable for that deadline to be 135 days prior to the primary election for a party that seeks only to appear on the general election ballot."[3364]

On October 18, following a bench trial, Judge Anderson permanently enjoined the 135-day requirement.[3365] Neither party qualified a candidate for the 2012 general election.[3366]

Ballot-Petition Deadline for Minor Parties

Baldwin v. Cortés (Yvette Kane, M.D. Pa. 1:08-cv-1626)

> A minor party's federal complaint alleged that it was improper for the state to require minor parties to submit ballot petitions earlier and with more signatures than what was required for major parties. The court of appeals affirmed a judgment by the district court of no impropriety in the ballot-access requirements.
>
> *Topics:* Getting on the ballot; case assignment.

The Constitution Party filed a federal complaint in the Middle District of Pennsylvania on August 29, 2008, alleging that it was improper for Pennsylvania to require minor parties to submit ballot petitions earlier and with more signatures than Pennsylvania required for major parties.[3367] As the result of a 1984 consent decree agreed to by Pennsylvania's secretary of the commonwealth, the deadline for minor parties was extended to August 1,[3368] which predated the major parties' conventions by several weeks.[3369]

3362. Minute Opinion, *id.* (May 21, 2012), D.E. 19 [hereinafter *California Justice Comm.* Minute Opinion], 2012 WL 2861349.

3363. Cal. Elec. Code § 5100.

3364. *California Justice Comm.* Minute Opinion, *supra* note 3362, at 5.

3365. Judgment, *California Justice Comm.*, No. 2:12-cv-3956 (C.D. Cal. Oct. 18, 2012), D.E. 50; Findings of Fact and Conclusions of Law, *id.* (Oct. 18, 2012), D.E. 49, 2012 WL 5057625; *see* Amended Judgment, *id.* (Nov. 29, 2012), D.E. 58.

3366. California Secretary of State, Certified List of Candidates for the November 6, 2012, General Election (Aug. 30, 2012), elections.cdn.sos.ca.gov/statewide-elections/2012-general/certified-list-candidates.pdf.

3367. Complaint, Baldwin v. Cortés, No. 1:08-cv-1626 (M.D. Pa. Aug. 29, 2008), D.E. 1 [hereinafter *Baldwin* Complaint].

3368. Consent Decree, Libertarian Party of Pa. v. Davis, No. 84-262 (M.D. Pa. June 13, 1984), *filed as* Ex. C, *Baldwin* Complaint, *supra* note 3367.

3369. *See Baldwin* Complaint, *supra* note 3367, at 7.

With its complaint, the party filed a motion for preliminary and permanent injunctions.[3370]

The court assigned the case to Judge Yvette Kane.[3371] On September 9, Judge Kane granted a motion for expedited hearing that the party filed that day, and Judge Kane scheduled a hearing for September 10.[3372] She conducted an additional conference call with the parties on the day after the hearing.[3373] Two days after the hearing, she invited the parties to move for her recusal because she served as secretary of the commonwealth in the 1990s.[3374] All parties consented to Judge Kane's continuing to preside over the case.[3375]

On September 12, Judge Kane issued an opinion finding no impropriety in the consent decree's deadline.[3376] On May 6, 2010, the court of appeals affirmed her decision.[3377]

Requiring Minor Parties to Qualify for the Ballot in Advance of Major Parties

Barr v. Ireland (John T. Copenhaver, Jr., S.D. W. Va. 2:08-cv-990)

> A minor party complained that it was unfair to require it to submit ballot-petition signatures in advance of major parties' declaring their candidates. The district judge dismissed the complaint, finding the deadline reasonable in light of the time required to verify signatures before the preparation of absentee ballots. The judge also concluded that the reason that the party did not meet the deadline was that it started collecting signatures too late.
>
> *Topics:* Getting on the ballot; intervention; absentee ballots.

The Libertarian Party, its candidates for President and Vice President, and two voters filed a federal complaint in the Southern District of West Virginia on August 13, 2008, complaining that the August 1 deadline for ballot-petition signatures for minor parties was unfair in light of the major

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3370. Motion, *Baldwin*, No. 1:08-cv-1626 (M.D. Pa. Aug. 29, 2008), D.E. 2.

3371. Letter, *id.* (Sept. 4, 2008), D.E. 5.

3372. Order, *id.* (Sept. 9, 2008), D.E. 8; *see* Transcript, *id.* (Sept. 10, 2008, filed Oct. 13, 2008), D.E. 21; Motion, *id.* (Sept. 9, 2008), D.E. 6.

3373. *See* Letter, *id.* (Sept. 12, 2008), D.E. 14.

3374. Order, *id.* (Sept. 12, 2008), D.E. 13; Order, *id.* (Sept. 12, 2008), D.E. 16; Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

3375. Letter, *Baldwin*, No. 1:08-cv-1626 (M.D. Pa. Sept. 12, 2008), D.E. 15.

3376. Opinion, *id.* (Sept. 12, 2008), D.E. 17, 2008 WL 4279874.

3377. Baldwin v. Cortes, 378 F. App'x 135 (3d Cir. 2010).

parties' not selecting their candidates until August 28 and September 4.[3378] With their complaint, the plaintiffs filed a motion for a preliminary injunction extending the party's signature deadline until September 4.[3379]

On August 18, Judge John T. Copenhaver, Jr., ordered service on the defendant secretary of state and set a conference and possible hearing for August 25.[3380] At the plaintiffs' request, Judge Copenhaver rescheduled the proceeding for August 27.[3381]

On September 5, Judge Copenhaver dismissed the action.[3382] Judge Copenhaver found the August 1 deadline a reasonable period of time in advance of the September 23 deadline for distributing absentee ballots for signature verification.[3383] Moreover, Judge Copenhaver concluded that the party's failure to obtain enough signatures in time resulted from its late start in seeking them.[3384]

On May 21, 2009, Judge Copenhaver denied a request from a nonparty to reopen the case, intervene, and seek reconsideration.[3385]

Providing Election Data Only to Major Parties

Green Party of Michigan v. Land (Nancy G. Edmunds, E.D. Mich. 2:08-cv-10149)

> Four days before a January 15 presidential primary election, minor parties filed a federal complaint challenging a statute specifying that party-preference data would be given only to the major parties. Approximately one month later, after the secretary of state answered the complaint, the plaintiffs moved for a temporary restraining order. The district court held a status conference twelve days later and heard the motion two days after that. On the following day, the district court temporarily enjoined the

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3378. Complaint, Barr v. Ireland, No. 2:08-cv-990 (S.D. W. Va. Aug. 13, 2008), D.E. 1; Barr v. Ireland, 575 F. Supp. 2d 747, 749 (S.D. W. Va. 2008); *see* Tom Searls, *Libertarian Candidate Barr Doesn't Make Cut for State Ballot*, Charleston Gazette, Aug. 9, 2008, at 1A (reporting that the campaign hoped to have enough signatures soon after the deadline).

3379. Preliminary-Injunction Motion, *Barr*, No. 2:08-cv-990 (S.D. W. Va. Aug. 13, 2008), D.E. 3.

3380. Order, *id.* (Aug. 18, 2008), D.E. 7.

3381. Order, *id.* (Aug. 20, 2008), D.E. 9; *see Barr*, 575 F. Supp. 2d at 749; Minutes, *Barr*, No. 2:08-cv-990 (S.D. W. Va. Aug. 27, 2008), D.E. 22 (preliminary-injunction hearing); Minutes, *id.* (Aug. 27, 2008), D.E. 21 (pretrial conference).

3382. *Barr*, 575 F. Supp. 2d 747; *see Judge Tosses Barr's W. Va. Ballot Access Lawsuit*, Charleston Gazette, Sept. 8, 2008, at 2A.

3383. *Barr*, 575 F. Supp. 2d at 751–53.

3384. *Id.* at 761.

3385. Order, *Barr*, No. 2:08-cv-990 (S.D. W. Va. May 21, 2009), D.E. 25.

> state from providing anyone with the party-preference data. On March 26, the district court declared the provision of party-preference data only to major parties to be a violation of equal protection.
>
> *Topics:* Equal protection; primary election; laches.

On January 11, 2008, three minor parties, a Detroit newspaper, and a political consultant filed in Detroit's federal courthouse a constitutional challenge to a 2007 Michigan statute that would have given only the two major political parties access to party-preference data for voters in the January 15 presidential primary election.[3386]

Governor Jennifer Granholm signed senate bill 624 on September 3, 2007, creating public act 52, which amended Michigan's election laws for presidential primary elections.[3387] The act increased the criterion for a party's participation in the primary election from 5% to 20% of the nationwide vote in the previous presidential election.[3388] The act also provided that party-preference data from the primary election would be provided only to participating parties; voter-registration data in Michigan did not include party preferences.[3389] The act also moved up the date of the primary election.[3390]

On November 21, Michigan's supreme court determined that the act did not violate Michigan's constitutional proscription on the appropriation of public money for private purposes without a two-thirds vote by each house of the legislature: "Political parties unquestionably serve a public purpose."[3391]

The federal complaint was served on Michigan's secretary of state on January 17, 2008,[3392] and she answered the complaint on January 31.[3393] Judge Nancy G. Edmunds held a telephone conference on February 6, at

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3386. Complaint, Green Party of Mich. v. Land, No. 2:08-cv-10149 (E.D. Mich. Jan. 11, 2008), D.E. 1; Green Party of Mich. v. Land, 541 F. Supp. 2d 912, 913–15 (E.D. Mich. 2008); *see* David Ashenfelter, *Legal Wrangling: ACLU Files Suit to Get Voter Information from Primary*, Detroit Free Press, Jan. 12, 2008, at A8.

3387. 2007 Mich. Pub. Acts No. 52.

3388. *Id.*; *Green Party of Mich.*, 541 F. Supp. 2d at 914 & n.1.

3389. 2007 Mich. Pub. Acts No. 52; *Green Party of Mich.*, 541 F. Supp. 2d at 914.

3390. *See* Christie Bleck, *Public Access Nailed Shut Over Primary*, Saginaw News, Mar. 16, 2008, at 3I.

3391. Grebner v. State, 480 Mich. 939, 744 N.W.2d 123, 126 (Mich. 2007); *see* Barrie Barber, *Jan. 15 Primary Gets OK*, Saginaw News, Nov. 22, 2007, at 1A.

3392. Service Certificate, Green Party of Mich. v. Land, No. 2:08-cv-10149 (E.D. Mich. Jan. 17, 2008), D.E. 2.

3393. Answer, *id.* (Jan. 31, 2008), D.E. 3.

which she set a date of March 26 for hearing dispositive motions.[3394] On February 13, the plaintiffs moved for a temporary restraining order.[3395] Judge Edmunds held a status conference on February 25 and heard the motion on February 27.[3396] On February 28, Judge Edmunds enjoined Michigan from providing anyone with the party-preference data until further order of the court, noting that the plaintiffs' summary-judgment motion would be heard on the statutory due date for such distribution.[3397]

On March 26, Judge Edmunds declared the statutory provision in question a violation of the minor parties' equal protection.[3398] Among the arguments by the secretary that she rejected was the claim of laches: "Because Defendant offers no evidence of prejudice, Plaintiffs' claims are not barred by the doctrine of laches."[3399]

The act included a nonseverability clause.[3400] Judge Edmunds did not rule on applicability of that clause, which was related to the validity of the early primary election.[3401]

> Both parties assert that the Court's ruling does not require the Court to address the issue of severability. The Court agrees that the issue of severability is beyond the scope of the claims raised by Plaintiffs in this motion. Accordingly, the Court makes no ruling regarding the constitutional validity of the remainder of PA 52.[3402]

Judge Edmunds approved two stipulations of extensions of time for the plaintiffs to seek attorney fees and costs,[3403] but no fee motion was ever filed.[3404]

3394. Docket Sheet, *id.* (Jan. 11, 2008) [hereinafter *Green Party of Mich.* Docket Sheet].

3395. Temporary-Restraining-Order Motion, *id.* (Feb. 13, 2008), D.E. 5.

3396. *Green Party of Mich.* Docket Sheet, *supra* note 3394.

3397. Temporary Restraining Order, *Green Party of Mich.*, No. 2:08-cv-10149 (E.D. Mich. Feb. 28, 2008), D.E. 10.

3398. Green Party of Mich. v. Land, 541 F. Supp. 2d 912, 916–24 (E.D. Mich. 2008); *see* David Ashenfelter, *State Loses in Primary-Lists Fight Statewide*, Detroit Free Press, Mar. 27, 2008, at B1; *Judge: Access to Primary Vote List Must Be Equal*, Detroit News, Mar. 27, 2008, at A1 [hereinafter *Access Must Be Equal*].

3399. *Green Party of Mich.*, 541 F. Supp. 2d at 916 n.3.

3400. 2007 Mich. Pub. Acts No. 52.

3401. *See* Ashenfelter, *supra* note 3398 (reporting on possible Democratic Party sanctions against the Michigan delegation for holding the primary election so early); *Access Must Be Equal*, *supra* note 3398.

3402. *Green Party of Mich.*, 541 F. Supp. 2d at 924.

3403. Stipulation and Order, Green Party of Mich. v. Land, No. 2:08-cv-10149 (E.D. Mich. June 2, 2008), D.E. 17; Stipulation and Order, *id.* (Apr. 21, 2008), D.E. 16.

3404. *Green Party of Mich.* Docket Sheet, *supra* note 3394.

On October 4, 2011, Governor Rick Snyder signed senate bill 584,[3405] which restored the criterion for participation in a presidential primary election to 5% of the previous national vote,[3406] provided for public disclosure of party-preference data,[3407] and specified a severability clause.[3408]

Challenging a Puerto Rico Party's Registration

Puerto Ricans for Puerto Rico Party v. Dalmau (Gustavo A. Gelpi, D.P.R. 3:07-cv-1867)

> A political party filed a federal complaint in the District of Puerto Rico alleging that another party had been illegally registered as a political party for the 2008 elections. The district judge dismissed the action as a matter for Puerto Rico's commonwealth courts. The court of appeals determined that the action was not necessarily foreclosed by commonwealth-court decisions, and the court of appeals held that it was error for the district judge to rely on original Spanish-language commonwealth-court opinions. In time, the action was dismissed as moot.
>
> *Topics:* Getting on the ballot; matters for state courts; attorney fees.

A political party in Puerto Rico—Puerto Ricans for Puerto Rico (PPR)—and its election commissioner filed a federal complaint in the District of Puerto Rico on September 19, 2007, against other election officials and the Puerto Rican Independence Party (PIP), alleging that the PIP had been illegally registered as a political party for the 2008 elections.[3409] With their complaint, the plaintiffs filed a motion for a temporary restraining order or a preliminary injunction.[3410]

Judge Gustavo A. Gelpi denied the plaintiffs a temporary restraining order on the day that their motion was filed and issued an order to show cause by October 1 why the case should not be dismissed as a matter for Puerto Rico's commonwealth courts, which had already ruled against the plaintiffs.[3411] To accommodate the plaintiffs' computer problems, Judge

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3405. 2011 Mich. Pub. Acts No. 163.

3406. Mich. Comp. Laws § 168.613a(2).

3407. *Id.* § 168.615c(4).

3408. 2011 Mich. Pub. Acts No. 163.

3409. Complaint, Puerto Ricans for P.R. Party v. Dalmau, No. 3:07-cv-1867 (D.P.R. Sept. 19, 2007), D.E. 1; Puerto Ricans for P.R. Party v. Dalmau, 544 F.3d 58, 61, 65 (1st Cir. 2008).

3410. Motion, *Puerto Ricans for P.R. Party*, No. 3:07-cv-1867 (D.P.R. Sept. 19, 2007), D.E. 2; *Puerto Ricans for P.R. Party*, 544 F.3d at 65–66.

3411. Order, *Puerto Ricans for P.R. Party*, No. 3:07-cv-1867 (D.P.R. Sept. 19, 2007),

Gelpi granted them an extension until after midnight to file their brief,[3412] and then Judge Gelpi dismissed the action and awarded the defendants attorney fees on October 2.[3413]

On October 11, the plaintiffs filed a motion for reconsideration[3414] and an amended complaint.[3415] Judge Gelpi denied the motion that day.[3416] On October 23, Judge Gelpi awarded $1,900 to the defendant who submitted a fee claim.[3417]

On October 6, 2008, the court of appeals determined that the plaintiffs' suit was not necessarily barred by the commonwealth courts' decisions, which concerned allowing PIP to register as a political party rather than the validity of PIP's registration signatures.[3418] The court of appeals also held, "The district court erred in granting a motion to dismiss that turned entirely on an untranslated Spanish language decision of the Puerto Rico Supreme Court."[3419]

The court of appeals issued its mandate on October 22, and the mandate was filed in the district court on October 23.[3420] Judge Gelpi set a preliminary-injunction hearing for October 27, eight days before the election.[3421] On that day, Judge Gelpi denied the plaintiffs a preliminary injunction, and they decided not to appeal.[3422] On November 25, Judge Gelpi dismissed the action as moot.[3423]

D.E. 4; *Puerto Ricans for P.R. Party*, 544 F.3d at 66; *see* Puerto Ricans for P.R. Party v. Dalmau, 517 F. Supp. 2d 601, 602 (D.P.R. 2007).

Judge Gelpi was elevated to the court of appeals on October 19, 2021. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

3412. Docket Sheet, *Puerto Ricans for P.R. Party*, No. 3:07-cv-1867 (D.P.R. Sept. 19, 2007) [hereinafter *Puerto Ricans for P.R. Party* Docket Sheet].

3413. *Puerto Ricans for P.R. Party*, 517 F. Supp. 2d 601, *rev'd*, 544 F.3d 58.

3414. Reconsideration Motion, *Puerto Ricans for P.R. Party*, No. 3:07-cv-1867 (D.P.R. Oct. 11, 2007), D.E. 25.

3415. Amended Complaint, *id.* (Oct. 11, 2007), D.E. 27.

3416. *Puerto Ricans for P.R. Party* Docket Sheet, *supra* note 3412.

3417. Puerto Ricans for P.R. Party v. Dalmau, 517 F. Supp. 2d 604 (D.P.R. 2007), *rev'd*, 544 F.3d 58.

3418. *Puerto Ricans for P.R. Party*, 544 F.3d at 64–65, 68–71.

3419. *Id.* at 67.

3420. Mandate, *Puerto Ricans for P.R. Party*, No. 3:07-cv-1867 (D.P.R. Oct. 23, 2008), D.E. 65.

3421. Order, *id.* (Oct. 23, 2008), D.E. 66.

3422. *Puerto Ricans for P.R. Party* Docket Sheet, *supra* note 3412.

3423. Judgment, *Puerto Ricans for P.R. Party*, No. 3:07-cv-1867 (D.P.R. Nov. 25, 2008), D.E. 80.

Challenging the Invalidation of Ballot-Access Signatures

Van Auken v. Blackwell (Gregory L. Frost, S.D. Ohio 2:04-cv-891)

> In 2004, the Socialist Equality Party failed to qualify a presidential candidate in Ohio for the general election and sought emergency relief in federal court. The district court denied immediate relief because the party had not shown that Ohio's secretary of state had failed to provide a legally required review of their case or that they could not obtain mandamus relief from Ohio's state courts if merited.
>
> *Topics:* Getting on the ballot; matters for state courts.

On September 15, 2004, the Socialist Equality Party candidates for President and Vice President and a Dayton voter filed a federal complaint in the Southern District of Ohio alleging unreasonable invalidation of 4,172 of the 7,983 signatures the candidates submitted for ballot qualification, leaving fewer than the 5,000 required.[3424] On the following day, the plaintiffs filed a motion for a temporary restraining order or a preliminary injunction.[3425]

Judge Gregory L. Frost held a teleconference with the parties and, on September 17, denied injunctive relief.[3426] Judge Frost determined that he could resolve the motion on the briefs, without a hearing.[3427] The plaintiffs had not shown that Ohio's secretary of state had failed to provide a legally required review of their case or that they could not obtain mandamus relief from Ohio's state courts if merited.[3428]

On November 22, the parties stipulated dismissal of the action.[3429]

Disqualification as an Independent Candidate for Voting in a Primary Election

McClure v. Galvin (Richard G. Stearns, D. Mass. 1:04-cv-10826)

> An attorney and would-be candidate for state senate filed a pro se federal complaint alleging that he was improperly denied a place on the ballot as an independent candidate because he had

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3424. Complaint, Van Auken v. Blackwell, No. 2:04-cv-891 (S.D. Ohio Sept. 15, 2004), D.E. 1.

3425. Motion, *id.* (Sept. 16, 2004), D.E. 3.

3426. Opinion, *id.* (Sept. 17, 2004), D.E. 4 [hereinafter *Van Auken* Opinion].

Tim Reagan interviewed Judge Frost for this report by telephone on June 1, 2012. Judge Frost retired on May 2, 2016. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

3427. Interview with Judge Gregory L. Frost, June 1, 2012.

3428. *Van Auken* Opinion, *supra* note 3426, at 5–7.

3429. Stipulation, *Van Auken*, No. 2:04-cv-891 (S.D. Ohio Nov. 22, 2004), D.E. 10.

> voted in a primary election. Three weeks later, the court denied the plaintiff injunctive relief because of a Supreme Court precedent upholding a party disaffiliation requirement.
>
> *Topics:* Getting on the ballot; pro se party; primary election.

An attorney and would-be candidate for state senate and another voter—his wife—filed a pro se federal complaint in the District of Massachusetts on April 26, 2004, alleging that the candidate was improperly denied a place on the November ballot as an independent candidate because he had voted in the March 2 Democratic primary.[3430] With their complaint, the plaintiffs filed a motion for a preliminary injunction.[3431]

Two days later, Judge Richard G. Stearns set the matter for hearing on May 11.[3432] Six days after the hearing, Judge Stearns denied the plaintiffs injunctive relief.[3433] Relief in the action was precluded by the Supreme Court's 1974 upholding of California's party disaffiliation requirement in *Storer v. Brown*.[3434] The court of appeals affirmed Judge Stearns's ruling on October 8.[3435]

Signature Requirements for Independent and New-Party Candidates

Delaney v. Bartlett (Frank W. Bullock, Jr., M.D.N.C. 1:02-cv-741)

> On September 6, 2002, a write-in candidate for the U.S. Senate filed a federal challenge to the state's signature requirement for getting on the ballot as an independent candidate. The district court denied preelection relief, and the candidate was defeated. In 2004, the judge determined that general-election ballot signature requirements for independent candidates—based on the number of registered voters—and new-party candidates—based on the number of voters in the last gubernatorial election—were an unconstitutional combination. The state modified its requirement for independent candidates to be similar to its requirement for new-party candidates.

3430. Complaint, McClure v. Galvin, No. 1:04-cv-10826 (D. Mass. Apr. 26, 2004), D.E. 1; McClure v. Galvin, 386 F.3d 36, 37, 40 (1st Cir. 2004).

3431. Preliminary-Injunction Motion, *McClure*, No. 1:04-cv-10826 (D. Mass. Apr. 26, 2004), D.E. 2.

3432. Docket Sheet, *id.* (Apr. 26, 2004).

3433. Opinion, *id.* (May 17, 2004), D.E. 9 [hereinafter D. Mass. *McClure* Opinion], 2004 WL 1092325; *McClure*, 386 F.3d at 38, 40.

3434. D. Mass. *McClure* Opinion, *supra* note 3433; *see* Storer v. Brown, 415 U.S. 724, 728 (1974) (finding constitutional the disqualification of independent candidates who had been affiliated with a political party within a year before the party primary election).

3435. *McClure*, 386 F.3d 36.

Topics: Getting on the ballot; equal protection.

"On September 6, 2002, approximately two months before the election and days before the absentee ballots were to be printed," a write-in candidate to be one of North Carolina's U.S. senators filed a federal complaint in the Middle District of North Carolina challenging the signature requirement for getting on the ballot as an independent candidate.[3436] With their complaint, the plaintiffs—the candidate and two of his supporters—filed a motion for a temporary restraining order and a preliminary injunction.[3437]

Judge Frank W. Bullock, Jr., heard the case on September 19 and denied the motions.[3438] One month later, he issued an opinion explaining his reasons.[3439] The candidate was defeated by Elizabeth Dole.[3440]

On July 26, 2004, Judge Bullock determined that ballot signature requirements for independent and new-party candidates in the general election were an unconstitutional combination.[3441] Independent candidates had to submit by the last Friday in June a number of signatures equal to 2% of the total number of registered voters; a candidate running on behalf of a new party, however, could get the party and the candidate on the ballot for a number of signatures equal to 2% of the voters in the most recent gubernatorial election, submitted by the first day of June.[3442] "Given the potential magnitude of the disparity and the historical evidence of ballot exclusion, the burden on unaffiliated candidates *vis-à-vis* new party candidates appears unreasonable and discriminatory."[3443] Moreover, the requirement based on voter registrations was unconstitutionally vague, because of uncertainty about what would be used as the authoritative record for comparison.[3444]

3436. Delaney v. Bartlett, 370 F. Supp. 2d 373, 374 (M.D.N.C. 2004); Docket Sheet, Delaney v. Bartlett, No. 1:02-cv-741 (M.D.N.C. Sept. 6, 2002) [hereinafter M.D.N.C. *Delaney* Docket Sheet].

3437. M.D.N.C. *Delaney* Docket Sheet, *supra* note 3436.

3438. *Id.*

Judge Bullock retired on August 1, 2006. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

3439. *Delaney*, 370 F. Supp. 2d at 374; M.D.N.C. *Delaney* Docket Sheet, *supra* note 3436.

3440. Opinion at 3, *Delaney*, No. 1:02-cv-741 (M.D.N.C. Dec. 24, 2003), D.E. 37, 2003 WL 23192145 (denying motions for summary judgment).

3441. *Delaney*, 370 F. Supp. 2d 373.

3442. *Id.* at 375.

3443. *Id.* at 378.

3444. *Id.* at 382–85.

An appeal was dismissed voluntarily on October 21.[3445] The signature requirement for independent candidates in North Carolina is now 1.5% of the most recent gubernatorial vote.[3446]

Last-Minute Change to Ballot-Petition Due Date and Interference with Write-In Votes

Swanson v. Alabama (2:02-cv-644) and Campbell v. Bennett (2:02-cv-784) (Myron H. Thompson) and Swanson v. Bennett (2:02-cv-1244) (W. Harold Albritton) (M.D. Ala.)

> Two lawsuits, one initially filed pro se, challenged the constitutionality of a last-minute moving up of the due date for independent candidates' ballot-petition signatures. The change had to be precleared pursuant to section 5 of the Voting Rights Act, and it was not known until a week before the new date that it would be precleared in time for the pending elections. The district judge denied temporary restraining orders but issued preliminary injunctions placing aggrieved candidates who otherwise had submitted sufficient numbers of signatures on the ballot. A postelection action by the original pro se candidate and plaintiff was unsuccessful. On summary judgment after the election, the judge found the sudden change in due date to be a moot issue and other constitutional claims to be without merit.
>
> *Topics:* Getting on the ballot; pro se party; enjoining certification.

On June 4, 2002, the day ballot-petition signatures were due, Johnny Swanson, who wished to be an independent candidate for the U.S. Senate, filed a pro se federal complaint against the State of Alabama in the Middle District of Alabama complaining that he was incorrectly told that the due date would be July 1 because a new law moving up the due date would not be in effect until the 2004 election.[3447] On June 14, Judge Myron H. Thompson denied the request for a temporary restraining order included in the complaint.[3448]

3445. Docket Sheet, Delaney v. Bartlett, No. 04-2230 (4th Cir. Sept. 30, 2004).

3446. N.C. Gen. Stat. § 163-122(a)(1).

3447. Complaint, Swanson v. Alabama, No. 2:02-cv-644 (M.D. Ala. June 4, 2002), D.E. 1; Swanson v. Worley, 490 F.3d 894, 897 (11th Cir. 2007); Swanson v. Bennett, 219 F. Supp. 2d 1225, 1227–28 (M.D. Ala. 2002).

3448. Order, *Swanson*, No. 2:02-cv-644 (M.D. Ala. June 14, 2002), D.E. 6.

Judge Thompson initially referred the case to Magistrate Judge Susan Russ Walker for pretrial matters,[3449] but Judge Thompson withdrew the referral once counsel appeared for Swanson.[3450]

Ray Campbell, who wished to be a candidate for Alabama's house of representatives and who was represented by counsel, filed a similar complaint on July 11 against state election officials.[3451] Six days later, the court reassigned this case to Judge Thompson.[3452] On July 31, Campbell filed a motion for a temporary restraining order and a preliminary injunction.[3453] On August 1, Judge Thompson denied the temporary restraining order and set the case for hearing on August 5.[3454]

On August 8, Judge Thompson issued a preliminary injunction placing Campbell on the ballot.[3455] The signature-deadline change moved the deadline for independent candidates from six days after the last primary election to the date of the first primary election.[3456] The purpose of the change was to prevent primary-election losers from running in the general election.[3457] Because the change in the signature due date had to be precleared pursuant to section 5 of the Voting Rights Act,[3458] and because it was not submitted for preclearance until March 29, election officials told candidates that it would not go into effect until 2004.[3459] Upon its May 28 preclearance, however, one week before the new deadline, election officials announced that it would go into effect immediately.[3460] Judge Thompson held the short notice to be probably unconstitutional.[3461]

3449. Order, *id.* (June 14, 2002), D.E. 7.

3450. Order, *id.* (July 18, 2002), D.E. 16.

3451. Complaint, Campbell v. Bennett, No. 2:02-cv-784 (M.D. Ala. July 11, 2002), D.E. 1.

3452. Docket Sheet, *id.* (July 11, 2002).

3453. Motion, *id.* (July 31, 2002), D.E. 5.

3454. Order, *id.* (Aug. 1, 2002), D.E. 9.

3455. Campbell v. Bennett, 212 F. Supp. 2d 1339 (M.D. Ala. 2002).

3456. Swanson v. Worley, 490 F.3d 894, 897 (11th Cir. 2007); Swanson v. Bennett, 219 F. Supp. 2d 1225, 1227 (M.D. Ala. 2002); *Campbell*, 212 F. Supp. 2d at 1341.

3457. *Campbell*, 212 F. Supp. 2d at 1341.

3458. Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination).

On June 25, 2013, the Supreme Court declined to hold section 5 unconstitutional, but the Court did hold unconstitutional the criteria for which jurisdictions require section 5 preclearance. Shelby County v. Holder, 570 U.S. 529 (2013).

3459. *Swanson*, 490 F.3d at 897; *Swanson*, 219 F. Supp. 2d at 1227–28; *Campbell*, 212 F. Supp. 2d at 1341–43.

3460. *Swanson*, 490 F.3d at 897; *Swanson*, 219 F. Supp. 2d at 1228; *Campbell*, 212 F.

In the earlier case, with the court's permission,[3462] Swanson amended his complaint on August 13 to add two additional candidates as plaintiffs and to substitute state officers for the state so as to avoid Eleventh Amendment difficulties.[3463] On August 30, Judge Thompson issued a preliminary injunction in favor of the two new plaintiffs.[3464] Swanson, however, never submitted enough signatures, and Judge Thompson found the signature requirement itself to be probably constitutional.[3465]

On summary judgment in 2004, Judge Thompson determined that the deadline-change issue was moot and the signature requirement was indeed constitutional.[3466] In 2006, Judge Thompson resolved in favor of the defendants an issue that the Swanson plaintiffs argued remained pending: that the new deadline unconstitutionally prevented independent candidates from collecting signatures at primary-election polling places.[3467] The court of appeals affirmed this decision on June 29, 2007.[3468]

In the November 5, 2002, general election, Swanson ran as a write-in candidate. On the Friday after the election, he filed a pro se federal complaint and a motion for a temporary restraining order alleging that voters were improperly prevented from voting for him because of intimidation, equipment malfunction, and other improprieties.[3469] On the day the complaint was filed, Judge W. Harold Albritton set the matter for hearing on November 13.[3470]

Supp. 2d at 1342.

3461. *Campbell*, 212 F. Supp. 2d at 1343–47.

3462. Order, Swanson v. Alabama, No. 2:02-cv-644 (M.D. Ala. Aug. 13, 2002), D.E. 44.

3463. Amended Complaint, *id.* (Aug. 13, 2002), D.E. 45; *Swanson*, 490 F.3d at 897; *see* Order, *Swanson*, No. 2:02-cv-644 (M.D. Ala. July 18, 2002), D.E. 17 (encouraging the candidate to amend the complaint to avoid Eleventh Amendment difficulties).

3464. *Swanson*, 219 F. Supp. 2d at 1225; *Swanson*, 490 F.3d at 898–99; *see Independents Put on Ballot*, Montgomery Advertiser, Sept. 4, 2002, at C3.

3465. *Swanson*, 219 F. Supp. 2d at 1227, 1231–34; *Swanson*, 490 F.3d at 899.

3466. Swanson v. Bennett, 340 F. Supp. 2d 1295 (M.D. Ala. 2004); *Swanson*, 490 F.3d at 899–900; *see* Campbell v. Bennett, 340 F. Supp. 2d 1301 (M.D. Ala. 2004); Opinion, Campbell v. Bennett, No. 2:02-cv-784 (M.D. Ala. Aug. 24, 2004), D.E. 33.

3467. Swanson v. Worley, 432 F. Supp. 2d 1262 (M.D. Ala. 2006); *Swanson*, 490 F.3d at 900–01.

3468. *Swanson*, 490 F.3d 894; *see* Phillip Rawls, *Court Upholds State's Ballot Access Laws*, Mobile Press-Reg., July 6, 2007, at B2.

3469. Complaint, Swanson v. Bennett, No. 2:02-cv-1244 (M.D. Ala. Nov. 8, 2002), D.E. 1.

3470. Order, *id.* (Nov. 8, 2002), D.E. 3; Minutes, *id.* (Nov. 13, 2002), D.E. 10; *see* Order, *id.* (Nov. 12, 2002), D.E. 7 (moving the hearing from 2:00 p.m. to 10:00 a.m.).

In a time-pressured case with lawyers on both sides, the judge usually could efficiently conference with the lawyers, frequently by telephone, to work out scheduling issues.[3471] With a pro se plaintiff, however, scheduling issues were more often addressed with arms-length formal orders.[3472]

On November 18, Judge Albritton denied Swanson immediate relief because claimed injuries to voters were not his injuries and there was no reason to believe that the alleged wrongs changed the outcome of the election.[3473]

On February 18, 2003, Judge Albritton granted the defendants' motion to dismiss the complaint:

> In this case, the Plaintiff argues that he is neither contesting the election nor seeking a "recanvass" or "recount." Instead, he insists that he is only requesting "an audit to determine the accuracy of the count." Semantics aside, the Plaintiff is directly contesting the number of votes he received. . . . Because such an action, regardless of how it is characterized, conflicts with the Constitution's express textual mandate that the Senate shall have the power to judge the elections and returns of its members, the court is without jurisdiction to proceed.[3474]

Ballot Access for a Minor Party in a Special Congressional Election

Green Party of Arkansas v. Priest (George Howard, Jr., E.D. Ark. 4:01-cv-586)

> A September 4, 2001, federal complaint challenged a state's ballot-access laws, which made it impossible for the Green Party to offer a candidate in a November 20 special election to replace a member of Congress who had been given a presidential appointment. The district judge tentatively granted the plaintiffs relief after a September 13 proceeding and issued an opinion confirming the injunction four days later: "The State has no compelling interest in allowing unrecognized parties to participate in some elections but not others." The plaintiffs were awarded $10,165.58 in attorney fees and costs.
>
> *Topics:* Getting on the ballot; attorney fees.

Tim Reagan interviewed Judge Albritton for this report by telephone on June 18, 2013.

3471. Interview with Judge W. Harold Albritton, June 18, 2013.

3472. *Id.*

3473. Opinion, *Swanson*, No. 2:02-cv-1244 (M.D. Ala. Nov. 18, 2002), D.E. 11.

3474. Opinion at 6, *id.* (Feb. 18, 2003), D.E. 18 (citation omitted).

On September 4, 2001, the Green Party, its candidate for a special election to Congress, and a voter filed a federal complaint in the Eastern District of Arkansas challenging Arkansas's ballot-access laws for making it impossible for the Green Party to participate in the November 20 special election to replace Asa Hutchinson, whom the President had named administrator of the Drug Enforcement Administration.[3475] With their complaint, the plaintiffs filed a motion for a preliminary injunction.[3476]

On September 10, Judge George Howard, Jr., set the case for a September 13 trial on the merits.[3477] The parties filed a joint stipulation of facts on September 12,[3478] which Judge Howard adopted.[3479]

At the conclusion of the September 13 proceeding, Judge Howard tentatively granted the plaintiffs an injunction, issuing an opinion confirming the injunction on September 17.[3480] "The State has no compelling interest in allowing unrecognized parties to participate in some elections but not others."[3481]

On October 3, Judge Howard granted the plaintiffs a stipulated fee-and-costs award of $10,165.58.[3482]

The Green Party candidate drew 2% of the vote.[3483]

Right to Form a Third Party

Public Interest v. Armstrong County Board of Elections (Donald E. Ziegler, W.D. Pa. 2:01-cv-1616)

> A voter, a candidate, and a political organization filed a federal complaint challenging exclusion of the candidate from the ballot for a school board. The candidate nominated by the Democratic

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3475. Complaint, Green Party of Ark. v. Priest, No. 4:01-cv-586 (E.D. Ark. Sept. 4, 2001), D.E. 1.

3476. Preliminary-Injunction Motion, *id.* (Sept. 4, 2001), D.E. 2.

3477. Order, *id.* (Sept. 10, 2001), D.E. 6; Green Party of Ark. v. Priest, 159 F. Supp. 2d 1140, 1141 & n.1 (E.D. Ark. 2001).

Judge Howard died on April 21, 2007. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

3478. Stipulation, *Green Party of Ark.*, No. 4:01-cv-586 (E.D. Ark. Sept. 12, 2001), D.E. 7.

3479. *Green Party of Ark.*, 159 F. Supp. 2d at 1141–43.

3480. *Id.*, 159 F. Supp. 2d 1140; *see Green Party Candidate Ordered Onto Ballot*, Memphis Commercial Appeal, Sept. 14, 2001, at B2.

3481. *Green Party of Ark.*, 159 F. Supp. 2d at 1144.

3482. Order, *Green Party of Ark.*, No. 4:01-cv-586 (E.D. Ark. Oct. 3, 2001), D.E. 14; *see* Stipulation, *id.* (Oct. 2, 2001), D.E. 13.

3483. *See Republican Candidate Wins Arkansas Congressional Seat*, Tulsa World, Nov. 21, 2001, at A3.

> and the Republican Party was a suspect in jewelry thefts that included the voter as a victim. The voter and others tried to launch a new political party with the candidate as its nominee. The candidate was disqualified because he was a registered Democrat. After a hearing, the court granted judgment to the plaintiffs.
>
> *Topic:* Getting on the ballot.

On August 24, 2001, a voter, a candidate, and a political organization filed a federal complaint in the Western District of Pennsylvania challenging the exclusion of the candidate from the ballot for the Leechburg Area's school board.[3484] According to the *Pittsburgh Post-Gazette*, the candidate nominated by the Democratic and the Republican Party was a suspect in jewelry thefts that included the voter as a victim.[3485] The voter and others tried to launch a new political party with the plaintiff candidate as its nominee.[3486] The candidate was disqualified because he was a registered Democrat.[3487] With their complaint, the plaintiffs filed a motion for a temporary restraining order or a preliminary injunction.[3488]

Judge Donald E. Ziegler held a status conference on August 24 and a hearing on August 30.[3489] On August 30, he granted judgment to the plaintiffs.[3490]

Disqualified Presidential Electors

Phillips v. Galvin (Reginald C. Lindsay, D. Mass. 1:00-cv-12067)

> A minor party's presidential campaign filed a federal complaint seeking an injunction placing the party's candidates on the November ballot despite a finding that some of its proposed presi-

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3484. Docket Sheet, Public Interest v. Armstrong Cty. Bd. of Elections, No. 2:01-cv-1616 (W.D. Pa. Aug. 24, 2001) [hereinafter *Public Interest* Docket Sheet] (D.E. 1); *see* Torsten Ove, *Third Party Seeks Ballot Spot in School Board Race*, Pittsburgh Post-Gazette, Aug. 25, 2001, at D4.

3485. Ove, *supra* note 3484.

3486. *See id.*

3487. *See id.*

3488. *Public Interest* Docket Sheet, *supra* note 3484 (D.E. 2).

3489. *Id.* (D.E. 5, 6).

Judge Ziegler retired on May 31, 2003, and died on September 21, 2019. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

3490. *Public Interest* Docket Sheet, *supra* note 3484 (D.E. 8); *see* Torsten Ove, *Ballot Opened to 3rd-Party Nominees*, Pittsburgh Post-Gazette, Aug. 31, 2001, at B18 ("A Federal judge declared unconstitutional a state law that prohibits candidates representing small, unrecognized political parties from running for certain public offices unless they are registered as independents.").

dential electors were not qualified. The court ruled against the party, in part because of laches.

Topics: Getting on the ballot; laches; interlocutory appeal.

On October 6, 2000, the Constitution Party campaign for President and Vice President filed a federal complaint in the District of Massachusetts seeking an injunction placing the party's candidates on the November ballot despite a finding that some of its proposed presidential electors were not qualified.[3491] With their complaint, the plaintiffs filed a motion for a preliminary injunction.[3492]

At an October 12 hearing,[3493] Judge Reginald C. Lindsay denied the plaintiffs immediate injunctive relief.[3494]

> Many times when the issues are as complicated as the issues are in this case, I advance the case for trial and try the case dealing with the preliminary injunction and the issue on the merits at the same time.
>
> Obviously, that is not a solution that is available to me in this case in light of the election on November 7th, so I have to decide this.[3495]

Judge Lindsay determined that the party had not shown Massachusetts's elector qualification requirements to be unconstitutional, and Massachusetts's secretary of state was entitled to a defense of laches because of the party's delay in bringing the action.[3496]

The plaintiffs filed a notice of interlocutory appeal on October 17.[3497] One week later, the court of appeals denied the plaintiffs immediate relief.[3498]

3491. Complaint, Phillips v. Galvin, No. 1:00-cv-12067 (D. Mass. Oct. 6, 2000), D.E. 1; *see* Transcript at 4, *id.* (Oct. 12, 2000, filed Oct. 16, 2000), D.E. 9 [hereinafter *Phillips* Transcript] ("they are denying a place on the ballot for Frazier and Phillips by deeming three of their twelve presidential elector candidates ineligible . . . on the basis of their having been enrolled in a political party").

3492. Docket Sheet, *id.* (Oct. 6, 2000) [hereinafter *Phillips* Docket Sheet] (D.E. 2).

3493. *Phillips* Transcript, *supra* note 3491.

3494. *Phillips* Docket Sheet, *supra* note 3492 (D.E. 7).

Judge Lindsay died on March 12, 2009. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

3495. *Phillips* Transcript, *supra* note 3491, at 65.

3496. *Id.* at 66–71; *see id.* at 27, 71 (noting that Judge Lindsay would not be preparing a written ruling because he was leaving town that afternoon and would be gone all of the following week).

3497. Notice, *Phillips*, No. 1:00-cv-12067 (D. Mass. Oct. 17, 2000), D.E. 11.

3498. Docket Sheet, Phillips v. Galvin, No. 00-2237 (1st Cir. Oct. 18, 2000) ("Given plaintiffs' less than favorable chances of prevailing on appeal, given their tardiness in filing suit, and given the impracticability of fashioning appropriate and nondisruptive relief at this late stage, . . . the motion for injunction pending appeal is denied.").

On December 19, the parties stipulated dismissal of the action.[3499]

Including on the Ballot Nominees of a Fractured Minor Party

Watson v. Miller (Paul V. Gadola, E.D. Mich. 4:00-cv-40336)

> Supporters of a minor party's presidential nominee filed a federal complaint to require the state's secretary of state to include the nominee on the general-election ballot after being denied such relief by the state's supreme court. Two rival factions of the party had put forward separate nominees. The federal district judge ruled that the plaintiffs had not established a clear right to the requested relief, and an appeal was dismissed by stipulation.
>
> *Topics:* Getting on the ballot; party procedures; interlocutory appeal; matters for state courts.

Because two competing factions of the Reform Party named different presidential nominees in 2000, Michigan's secretary of state decided not to include the Reform Party on the November 7, 2000, ballot.[3500] Two voters supporting the nomination of Pat Buchanan filed a federal complaint in the Eastern District of Michigan late in the afternoon of Friday, September 15, 2000, challenging the secretary's decision.[3501] With their complaint, the plaintiffs filed a motion for a preliminary injunction.[3502]

The court assigned the case to Judge Paul V. Gadola, who was out of state on that day, but who returned on Sunday and held a hearing first thing Monday morning.[3503]

The federal complaint was filed on the day that Michigan's supreme court denied relief to the Buchanan campaign.[3504] The campaign sought a writ of mandamus in Michigan's circuit court and failed to prevail in an

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3499. Stipulation, *Phillips*, No. 1:00-cv-12067 (D. Mass. Dec. 19, 2000), D.E. 15.

3500. *See* Transcript at 5–7, Watson v. Miller, No. 4:00-cv-40336 (E.D. Mich. Sept. 18, 2000, filed Sept. 19, 2000), D.E. 9 [hereinafter *Watson* Transcript]; *see also* Amy Franklin, *Buchanan Camp Works for Spot on State Ballot*, Grand Rapids Press, Sept. 1, 2000, at C4.

3501. Docket Sheet, *Watson*, No. 4:00-cv-40336 (E.D. Mich. Sept. 15, 2000) [hereinafter E.D. Mich. *Watson* Docket Sheet] (D.E. 1); *see Watson* Transcript, *supra* note 3500, at 4–5, 14–15.

3502. E.D. Mich. *Watson* Docket Sheet, *supra* note 3501 (D.E. 2); *see Watson* Transcript, *supra* note 3500, at 15.

3503. *Watson* Transcript, *supra* note 3500, at 1–4, 15 (noting that the proceeding began at 8:45 a.m.).

Judge Gadola died on December 26, 2014. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

3504. Buchanan v. Sec'y of State, 463 Mich. 867, 616 N.W.2d 162 (2000); *see Watson* Transcript, *supra* note 3500, at 10; *see also* Amy Franklin, *Justices Block Reform Candidates*, Grand Rapids Press, Sept. 16, 2000, at A6.

appeal from denial of that relief.[3505] As a result of decisions by Michigan's secretary of state and Michigan's courts, Buchanan's rival for the Reform Party nomination would appear on Michigan's ballot, because the rival was also nominated by the Natural Law Party.[3506]

After a hearing recess of fourteen minutes, Judge Gadola denied the plaintiffs relief.[3507] He saw their requested relief as a writ of mandamus, with a stricter standard than a preliminary injunction's.[3508] Under either standard, however, Judge Gadola found that the plaintiffs had not shown a clear entitlement to place Buchanan on the ballot as the Reform Party's candidate.[3509]

An appeal was dismissed by stipulation on November 2.[3510]

A New Party's Qualification for the Ballot in Texas

Natural Law Party of Texas v. Bomer (James R. Nowlin, W.D. Tex. 1:00-cv-592)

> A district judge determined that it was proper for election officials to use statistical sampling to determine that a new political party had not submitted enough signatures to qualify for a general-election ballot. Moreover, the party waited four weeks to file its complaint and then another week to seek an injunction.
>
> *Topics:* Getting on the ballot; laches; interlocutory appeal.

The Natural Law Party filed a federal complaint in the Western District of Texas's Austin courthouse on September 12, 2000, challenging an August 15 rejection of the party's inclusion on the November 7 general-election ballot.[3511] On September 19, the party filed a motion for a preliminary injunction.[3512]

Judge James R. Nowlin set the case for hearing on September 28.[3513] On September 29, he issued an opinion explaining his ruling from the bench

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3505. *Buchanan*, 463 Mich. at 867, 616 N.W.2d at 162 (Justice Stephen Markman, concurring); *see Watson* Transcript, *supra* note 3500, at 7–9.

3506. *See Watson* Transcript, *supra* note 3500, at 8.

3507. *Id.* at 72, 89.

3508. *Id.* at 77, 87–88.

3509. *Id.* at 83–84, 88, 97.

3510. Docket Sheet, Watson v. Miller, No. 00-2076 (6th Cir. Sept. 20, 2000) (D.E. 25).

3511. Docket Sheet, Natural Law Party of Tex. v. Bomer, No. 1:00-cv-592 (W.D. Tex. Sept. 12, 2000) [hereinafter *Natural Law Party of Tex.* Docket Sheet] (D.E. 1); Opinion at 1, 3, *id.* (Sept. 29, 2000), D.E. 15 [hereinafter *Natural Law Party of Tex.* Opinion].

3512. *Natural Law Party of Tex.* Docket Sheet, *supra* note 3511 (D.E. 4); *Natural Law Party of Tex.* Opinion, *supra* note 3511, at 1, 3.

3513. Order, *Natural Law Party of Tex.*, No. 1:00-cv-592 (W.D. Tex. Sept. 20, 2000), D.E. 6.

on the previous day denying the plaintiffs immediate relief.[3514] Judge Nowlin ruled that it was proper for election officials to use statistical sampling to determine that the party had not submitted a sufficient number of valid signatures to qualify for the ballot.[3515] Moreover, the plaintiffs filed their complaint four weeks after their notice of ballot disqualification and did not seek immediate relief until a week after that.[3516]

On October 6, the court of appeals denied the plaintiffs an injunction pending appeal.[3517] Two weeks later, Judge Nowlin granted the defendants' unopposed motion to dismiss the case.[3518]

Certification as a Write-In Candidate

Pearlman v. Gonzales (Martha Vázquez, 6:98-cv-1160) and Pearlman v. Vigil-Giron (Bruce D. Black, 1:00-cv-1475) (D.N.M.)

> A pro se litigant filed a federal complaint challenging his exclusion from the gubernatorial ballot as a Green Party candidate because the secretary of state determined that the Green Party had become a major party requiring nomination by primary election. The district judge opined that the plaintiff's exclusion was improper, but she held that the action was barred by the Eleventh Amendment. Two years later, the plaintiff filed another federal complaint seeking an order that the state provide for write-in presidential candidates. A different district judge also determined that the suit was barred by the Eleventh Amendment, and moreover it had been filed too late for the equitable relief sought.
>
> *Topics:* Getting on the ballot; write-in candidate; matters for state courts; laches; pro se party; primary election.

A pro se litigant filed a federal complaint in the District of New Mexico on September 23, 1998, challenging the refusal by New Mexico's secretary of state to certify the plaintiff as a write-in Green Party candidate for governor.[3519] One reason for the refusal was that the Green Party had become a

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3514. *Natural Law Party of Tex.* Opinion, *supra* note 3511.

3515. *Id.* at 2–3.

3516. *Id.* at 3–4.

3517. Order, Natural Law Party of Tex. v. Bomer, No. 00-50972 (5th Cir. Oct. 6, 2000), *filed as* Order, *Natural Law Party of Tex.*, No. 1:00-cv-592 (W.D. Tex. Oct. 18, 2000), D.E. 19.

On October 25, 2000, the court of appeals dismissed the appeal for lack of prosecution. Order, *id.* (Oct. 25, 2000), *filed as* Order, *Natural Law Party of Tex.*, No. 1:00-cv-592 (W.D. Tex. Oct. 30, 2000), D.E. 21.

3518. Order, *Natural Law Party of Tex.*, No. 1:00-cv-592 (W.D. Tex. Oct. 20, 2000), D.E. 20.

3519. Complaint, Pearlman v. Gonzales, No. 6:98-cv-1160 (D.N.M. Sept. 23, 1998),

major political party, so its candidate had to be selected in a primary election.[3520] Approximately three weeks later, Judge Martha Vázquez determined that "[t]he reasons cited by Secretary Gonzales for declining Pearlman's candidacy are not supported by fact or law."[3521] Judge Vázquez also determined, however, that the suit was barred by the Eleventh Amendment.[3522] "The proper venue for the resolution of this dispute is not with the federal courts but in the New Mexico Supreme Court."[3523] The plaintiff had already failed to prevail there.[3524]

On October 24, 2000, the pro se litigant filed another federal complaint against New Mexico's secretary of state, this time seeking certification as a write-in candidate for President and an injunction requiring New Mexico to provide a space on the ballot for write-in presidential candidates.[3525] On the following day, Judge Bruce D. Black opined that the difference in office to which the plaintiff aspired did not negate New Mexico's Eleventh Amendment immunity.[3526] Moreover, the litigant's filing suit after the ballots had already been printed weighed against the equitable relief he sought.[3527] On January 8, 2001, Judge Black granted the secretary's motion to dismiss the action.[3528]

D.E. 1; *see* Amended Complaint, *id.* (Sept. 28, 1998), D.E. 3.

3520. Opinion, *id.* (Oct. 15, 1998), D.E. 9.

3521. *Id.* at 14.

3522. *Id.* at 17–21.

3523. *Id.* at 20.

3524. *See High Court Won't Reconsider Bid*, Albuquerque J., Sept. 23, 1998, at C3.

3525. Complaint, Pearlman v. Vigil-Giron, No. 1:00-cv-1475 (D.N.M. Oct. 24, 2000), D.E. 1; *see Would-Be Write-In Candidate Sues State*, Albuquerque J., Oct. 25, 2000, at B3; *see also* Michael Janofsky, *Forget Third Party, These Presidential Hopefuls Offer Array of Choices*, N.Y. Times, July 8, 2000, at A10.

3526. Opinion at 2, *Pearlman*, No. 1:00-cv-1475 (D.N.M. Oct. 25, 2000), D.E. 2 [hereinafter Black *Pearlman* Opinion].

Judge Black retired on January 1, 2017. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

3527. Black *Pearlman* Opinion, *supra* note 3526, at 2–3.

3528. Docket Sheet, *Pearlman*, No. 1:00-cv-1475 (D.N.M. Oct. 24, 2000).

D. Party Designations

Courts have held that it is proper for political parties to exercise control over who is entitled to adopt the party label in elections.

Both the district court and the court of appeals in a Texas case upheld the constitutionality of a loyalty oath requiring candidates seeking a party's nomination to fully support the eventual nominee.[3529] Neither did another district court grant relief to a candidate excluded from a major party's primary-election ballot because the candidate previously ran as a write-in independent.[3530]

A Republican town-board incumbent in New York challenged exclusion from the Conservative Party's primary-election ballot as improper punishment aimed at the Republican Party and inconsistent with another candidate's inclusion on the ballot although that candidate was not a member of the Conservative Party.[3531] Denying relief, the district judge noted that the party's county chair had a duty to ensure that party candidates reflected the political philosophy of the party.[3532] A district judge in Alabama declined to review a state-court ruling that a political party could exclude from its primary-election ballot a candidate who had opposed the party.[3533]

A federal judge may be asked to resolve apparent manipulation of a state's party-designation rules to achieve a result not in keeping with the rules' purposes. In New York in 2008, a minor party's nominee was alleged to have falsely claimed residency in another jurisdiction so that a major party's congressional nominee could be named as a substitute.[3534] The dis-

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3529. Kucinich v. Tex. Democratic Party, 563 F.3d 161, 163 (5th Cir. 2009), *aff'g* 530 F. Supp. 2d 879 (W.D. Tex. 2008), *as reported in* "Party Loyalty Oath," *infra* page 481.

3530. Swanson v. Pitt, 330 F. Supp. 2d 1269 (M.D. Ala. 2004), *as reported in* "Disqualification of a Primary-Election Candidate for Previously Running as an Independent," *infra* page 484.

3531. Rider v. Mohr, No. 1:01-cv-610, 2001 WL 1117157, at *1 (W.D.N.Y. Sept. 6, 2001), *as reported in* "Exclusion from Primary-Election Ballots for Not Being Members of the Party," *infra* page 488.

3532. *Rider*, 2001 WL 1117157, at *2.

3533. Opinion, McGinley v. Ala. Republican Party, No. 2:04-cv-434 (M.D. Ala. May 21, 2004), D.E. 36, *as reported in* "Expulsion from a Primary Election for Disloyalty to the Party," *infra* page 485.

3534. Complaint, N.Y. State Republican Comm. v. N.Y. State Bd. of Elections, No. 1:08-cv-810 (W.D.N.Y. Oct. 31, 2008), D.E. 1, *as reported in* "Fraudulently Withdrawing from a Ballot," *infra* page 477.

trict judge enjoined disqualification of the minor party's primary-election winner.[3535]

Both the political parties and the states have a valid interest in ensuring that party labels are meaningful.[3536] In South Dakota, a major-party member changed party affiliation on the day that the member was nominated for office by a minor party, but the county auditor received the change four days later.[3537] The state's disqualification of the party nominee for being a member of another party was not unconstitutional.[3538]

Lawsuits in Texas arose when a member of Congress decided not to run for reelection after the deadline for removal from the primary-election ballot.[3539] The member's party filed suit to obtain his removal, and the opposing party filed suit to oppose his removal. The issue was resolved with limited judicial action.

Presidential nomination procedures are unusually complex because they involve separate elections and other nomination mechanisms in the various states and territories. Sometimes it is not clear whether the rules for major parties are the same as the rules for minor parties.[3540]

In the 2016 election, a judge granted a party-convention delegate relief from a state statute that required the delegate to vote on the first ballot for the primary-election winner in that state, a candidate whom the delegate deemed unfit.[3541] So long as party rules permitted the delegate to vote his conscience, the state could not require otherwise.[3542]

On occasion, federal judges have been asked to resolve intraparty conflicts.

In 2000, rival factions of Arizona's Libertarian Party had different candidate preferences, and the one selected for the Arizona ballot was differ-

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3535. Temporary Restraining Order, *N.Y. State Republican Comm.*, No. 1:08-cv-810 (W.D.N.Y. Oct. 31, 2008), D.E. 6; Transcript, *id.* (Oct. 31, 2008, filed Nov. 3, 2008), D.E. 8.

3536. *See, e.g.*, "Remanding to State Court an Emergency Election Case After the Federal Claim Is Withdrawn," *infra* page 476.

3537. *See* "Requirement That a Party's Nominee Be a Member of the Party," *infra* page 475.

3538. S.D. Libertarian Party v. Gant, 60 F. Supp. 3d 1043 (D.S.D. 2014).

3539. *See* "Suits Over Removing Withdrawn Candidate from a Primary-Election Ballot," *infra* page 469.

3540. *See, e.g.*, "Substituting Minor-Party Presidential Candidates," *infra* page 479.

3541. Boston Correll v. Herring, 212 F. Supp. 3d 584, 592 (E.D. Va. 2016), *as reported in* "Conscience Voting at a National Convention," *infra* page 471.

3542. *Boston Correll*, 212 F. Supp. 3d 584.

ent from the national party's choice.[3543] Among the reasons that the federal judge denied relief was an improper effort to achieve federal relief after state-court relief had been denied.[3544]

In a dispute between rival factions of a minor party in a state legislative election, a judge also declined to resolve the dispute.[3545]

Suits Over Removing Withdrawn Candidate from a Primary-Election Ballot

Republican Party of Texas v. Pablos (Andrew Austin and Sam Sparks, 1:17-cv-1167) and Texas Democratic Party v. Republican Party of Texas (Lee Yeakel, 1:17-cv-1186) (W.D. Tex.)

> A member of Congress withdrew from reelection consideration after the statutory deadline for removal from the primary-election ballot. His party filed a federal action to keep him off the ballot, and the state's secretary of state said that he would not interfere with the removal. The opposing party filed a federal case to keep the incumbent on the ballot, but the judge declined to order immediate relief. Both actions were withdrawn voluntarily.
>
> *Topics:* Getting on the ballot; primary election; party procedures; case assignment; enjoining elections.

On Thursday, December 14, 2017, two days after the state's deadline for withdrawing from the primary election, a member of Congress decided not to run for reelection.[3546] Late on the next day, the Republican Party of Texas, its state chair, and a voter filed a federal complaint in the Western District of Texas seeking relief from state election laws that would prevent the party from removing the retiring member of Congress from the 2018 primary-election ballot.[3547] The complaint alleged that although the dead-

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3543. *See* "Minor-Party State Faction Opposing the National Nominee," *infra* page 491.

3544. Opinion, Browne v. Bayless, No. 2:00-cv-1774 (D. Ariz. Sept. 22, 2000), D.E. 12.

3545. Order, Hinkleman v. N.Y. State Bd. of Elections, No. 5:08-cv-207 (N.D.N.Y. Feb. 25, 2008), D.E. 8, *as reported in* "Federal Court Intervention in a Party-Nomination Dispute," *infra* page 480.

3546. *See* John C. Moritz, *Farenthold Out*, Corpus Christi Caller-Times, Dec. 15, 2017, at A7; Sheryl Gay Stolberg, *Texas Republican, Under Ethics Investigation, Says He Won't Run Again*, N.Y. Times, Dec. 15, 2017, at A21; Elise Viebeck & Mike DeBonis, *Facing Allegations of Harassment, Rep. Farenthold Won't Seek Reelection*, Wash. Post, Dec. 15, 2017, at A4.

3547. Complaint, Republican Party of Tex. v. Pablos, No. 1:17-cv-1167 (W.D. Tex. Dec. 15, 2017), D.E. 1 [hereinafter *Republican Party of Tex.* Complaint]; *see* Rebecca Elliott, *GOP Sues to Remove Farenthold from Ballot*, Hous. Chron., Dec. 17, 2017, at A3; John C. Moritz, *GOP Sues to Remove Farenthold on Ballot*, Corpus Christi Caller-Times,

line for withdrawal was December 12, because the deadline for the party chair to submit candidates' names to Texas's secretary of state was not until December 19, the plaintiffs were entitled to equitable relief.[3548] With their complaint, the plaintiffs filed a motion for preliminary and permanent injunctions and a temporary restraining order.[3549]

The member of Congress decided not to run following an $84,000 sexual harassment settlement.[3550] He resigned from Congress on April 6, 2018.[3551]

On the day that the complaint was filed, Judge Sam Sparks referred the motion to Magistrate Judge Andrew Austin,[3552] who set the case for hearing on Tuesday, December 19.[3553] At the hearing, the lawyer for Texas's secretary of state said that the secretary would not interfere with the party's omitting the incumbent's name from the primary-election ballot.[3554] The plaintiffs orally moved for dismissal of their case, and Judge Sparks granted the dismissal that day.[3555]

On the next day, the Texas Democratic Party and its chair filed a federal action in the Western District seeking to keep the incumbent's name on the primary-election ballot.[3556] With their complaint, the plaintiffs filed

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Dec. 17, 2017, at A5.

3548. *Republican Party of Tex.* Complaint, *supra* note 3547, at 5–6.

3549. Motion, *Republican Party of Tex.*, No. 1:17-cv-1167 (W.D. Tex. Dec. 15, 2017), D.E. 3.

3550. *See* Moritz, *supra* note 3546; Stolberg, *supra* note 3546; Viebeck & DeBonis, *supra* note 3546.

3551. *See* Emily Cochrane, *Texas Lawmaker in Sex Settlement Resigns*, N.Y. Times, Apr. 7, 2018, at A15; Mike DeBonis, *Rep. Farenthold Abruptly Resigns from Congress*, Wash. Post, Apr. 7, 2018, at A16.

3552. Referral Order, *Republican Party of Tex.*, No. 1:17-cv-1167 (W.D. Tex. Dec. 15, 2017), D.E. 5.

Judge Austin retired in 2021. *See* The University of Texas School of Law, law.utexas.edu/faculty/andrew-w-austin/.

3553. Order, *Republican Party of Tex.*, No. 1:17-cv-1167 (W.D. Tex. Dec. 18, 2017), D.E. 8.

3554. *See* John C. Moritz, *Farenthold Taken Off Ballot by Republicans*, Corpus Christi Caller-Times, Dec. 21, 2017, at A5.

"Republicans pulled U.S. Rep. Blake Farenthold's name off the ballot late Tuesday after their lawyer was told in court that the secretary of state's office would not mount a legal challenge to leave the four-term incumbent as an option for March 6 GOP primary voters." *Id.*

3555. Order, *Republican Party of Tex.*, No. 1:17-cv-1167 (W.D. Tex. Dec. 19, 2017), D.E. 13.

3556. Complaint, Tex. Democratic Party v. Republican Party of Tex., No. 1:17-cv-1186 (W.D. Tex. Dec. 20, 2017), D.E. 1; *see* Alejandra Matos, *Farenthold's Exit from Race*

an application for a temporary restraining order, a preliminary injunction, and a permanent injunction.[3557] The second case was assigned to Judge Sparks,[3558] but because of his unavailability he transferred it to Judge Lee Yeakel.[3559]

Judge Yeakel held a telephonic conference on the day that the complaint was filed.[3560]

> I could go ahead and rule on the temporary restraining order just on the pleadings in front of me because I don't have any time to set you for an immediate hearing on the temporary restraining order because I have sentencings all day tomorrow. . . . My suggestion is that we go directly to a preliminary injunction hearing and that we do it next week.[3561]

At the end of the hearing, Judge Yeakel denied immediate relief and set the case for hearing on December 26.[3562] He was unwilling to issue an immediate injunction on so thin a record.[3563] The plaintiffs dismissed the action on the day that they filed it.[3564]

Conscience Voting at a National Convention

Correll v. Herring (Robert E. Payne, E.D. Va. 3:16-cv-467)

> A delegate to a national presidential nominating convention sought an injunction against a state statute that criminalized failure to vote for the state's primary-election winner on the first ballot. The district judge concluded that the statute unconstitutionally infringed on the plaintiff's right to vote his conscience consistent with party rules.
>
> *Topics:* Party procedures; primary election; class action; intervention; laches; attorney fees.

A delegate to the 2016 national convention for the Republican Party filed a federal class-action complaint on June 24, 2016, in the Eastern District of

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Sparks Criticism from Dems, Hous. Chron., Dec. 21, 2017, at A6; Moritz, *supra* note 3554.

3557. Motion, *Tex. Democratic Party*, No. 1:17-cv-1186 (W.D. Tex. Dec. 20, 2017), D.E. 3.

3558. Docket Sheet, *id.* (Dec. 20, 2017).

3559. Order, *id.* (Dec. 20, 2017), D.E. 2; Transcript at 3, *id.* (Dec. 20, 2017, filed Jan. 31, 2018), D.E. 8 [hereinafter *Tex. Democratic Party* Transcript].

Judge Yeakel retired on May 1, 2023. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

3560. *Tex. Democratic Party* Transcript, *supra* note 3559.

3561. *Id.* at 2–3.

3562. *Id.* at 8; *see* Matos, *supra* note 3556.

3563. *Tex. Democratic Party* Transcript, *supra* note 3559, at 4–5.

3564. Final Judgment, *Tex. Democratic Party*, No. 1:17-cv-1186 (W.D. Tex. Dec. 20, 2017), D.E. 7; Stipulation, *id.* (Dec. 20, 2017), D.E. 5; *see* Matos, *supra* note 3556.

Virginia's Richmond courthouse against commonwealth election officials, seeking relief from a Virginia statute requiring the plaintiff to vote on the first convention ballot for the winner of the commonwealth's primary election.[3565] With his complaint, the delegate filed a motion for a temporary restraining order and a preliminary injunction.[3566]

On June 27, Judge Robert E. Payne set the case for hearing on July 7.[3567]

At a June 28 morning conference call, Judge Payne informed the plaintiff that the court would need copies of relevant party rules.[3568] Judge Payne also asked the plaintiff to take a stand on whether proceedings would be necessary following a preliminary injunction and whether class certification had to be determined before a decision on the preliminary injunction.[3569] The plaintiff's attorney agreed to reflect on the matter and address it at an afternoon conference call.[3570] Another plaintiff's attorney reported in the afternoon that "the State and the plaintiff would stipulate to the requirements for certification for a class of Republican delegates but not Democrat delegates."[3571]

The defendants' injunction opposition brief was originally due on June 30.[3572] Judge Payne urged the defendants to also file their answer before the July 7 hearing:

> I think it's a good idea to get the answer in before you actually have the hearing and before all the briefing is in, because the issues can get framed differently depending on what defense you're going to raise . . . .

3565. Complaint, Correll v. Herring, No. 3:16-cv-467 (E.D. Va. June 24, 2016), D.E. 1; Boston Correll v. Herring, 212 F. Supp. 3d 584, 592 (E.D. Va. 2016); *see* Louis Llovia, *Va. GOP Delegate Sues for Right to Not Vote for Trump at Convention*, Richmond Times-Dispatch, June 25, 2016, at 2A.

3566. Motion, *Correll*, No. 3:16-cv-467 (E.D. Va. June 24, 2016), D.E. 4; *Boston Correll*, 212 F. Supp. 3d at 593.

3567. Scheduling Order, *Correll*, No. 3:16-cv-467 (E.D. Va. June 27, 2016), D.E. 11; *Boston Correll*, 212 F. Supp. 3d at 593; *see* Transcript, *Correll*, No. 3:16-cv-467 (E.D. Va. July 7, 2016, filed July 11, 2016), D.E. 42 (232 pages); Minutes, *id.* (July 7, 2016), D.E. 46; *see also* Graham Moomaw, *Anti-Trump Suit May Strike Down Delegate Voting Law in Virginia*, Richmond Times-Dispatch, July 8, 2016, at 1A (reporting that the hearing lasted roughly six hours); Jenna Portnoy, *In Federal Case, Anti-Trump GOP Delegate Argues He Can Vote His Conscience*, Wash. Post, July 8, 2016, at B3 (same).

3568. Transcript at 9–10, *Correll*, No. 3:16-cv-467 (E.D. Va. June 28, 2016, filed June 28, 2016), D.E. 16 [hereinafter June 28, 2016, *Correll* Morning Transcript].

3569. *Id.* at 3–9.

3570. *Id.* at 8–9, 16–17.

3571. Transcript at 5, *id.* (June 28, 2016, filed July 5, 2016), D.E. 31 [hereinafter June 28, 2016, *Correll* Afternoon Transcript].

3572. *Correll* Scheduling Order, *supra* note 3567.

> . . .
>
> . . . [E]xperience has taught me the hard way that it is preferable from the standpoint of a litigant to answer before you file other papers if you can in this kind of situation so that you are not at cross-purposes with each other.[3573]

Defense counsel informed Judge Payne that answering a verified complaint requires party signatures, "and our clients are sometimes difficult to get ahold of."[3574]

> THE COURT: Let me put an end to that right now. You call them and tell them they're not going to be difficult to get hold of.
>
> [DEFENSE ATTORNEY]: Okay.
>
> THE COURT: And they have homes, they have—and you can do anything by electronic signature and all kinds of different things in this world, and in this case, they're not going to be hard to get hold of.
>
> [DEFENSE ATTORNEY]: That, Your Honor, makes it much simpler.[3575]

The parties and the court agreed to a one-day extension, until Friday, July 1, for the defendants to file their answer and brief, and the plaintiff agreed to keep to his July 5 deadline for his reply, a day that was a federal holiday because Independence Day fell on a Sunday.[3576] It was also agreed that the plaintiff would file an amended complaint on June 29 limiting the case to the Republican convention.[3577]

Judge Payne specified several additional issues for the parties to address, such as whether the Virginia statute was enforceable outside of Virginia and the risk of prosecution for violating the statute.[3578]

On June 30, eight Virginia delegates to the Republican national convention, who otherwise would be part of the plaintiff's class, moved to intervene in opposition to the plaintiff.[3579] Judge Payne held a conference call on the following day[3580] and then granted intervention by right.[3581]

3573. June 28, 2016, *Correll* Afternoon Transcript, *supra* note 3571, at 16–17.

3574. *Id.* at 14.

3575. *Id.*

3576. *Id.* at 17–19; Order, *Correll*, No. 3:16-cv-467 (E.D. Va. June 28, 2016), D.E. 18; *see* Graham Moomaw, *Herring Asks Court to Toss Anti-Trump Suit*, Richmond Times-Dispatch, July 2, 2016, at 9A.

3577. June 28, 2016, *Correll* Afternoon Transcript, *supra* note 3571, at 25–26; *see* Amended Complaint, *Correll*, No. 3:16-cv-467 (E.D. Va. June 29, 2016), D.E. 20; Boston Correll v. Herring, 212 F. Supp. 3d 584, 592 (E.D. Va. 2016).

3578. Order, *Correll*, No. 3:16-cv-467 (E.D. Va. June 28, 2016), D.E. 15, 2016 WL 9211719; June 28, 2016, *Correll* Morning Transcript, *supra* note 3568, at 14–16.

3579. Intervention Motion, *Correll*, No. 3:16-cv-467 (E.D. Va. June 30, 2016), D.E. 22;

On July 11, Judge Payne granted the plaintiff an injunction.[3582] "There has been no motion for class certification and, given the position of the Intervenors, it is doubtful that even the modified class identified in the Amended Complaint could be so certified."[3583]

Virginia Code § 24.2-545(D) provides,

> The State Board shall certify the results of the presidential primary to the state chairman. If the party has determined that its delegates and alternates will be selected pursuant to the primary, the slate of delegates and alternates of the candidate receiving the most votes in the primary shall be deemed elected by the state party unless the party has determined another method for allocation of delegates and alternates. If the party has determined to use another method for selecting delegates and alternates, those delegates and alternates shall be bound to vote on the first ballot at the national convention for the candidate receiving the most votes in the primary unless that candidate releases those delegates and alternates from such vote.[3584]

The plaintiff was selected as a delegate to the Republican national convention on April 16 at a local convention ("another method for selecting delegates and alternates") following a March 1 presidential primary election in Virginia.[3585] The plaintiff regarded the winner of the Republican primary election as unfit and alleged that a vote for the winner would violate the plaintiff's conscience.[3586] Violation of the Virginia statute would be a class 1 misdemeanor, and Judge Payne found the plaintiff's fear of prosecution to be objectively reasonable.[3587] Virginia argued that it was proper for the commonwealth to require that a primary election held at commonwealth expense be consequential.[3588]

Boston Correll, 212 F. Supp. 3d at 592.

3580. Transcript, *Correll*, No. 3:16-cv-467 (E.D. Va. July 1, 2016, filed July 5, 2016), D.E. 32.

3581. Order, *id.* (July 1, 2016), D.E. 29; *Boston Correll*, 212 F. Supp. 3d at 592–93.

3582. *Boston Correll*, 212 F. Supp. 3d 584; *see* Graham Moomaw, *Judge Strikes Down Va. Primary Law at Center of GOP Feud*, Richmond Times-Dispatch, July 12, 2016, at 1B; Jenna Portnoy & Ed O'Keefe, *Judge Rules for Anti-Trump Delegate*, Wash. Post, July 12, 2016, at B5.

3583. *Boston Correll*, 212 F. Supp. 3d at 593.

3584. Code of Virginia, law.lis.virginia.gov/vacode/title24.2/chapter5/section24.2-545/.

3585. *Boston Correll*, 212 F. Supp. 3d at 595–96.

3586. *Correll* Amended Complaint, *supra* note 3577, at 5; *Boston Correll*, 212 F. Supp. 3d at 596.

3587. *Boston Correll*, 212 F. Supp. 3d at 597, 600–04 (noting that it was reasonable to assume that the statute was adopted with the intention that it would be enforced).

3588. Opposition Brief at 1, Correll v. Herring, No. 3:16-cv-467 (E.D. Va. July 1,

Judge Payne determined that the statute violated the plaintiff's First Amendment rights to vote his conscience so long as party rules permitted such a vote, and Judge Payne found that party rules did that.[3589]

The litigating parties reached a settlement on attorney fees and costs.[3590]

Requirement That a Party's Nominee Be a Member of the Party

South Dakota Libertarian Party v. Gant (Lawrence L. Piersol, D.S.D. 4:14-cv-4132)

> A party's nominee was disqualified because the nominee's party change was not effective until it was received by the county auditor, after the nomination. The district judge denied the party and the nominee a preliminary injunction, because the minimal burden of requiring the party change before the nomination was justified by the state's interest in maintaining party integrity.
>
> *Topic:* Getting on the ballot.

South Dakota's Libertarian Party and its candidate for public utilities commissioner filed a federal complaint in the District of South Dakota on August 25, 2014, against South Dakota's secretary of state, challenging as unconstitutional the disqualification of the candidate for being a member of the Republican Party.[3591] Judge Lawrence L. Piersol set the case for hearing on August 28.[3592] The plaintiffs filed a motion for a preliminary injunction on August 27.[3593]

At the hearing, Judge Piersol denied the plaintiffs an injunction and granted the defendants a dismissal.[3594] On October 10, Judge Piersol issued a published opinion explaining his ruling.[3595]

The candidate changed his registration on the morning of his nomination, but the change was not received by the county auditor until four days later.[3596]

2016), D.E. 25.

3589. *Boston Correll*, 212 F. Supp. 3d 584.

3590. Notice, *Correll*, No. 3:16-cv-467 (E.D. Va. Aug. 10, 2016), D.E. 51.

3591. Complaint, S.D. Libertarian Party v. Gant, No. 4:14-cv-4132 (D.S.D. Aug. 25, 2014), D.E. 1.

3592. Order, *id.* (Aug. 25, 2014), D.E. 7; *see* Minutes, *id.* (Aug. 28, 2014), D.E. 14.

3593. Preliminary-Injunction Motion, *id.* (Aug. 27, 2014), D.E. 9.

3594. Order, *id.* (Aug. 28, 2014), D.E. 16; S.D. Libertarian Party v. Gant, 60 F. Supp. 3d 1043, 1043 (D.S.D. 2014).

3595. *S.D. Libertarian Party*, 60 F. Supp. 3d 1043.

3596. *Id.* at 1044.

> A change in voter registration is not effective until received by the county auditor. . . .
>
> . . .
>
> . . . [The candidate] easily could have met the affiliation requirement by simply filling out a voter registration card [in person] at an approved agency, or by getting the form to the county auditor, any time prior to his nomination.[3597]

Judge Piersol agreed with South Dakota's argument that "the State has an interest in preserving political parties as viable and identifiable groups, enhancing party building efforts, and guarding against party raiding and 'sore loser' candidacies by spurned primary contenders."[3598] The minimal burden on the party was justified by the state's legitimate and important interests.[3599]

Remanding to State Court an Emergency Election Case After the Federal Claim Is Withdrawn

Oliver v. Lewis (Lee H. Rosenthal, S.D. Tex. 4:12-cv-2568)

> Defendants removed a state-court challenge to the disqualification of a primary-election victor for party disloyalty. Upon the plaintiffs' agreement to dismissal of a federal constitutional claim by nonsuiting the voter plaintiffs, the district court remanded the case because of the early withdrawal of the federal claim and the complexity of the state claims.
>
> *Topics:* Matters for state courts; getting on the ballot; primary election.

On August 26, 2012, county party officials removed an action to the U.S. District Court for the Southern District of Texas that challenged the party's removal of a district-attorney primary-election victor from the general-election ballot.[3600] On the following day, the removed candidate and

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3597. *Id.*

3598. *Id.* at 1051.

3599. *Id.* at 1050–51.

3600. Notice of Removal, Oliver v. Lewis, No. 4:12-cv-2568 (S.D. Tex. Aug. 27, 2012), D.E. 2; Oliver v. Lewis, 891 F. Supp. 2d 839, 841 (S.D. Tex. 2012); *see* Mike Glenn, *Candidate to Fight Party to Stay in Race*, Hous. Chron., Aug. 25, 2012, at 2; *see also* Brian Rogers, *Dems Prefer No DA Candidate at All Over Oliver*, Hous. Chron., Aug. 23, 2012, at 1 ("Oliver has been a controversial candidate because he has been indicted three times, but never convicted. He has said he continues to run in elections because getting his name on the ballot helps his legal practice."); Brian Rogers & James Pinkerton, *Anderson Defeats Lykos in Bitter Battle*, Hous. Chron., May 30, 2012, at 1 ("Perennial candidate Lloyd Oliver shocked courthouse insiders by beating defense attorney Zack Fertitta.").

Officials of the Harris County Democratic Party have notified Oliver that they will not place

the other plaintiffs—two voters—filed an emergency motion for remand alleging that removal of the case to federal court occurred one day in advance of a scheduled state-court hearing on the case and that mailing of general-election ballots was to begin on August 30.[3601]

Judge Lee H. Rosenthal heard from the plaintiffs on August 27 and from both sides on August 28.[3602] At the second hearing, it was established that the deadline for finalizing the November 6 ballot was September 6.[3603] Also at the second hearing, the voters withdrew as plaintiffs, removing from the case their federal constitutional claim.[3604]

On August 31, Judge Rosenthal remanded the case, finding it appropriate to do so when "the only federal law claims are abandoned very early in the litigation and the remaining claims raise novel or unsettled state-law issues."[3605]

The state court ordered the candidate's name to remain on the general-election ballot.[3606] He lost the election.[3607]

Fraudulently Withdrawing from a Ballot

New York State Republican Committee v. New York State Board of Elections (Richard J. Arcara, W.D.N.Y. 1:08-cv-810)

> In a congressional election in New York, the Republican Party alleged that the Working Families Party's primary winner falsely claimed to be a resident of the District of Columbia so that the Democratic Party nominee could be named also a replacement Working Families Party nominee. The complaint was filed on the Friday before the election, and the court heard arguments that day by telephone. The district judge granted the Republican

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his name on the general-election ballot as the Party's nominee on the basis that public statements he made, including praising his primary opponent as well as the incumbent (Republican) district attorney, violated Texas Democratic Party rules.

Oliver, 891 F. Supp. 2d at 840.

3601. Motion, *Oliver*, No. 4:12-cv-2568 (S.D. Tex. Aug. 27, 2012), D.E. 2; *Oliver*, 891 F. Supp. 2d at 841.

3602. Docket Sheet, *Oliver*, No. 4:12-cv-2568 (S.D. Tex. Aug. 26, 2012) [hereinafter *Oliver* Docket Sheet] (D.E. 3, 5); *Oliver*, 891 F. Supp. 2d at 841.

3603. *Oliver* Docket Sheet, *supra* note 3602 (D.E. 5).

3604. *Oliver*, 891 F. Supp. 2d at 843.

3605. *Id.* at 849.

3606. *See* Joe Holley, *Oliver Won't Be Booted off Ballot*, Hous. Chron., Sept. 6, 2012, at 1 (reporting that the state judge agreed that the candidate had a First Amendment right to compliment the defeated incumbent of the other party after her primary-election defeat).

3607. *See* Brian Rogers, *Anderson Rolls in DA's Race*, Hous. Chron., Nov. 7, 2012, at 1.

> Party an injunction at 10:17 p.m., and the court of appeals affirmed the injunction on Monday.
>
> *Topics:* Getting on the ballot; party procedures; primary election.

New York's Republican Party filed a federal complaint on Friday, October 31, 2008, in the Western District of New York's Buffalo courthouse to prevent the Democratic Party's nominee for a congressional seat from being named also as the Working Families Party's nominee.[3608] The complaint alleged that the winner of the Working Families Party primary election falsely claimed to be a resident of the District of Columbia so that the Democratic nominee could be named as his replacement.[3609] With its complaint, the Republican Party filed a motion for a temporary restraining order[3610] and a motion for expedited hearing.[3611]

Judge Richard J. Arcara heard oral arguments that same day by telephone.[3612] At 10:17 p.m., Judge Arcara granted the Republican Party an injunction, enjoining the disqualification of the Working Families Party primary winner.[3613] The disqualification was unconstitutional for two reasons: (1) "it is solely for Congress, not a state court to determine who is qualified to serve in Congress," and (2) neither Congress nor the Constitution has established a preelection residency requirement.[3614] Moreover, "You simply can't change the parties on the ballot after [absentee] voting has started."[3615]

The defendants immediately sought an interlocutory appeal.[3616] The clerk of court for the court of appeals was walking with family on the streets of Boston when she got a call about the appeal.[3617] Over her Black-

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3608. Complaint, N.Y. State Republican Comm. v. N.Y. State Bd. of Elections, No. 1:08-cv-810 (W.D.N.Y. Oct. 31, 2008), D.E. 1.

3609. *Id.*

3610. Temporary-Restraining-Order Motion, *id.* (Oct. 31, 2008), D.E. 2.

3611. Expedition Motion, *id.* (Oct. 31, 2008), D.E. 3.

3612. Docket Sheet, *id.* (Oct. 31, 2008).

3613. Temporary Restraining Order, *id.* (Oct. 31, 2008), D.E. 6; Transcript, *id.* (Oct. 31, 2008, filed Nov. 3, 2008), D.E. 8 [hereinafter *N.Y. State Republican Comm.* Transcript].

3614. *N.Y. State Republican Comm.* Transcript, *supra* note 3613, at 2–3.

3615. *Id.* at 4.

3616. Docket Sheet, N.Y. State Republican Comm. v. N.Y. State Bd. of Elections, No. 08-5327 (2d Cir. Nov. 3, 2008) [hereinafter 2d Cir. *N.Y. State Republican Comm.* Docket Sheet].

3617. Interview with Catherine Wolfe, Oct. 11, 2012.

Tim Reagan interviewed Ms. Wolfe for this report by telephone.

berry, she selected a panel and arranged for briefing over the weekend.[3618] On Monday, the court of appeals heard the case and affirmed the preliminary injunction:[3619]

> Defendants' application to expedite proceedings is GRANTED. The application of defendants for immediate vacatur of the temporary restraining order entered by the District Court, and the application to direct the District Court to dismiss the complaint *sua sponte* for lack of jurisdiction are each hereby DENIED. We MODIFY the district court's order . . . to strike the word "Permanently." In entering these orders we express no view on the ultimate merits of the claims of the parties. Any further appeal in this action shall be assigned to another panel of the Court in the normal course.[3620]

On December 2, the parties stipulated dismissal.[3621]

Substituting Minor-Party Presidential Candidates

Barr v. Galvin (Nathaniel M. Gorton, D. Mass. 1:08-cv-11340)

> A minor party filed a federal complaint seeking an order allowing it to substitute its nominees for President and Vice President for the names used to gather ballot-application signatures before the party's nominating convention. The judge ruled in favor of the party because it was not clear whether statutory provisions on substitution of candidates applied to minor parties' presidential candidates. After the election, the court of appeals determined that the statutory vagueness should be resolved by state-court interpretation.
>
> *Topics:* Getting on the ballot; matters for state courts.

The Libertarian Party filed a federal complaint in the District of Massachusetts on August 6, 2008, seeking an order allowing it to substitute its nominees for President and Vice President for the names used to gather ballot-application signatures before the party's May 22–26 nominating convention.[3622] On August 15, the party filed a motion for a preliminary injunction.[3623]

3618. *Id.*

3619. 2d Cir. *N.Y. State Republican Comm.* Docket Sheet, *supra* note 3616.

3620. Order, *N.Y. State Republican Comm.*, No. 08-5327 (2d Cir. Nov. 3, 2008).

3621. Stipulated Dismissal, N.Y. State Republican Comm. v. N.Y. State Bd. of Elections, No. 1:08-cv-810 (W.D.N.Y. Dec. 2, 2008), D.E. 10.

3622. Complaint, Barr v. Galvin, No. 1:08-cv-11340 (D. Mass. Aug. 6, 2008), D.E. 1; Barr v. Galvin, 626 F.3d 99, 103 (1st Cir. 2010); Barr v. Galvin, 584 F. Supp. 2d 316, 319 (D. Mass. 2008); Barr v. Galvin, 659 F. Supp. 2d 225, 227 (D. Mass. 2009).

3623. Preliminary-Injunction Motion, *Barr*, No. 1:08-cv-11340 (D. Mass. Aug. 15, 2008), D.E. 6; *Barr*, 584 F. Supp. 2d at 319.

Judge Nathaniel M. Gorton heard the motion on September 12.[3624] On September 22, Judge Gorton granted the party a preliminary injunction, because it was not clear whether Massachusetts's statutory provisions on substitution of candidates applied to minor parties' presidential candidates.[3625] In September 2009, Judge Gorton awarded the party summary judgment on the same grounds.[3626]

On November 16, 2010, the court of appeals determined that the statutory vagueness should be resolved by state-court interpretation, so the court remanded the case for dismissal without prejudice.[3627]

Federal Court Intervention in a Party-Nomination Dispute

Hinkleman v. New York State Board of Elections (David N. Hurd, N.D.N.Y. 5:08-cv-207)

> The district judge declined to resolve an intraparty dispute over who would be the party's nominee in a special legislative election.
>
> *Topics:* Getting on the ballot; class action; party procedures; matters for state courts; case assignment.

On February 22, 2008, a voter and two organizational parts of New York's Independence Party filed a federal class-action complaint in the Northern District of New York seeking resolution in their favor of a dispute over what part or parts of the party were authorized to name a nominee for a February 26 special election to fill a vacancy in the state's senate.[3628] On the day that the complaint was filed, the court reassigned the case from Judge Neal P. McCurn to Judge David N. Hurd.[3629]

On February 25, Judge Hurd granted a motion to intervene filed by a candidate opposing the candidate supported by the plaintiffs.[3630] Judge Hurd denied the plaintiffs preliminary relief.[3631]

3624. Transcript, *Barr*, No. 1:08-cv-11340 (D. Mass. Sept. 12, 2008, filed Oct. 23, 2008), D.E. 25; *Barr*, 584 F. Supp. 2d at 319.

3625. Preliminary Injunction, *Barr*, No. 1:08-cv-11340 (D. Mass. Sept. 22, 2008), D.E. 22; *Barr*, 584 F. Supp. 2d at 320–21; *Barr*, 626 F.3d at 103–04; *Barr*, 659 F. Supp. 2d at 226–27.

3626. *Barr*, 659 F. Supp. 2d 225, *rev'd*, 626 F.3d 99.

3627. *Barr*, 626 F.3d 99 *cert. denied*, 565 U.S. 929 (2011).

3628. Complaint, Hinkleman v. N.Y. State Bd. of Elections, No. 5:08-cv-207 (N.D.N.Y. Feb. 22, 2008), D.E. 1.

3629. Order, *id.* (Feb. 22, 2008), D.E. 5.

Judge McCurn died on September 7, 2014. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

3630. Order, *Hinkleman*, No. 5:08-cv-207 (N.D.N.Y. Feb. 25, 2008), D.E. 7.

New York's court of appeals, however, ruled on February 25 that the federal court intervenor could not pursue a state-court challenge against the federal plaintiffs' candidate's being listed as the Independence nominee, because the federal intervenor was not a member of the Independence Party.[3632]

The intervenor won the election.[3633]

Having received the desired relief in state court, the plaintiffs dismissed their federal action on March 19.[3634]

Party Loyalty Oath

Kucinich v. Texas Democratic Party (Lee Yeakel, W.D. Tex. 1:08-cv-7)

> Two months before Texas's 2008 Democratic presidential primary election, a candidate filed a federal constitutional challenge to the state party's loyalty oath for presidential candidates. The district court conducted a proceeding on the day that the case was filed. The judge and the parties agreed to a bench trial nine days later. The court ruled against the candidate at the conclusion of the trial and issued an opinion six days later. The court of appeals agreed that the loyalty oath was not unconstitutional.
>
> *Topics:* Getting on the ballot; party procedures.

Two months before Texas's March 4, 2008, presidential primary election, Democratic candidate Dennis Kucinich, and Willie Nelson in his capacity as a voter, filed a federal complaint in the Western District of Texas's Austin courthouse challenging the constitutionality of a loyalty oath required by the Texas Democratic Party: "I further swear that I will fully support the Democratic nominee for President, whoever that shall be."[3635] With

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3631. Order, *id.* (Feb. 25, 2008), D.E. 8; *see* Intervention Motion, *id.* (Feb. 25, 2008), D.E. 6.

3632. *In re* Fehrman v. N.Y. State Bd. of Elections, 10 N.Y.3d 759, 883 N.E.2d 1008, 854 N.Y.S.2d 101 (2008); *see* Charles McChesney, *Court Grants Barclay Independence Line*, Syracuse Post-Standard, Feb. 26, 2008, at B1; Rick Karlin, *GOP Gains Edge in Contest*, Albany Times Union, Feb. 26, 2008, at A3; Jeremy W. Peters, *In Race Upstate, Republican Gets a Second Ballot Line*, N.Y. Times, Feb. 26, 2008, at 5.

3633. *See* Trymaine Lee, *Upset Sends Democrat to Albany*, N.Y. Times, Feb. 27, 2008, at 1; Irene Jay Liu, *Senate Loss Slams State GOP*, Albany Times Union, Feb. 27, 2008, at A1.

3634. Voluntary Dismissal, *Hinkleman*, No. 5:08-cv-207 (N.D.N.Y. Mar. 19, 2008), D.E. 10.

3635. Complaint, Kucinich v. Tex. Democratic Party, No. 1:08-cv-7 (W.D. Tex. Jan. 2, 2008), D.E. 1; Kucinich v. Tex. Democratic Party, 563 F.3d 161, 163 (5th Cir. 2009); Kucinich v. Tex. Democratic Party, 530 F. Supp. 2d 879, 882 (W.D. Tex. 2008); *see* Amended Complaint, *Kucinich*, No. 1:08-cv-7 (W.D. Tex. Jan. 4, 2008), D.E. 8; *see also*

their complaint, on January 2, 2008, the plaintiffs also filed a motion for a temporary restraining order and a preliminary injunction.[3636]

> Despite signing an identical ballot application in 2004, which contained the same oath, Kucinich informed the [Texas Democratic Party] that he would only pledge to support a nominee who would not employ war as an instrument of foreign policy, and that he would not re-sign the oath based on this firm belief.[3637]

Judge Lee Yeakel heard the motion on the day after it was filed.[3638] He was able to act quickly on the case because the clerk's office was alert to the filing of urgent cases, and good attorneys knew that providing the court with courtesy copies of an electronically filed complaint improved the odds of the court's finding out about the case promptly.[3639]

It was Judge Yeakel's practice to promptly contact the plaintiff's attorney in an emergency case to find out who the likely defense attorneys were going to be and then promptly contact them.[3640] Judge Yeakel would shift pending obligations in other cases to accommodate emergency matters.[3641] Often, district court proceedings are just a whistle stop on a trip to higher courts, so the sooner the case can move on its journey the better.[3642]

For emergency matters, Judge Yeakel discouraged discovery and encouraged stipulation to facts.[3643] The facts in this case were undisputed.[3644]

At the hearing, the parties agreed to a schedule culminating in a bench trial on January 11.[3645] After the trial and a fifty-minute recess, Judge

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Robert T. Garrett, *Kucinich Fighting Texas Loyalty Oath*, Dallas Morning News, Jan. 4, 2008, at 12A; John Moritz, *Willie Joins Kucinich in Ballot Battle*, Fort Worth Star-Telegram, Jan. 4, 2008, at B1; R.G. Ratcliffe & Peggy Fikac, *Hot Local, National Races to Fill Long Primary Ballot*, Hous. Chron., Jan. 3, 2008, at B1.

3636. Motion, *Kucinich*, No. 1:08-cv-7 (W.D. Tex. Jan. 2, 2008), D.E. 2.

3637. *Kucinich*, 530 F. Supp. 2d at 882.

3638. Docket Sheet, *Kucinich*, No. 1:08-cv-7 (W.D. Tex. Jan. 2, 2008).

Tim Reagan interviewed Judge Yeakel for this report by telephone on September 12, 2012. Judge Yeakel retired on May 1, 2023. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

3639. Interview with Judge Lee Yeakel, Sept. 12, 2012.

3640. *Id.*

3641. *Id.*

3642. *Id.*

3643. *Id.*

3644. *Id.*

3645. Order, Kucinich v. Tex. Democratic Party, No. 1:08-cv-7 (W.D. Jan. 3, 2008), D.E. 5.

Willie Nelson did not personally attend the hearing, which probably relieved the court of increased media attention. Interview with Judge Lee Yeakel, Sept. 12, 2012.

Yeakel resolved the case against Kucinich.[3646] Six days later, he issued an opinion explaining his ruling.[3647]

Judge Yeakel applied the Supreme Court's balancing test for evaluating the constitutionality of ballot restriction laws.[3648] In *Anderson v. Celebrezze*, the Court determined that Ohio's March filing deadline for independent presidential candidates, such as the plaintiff John Anderson, was earlier than could be justified by Ohio's asserted interests.[3649] In the 1992 case of *Burdick v. Takushi*, the Court determined that Hawaii's interests in proscribing write-in voting outweighed candidates' and voters' interests in having write-in options.[3650] In 2000, the Court resolved *California Democratic Party v. Jones* by striking down California's blanket primary scheme[3651] in which "each voter's primary ballot . . . lists every candidate regardless of party affiliation and allows the voter to choose freely among them."[3652]

Judge Yeakel determined,

> The oath before the Court is not an instance of a party seeking to disenfranchise classes of people on the basis of race, sex, national origin, or religion. . . .
>
> The oath only restricts Kucinich's speech to the extent his conscience chooses to be restricted. . . . The dominant right of association in this case lies with the party.[3653]

Kucinich immediately appealed.[3654] The district court,[3655] the court of appeals,[3656] and the Supreme Court[3657] all denied him stays pending ap-

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3646. Judgment, *Kucinich*, No. 1:08-cv-7 (W.D. Tex. Jan. 11, 2008), D.E. 24; Transcript at 35–37, *id.* (Jan. 11, 2008), D.E. 38; Kucinich v. Tex. Democratic Party, 530 F. Supp. 2d 879, 881–82 (W.D. Tex. 2008); *see* R.G. Ratcliffe, *Judge Sides with Texas Dems, Keeps Kucinich Off State Ballot*, Hous. Chron., Jan. 12, 2008, at A23 (reporting that Judge Yeakel determined that "free association rights of Texas Democrats as a group outweighed Kucinich's rights as an individual").

3647. *Kucinich*, 530 F. Supp. 2d 879.

3648. *Id.* at 883–86.

3649. 460 U.S. 780, 796–806 (1983); *see id.* at 789–90 (constitutional challenges to state election laws must often be resolved by balancing the state's interests against those of the candidates and the voters).

3650. 504 U.S. 428, 434–40 (1992); *see id.* at 434 ("the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights").

3651. 530 U.S. 567, 577–86 (2000).

3652. *Id.* at 570.

3653. *Kucinich*, 530 F. Supp. 2d at 885.

3654. Docket Sheet, Kucinich v. Tex. Democratic Party, No. 08-50038 (5th Cir. Jan. 15, 2008); Notice of Appeal, Kucinich v. Tex. Democratic Party, No. 1:08-cv-7 (W.D. Tex.

peal.[3658] On January 25, 2008, Kucinich informed the court of appeals that expedition of his appeal would not be necessary because he had dropped out of the race for the Democratic nomination.[3659] On March 24, 2009, the court of appeals agreed with Judge Yeakel that the loyalty oath was not unconstitutional.[3660]

The district court[3661] and the court of appeals[3662] rejected pro se efforts in 2008 and 2009 by a federal prisoner to intervene in the case.

Disqualification of a Primary-Election Candidate for Previously Running as an Independent

Swanson v. Pitt (Myron H. Thompson, M.D. Ala. 2:04-cv-534)

> A would-be candidate for the United States Senate filed a pro se federal complaint alleging that it was improper to exclude him as a candidate in a primary election for having previously run as an independent. The district judge declined to issue a temporary restraining order; later, he granted the defendants summary judgment.
>
> *Topics:* Getting on the ballot; primary election; pro se party.

A would-be candidate for the United States Senate filed a pro se federal complaint in the Middle District of Alabama on June 1, 2004, claiming that it was improper to exclude him as a candidate in the Democratic primary election for having previously run as an independent.[3663] In 2002, the plaintiff attempted to qualify for the ballot as an independent candidate,

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Jan. 14, 2008), D.E. 26.

3655. Order, *Kucinich*, No. 1:08-cv-7 (W.D. Tex. Jan. 15, 2008), D.E. 32.

3656. Order, *Kucinich*, No. 08-50038 (5th Cir. Jan. 17, 2008).

3657. Kucinich v. Tex. Democratic Party, 552 U.S. 1161 (2008); *see High Court Refuses to Hear Kucinich Case*, Hous. Chron., Jan. 19, 2008, at A21.

3658. Kucinich v. Tex. Democratic Party, 563 F.3d 161, 163 (5th Cir. 2009).

3659. Motion, *Kucinich*, No. 08-50038 (5th Cir. Jan. 25, 2008); *see* Order, *id.* (Jan. 29, 2008) (vacating expedited status).

3660. *Kucinich*, 563 F.3d 161.

3661. Order, Kucinich v. Tex. Democratic Party, No. 1:08-cv-7 (W.D. Tex. July 2, 2009), D.E. 53 (dismissing a motion by a would-be pro se intervenor for recusal).

3662. Order, Tex. Democratic Party v. Riches, No. 09-50643 (5th Cir. Nov. 17, 2009) (dismissing recusal appeal for lack of being a party to the underlying action); Order, Kucinich v. Tex. Democratic Party, No. 08-50947 (5th Cir. Oct. 17, 2008) (dismissing a purported appeal for failure to pay the filing fee).

3663. Complaint, Swanson v. Pitt, No. 2:04-cv-534 (M.D. Ala. June 1, 2004), D.E. 1 [hereinafter *Swanson* Complaint]; Swanson v. Pitt, 330 F. Supp. 2d 1269, 1271–72 (M.D. Ala. 2004).

and failing to do so he ran as a write-in candidate.[3664] Among the relief sought was a temporary restraining order.[3665]

On June 2, Judge Myron H. Thompson declined to issue a temporary restraining order.[3666] On August 4, he granted the defendants summary judgment.[3667]

Expulsion from a Primary Election for Disloyalty to the Party

McGinley v. Alabama Republican Party (W. Harold Albritton, 2:04-cv-434) and Jones v. Alabama Republican Party (Mark E. Fuller, No. 2:04-cv-500) (M.D. Ala.), Smith v. Alabama Republican Party (1:04-cv-360) and McGinley v. Alabama Republican Party (1:04-cv-579) (Callie V.S. Granade, S.D. Ala.), and McGinley v. Alabama Republican Party (U.W. Clemon, N.D. Ala. 2:04-cv-2203)

> A federal complaint sought restoration to a primary-election ballot for state board of education. The plaintiff alleged that she was stricken from the ballot because of a false rumor that she had left the party. The state's supreme court had stayed a state-court order restoring her to the ballot pending appeal. After the state court determined that the party was entitled to strike the candidate from its ballot, the federal judge dismissed the action as barred by the *Rooker-Feldman* doctrine that among federal courts only the Supreme Court has appellate jurisdiction over state-court proceedings. Postelection actions to nullify the results filed in the state's other two districts were unsuccessful.
>
> *Topics:* Getting on the ballot; matters for state courts; primary election; party procedures.

On May 4, 2004, Kelly McGinley filed a federal complaint in the Middle District of Alabama seeking an order restoring her to the ballot for the June 1 Republican primary election for the state's board of education.[3668] She alleged that she was stricken from the ballot because of a false rumor

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3664. *Swanson*, 330 F. Supp. 2d at 1273 & n.6; *see* Swanson v. Worley, 490 F.3d 894 (11th Cir. 2007) (denying relief from a signature requirement); Swanson v. Bennett, 219 F. Supp. 2d 1225 (M.D. Ala. 2002) (providing relief to other candidates with sufficient signatures from a last-minute change in the due date); Opinion, Swanson v. Bennett, No. 2:02-cv-1244 (M.D. Ala. Feb. 18, 2003), D.E. 18 (denying relief for alleged interferences with write-in votes).

3665. *Swanson* Complaint, *supra* note 3663.

3666. Order, *Swanson*, No. 2:04-cv-534 (M.D. Ala. June 2, 2004), D.E. 14.

3667. *Swanson*, 330 F. Supp. 2d 1269.

3668. Complaint, McGinley v. Ala. Republican Party, No. 2:04-cv-434 (M.D. Ala. May 4, 2004), D.E. 1 [hereinafter M.D. Ala. *McGinley* Complaint].

that she had left the party.[3669] With her complaint, she filed a motion for a temporary restraining order.[3670]

McGinley previously sought relief in state court—Montgomery County's circuit court—on April 19.[3671] On April 27, the circuit judge ordered her restored to the ballot,[3672] but Alabama's supreme court stayed this order, pending appeal, on May 3.[3673]

Judge W. Harold Albritton set the federal matter for hearing on May 6.[3674] Following the initial hearing, he continued the matter to May 21.[3675] This schedule accommodated the time pressure of the case but allowed time for the state court to act.[3676] The parties agreed to a practice of cross-filing in which both courts were provided with filings in each.[3677]

Also on May 6, Alabama's supreme court modified its stay to accommodate the time pressure for preparation of absentee ballots to allow the absentee ballots to include McGinley as a candidate.[3678]

McGinley filed a renewed motion for a temporary restraining order on May 18, stating that she learned that that day was the deadline for her name to be included on the ballot.[3679] Judge Albritton ordered a telephone conference with the parties for 2:00 that afternoon.[3680] That day, Alabama's supreme court reached a decision reversing the state judge's ordering McGinley's inclusion on the ballot, reasoning that party officials' striking

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3669. *Id.* at 1–2.

3670. Temporary-Restraining-Order Motion, *id.* (May 4, 2004), D.E. 2.

3671. Complaint, McGinley v. Ala. Republican Party, No. CV-04-1017 (Ala. Cir. Ct. Montgomery Cty. Apr. 19, 2004), *attached as* Ex. F, M.D. Ala. *McGinley* Complaint, *supra* note 3668; Ala. Republican Party v. McGinley, 893 So. 2d 337, 341 (Ala. 2004).

3672. Order, *McGinley*, No. CV-04-1017 (Ala. Cir. Ct. Montgomery Cty. Apr. 27, 2004), *attached as* Ex. G, M.D. Ala. *McGinley* Complaint, *supra* note 3668; *Ala. Republican Party*, 893 So. 2d at 339, 342.

3673. Order, Ala. Republican Party v. McGinley, No. 1031166 (Ala. May 3, 2004), *attached as* Ex. H, M.D. Ala. *McGinley* Complaint, *supra* note 3668.

3674. Order, *McGinley*, No. 2:04-cv-434 (M.D. Ala. May 5, 2004), D.E. 3.

Tim Reagan interviewed Judge Albritton for this report by telephone on June 18, 2013.

3675. Order, *McGinley*, No. 2:04-cv-434 (M.D. Ala. May 6, 2004), D.E. 12; Minutes, *id.* (May 6, 2004), D.E. 16.

3676. Interview with Judge W. Harold Albritton, June 18, 2013.

3677. *Id.*

3678. Order, *Ala. Republican Party*, No. 1031166 (Ala. May 6, 2004), *attached to* Notice, *McGinley*, No. 2:04-cv-434 (M.D. Ala. May 7, 2004), D.E. 14.

3679. Renewed Temporary-Restraining-Order Motion, *McGinley*, No. 2:04-cv-434 (M.D. Ala. May 18, 2004), D.E. 26.

3680. Order, *id.* (May 18, 2004), D.E. 29; *see* Minutes, *id.* (May 18, 2004), D.E. 33.

her from the ballot because of her criticism of the party was not beyond the officials' prerogatives.[3681]

On May 21, Judge Albritton dismissed the action as barred by the *Rooker-Feldman* doctrine, which states that among federal courts only the Supreme Court has appellate jurisdiction over state-court proceedings.[3682]

On May 24, a voter filed another complaint in the Middle District seeking a writ of mandamus restoring McGinley's name to the ballot.[3683] The plaintiff sought a temporary restraining order.[3684] On May 25, Judge Mark E. Fuller ruled, "Due to Plaintiff's failure to satisfy the prerequisites to the relief requested as set forth in Federal Rule of Civil Procedure 65(b), the Motion for Temporary Restraining Order is DENIED."[3685] Judge Fuller granted a voluntary dismissal on June 2.[3686]

Two days after the June 1 election, three voters filed a class action in the Southern District of Alabama seeking to nullify the results of the primary election in which McGinley was omitted from the ballot.[3687] With their complaint, the voters filed a motion for a temporary restraining order.[3688] Judge Callie V.S. Granade denied the motion on June 4 because (1) the plaintiffs had not adequately explained how they had served the complaint and motion on the defendants so the court could not determine whether the defendants yet had notice, and (2) the plaintiffs had not shown the need for relief before defendants could be heard.[3689] A June 8 amended motion[3690] did not adequately cure the motion's lack of merit.[3691]

3681. Ala. Republican Party v. McGinley, 893 So. 2d 337 (Ala. 2004).

3682. Opinion, *McGinley*, No. 2:04-cv-434 (M.D. Ala. May 21, 2004), D.E. 36; Minutes, *id.* (May 21, 2004), D.E. 35; *see* D.C. Ct. App. v. Feldman, 460 U.S. 462 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923); *see also* Martin A. Schwartz, Section 1983 Litigation 21–24 (Federal Judicial Center 3d ed. 2014).

3683. Complaint, Jones v. Ala. Republican Party, No. 2:04-cv-500 (M.D. Ala. May 24, 2004), D.E. 1.

3684. Temporary-Restraining-Order Motion, *id.* (May 24, 2004), D.E. 2.

3685. Order, *id.* (May 25, 2004), D.E. 3.

Judge Fuller resigned on August 1, 2015. Federal Judicial Center Biographical Directory of Article III Federal Judges [hereinafter FJC Biographical Directory], www.fjc.gov/history/judges.

3686. Order, *Jones*, No. 2:04-cv-500 (M.D. Ala. June 2, 2004), D.E. 5; *see* Voluntary Dismissal, *id.* (June 2, 2004), D.E. 4.

3687. Complaint, Smith v. Ala. Republican Party, No. 1:04-cv-360 (S.D. Ala. June 3, 2004), D.E. 1; *see* Amended Complaint, *id.* (June 8, 2004), D.E. 15 (adding an additional plaintiff).

3688. Temporary-Restraining-Order Motion, *id.* (June 3, 2004), D.E. 2.

3689. Order, *id.* (June 4, 2004), D.E. 5.

3690. Amended Temporary-Restraining-Order Motion, *id.* (June 8, 2004), D.E. 7.

On July 15, McGinley and a voter filed a federal action in the Northern District of Alabama to nullify the results of the primary election.[3692] On August 13, however, Judge U.W. Clemon transferred the case to the Southern District.[3693] On October 19, Judge Granade consolidated McGinley's new action with the similar one by McGinley's supporters.[3694]

On October 26, Judge Granade dismissed the cases as both without merit and precluded by the state supreme court's decision.[3695] An appeal filed in 2005 was untimely.[3696]

Exclusion from Primary-Election Ballots for Not Being Members of the Party

Rider v. Mohr (John T. Elfvin, W.D.N.Y. 1:01-cv-610), Sementilli v. Commissioners of Elections (Richard Conway Casey, S.D.N.Y. 1:04-cv-6936), and Soleil v. Board of Election (Brian M. Cogan, E.D.N.Y. 1:10-cv-3565)

> In 2001, a candidate for town board filed a federal complaint in the Western District of New York challenging his exclusion from the primary-election ballot for the Conservative Party, of which he was not a member. The district judge concluded that the party was entitled to scrutinize nonmembers for adherence to party philosophy before accepting them as candidates. Three years later, a district judge in the Southern District of New York determined that a prospective candidate for a state-assembly primary-election ballot who was excluded for not being a member of the party was not entitled to name a replacement candidate. In 2010, a district judge in the Eastern District of New York denied relief to a pro se attorney who refused to file a certificate accepting the

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3691. Order, *id.* (June 9, 2004), D.E. 8.

3692. Complaint, McGinley v. Ala. Republican Party, No. 2:04-cv-2203 (N.D. Ala. July 15, 2004), D.E. 1.

3693. Transfer Order, *id.* (Aug. 16, 2004), D.E. 3; *see* Order, *id.* (Aug. 30, 2004), D.E. 5 (denying a motion for reconsideration).

Judge Clemon retired on January 31, 2009. FJC Biographical Directory, *supra* note 3685.

3694. Consolidation Order, McGinley v. Ala. Republican Party, No. 1:04-cv-579 (S.D. Ala. Oct. 19, 2004), D.E. 21.

3695. Order, *Smith*, No. 1:04-cv-360 (S.D. Ala. Oct. 26, 2004), D.E. 41 ("The court will not second guess the party's determination that McGinley did not comply with the requirement that she be 'in accord with, and endorse, the principles and policies of the Republican Party.'"); *see* Order, *id.* (June 6, 2005), D.E. 47 (denying a motion for reconsideration); Order, *id.* (Mar. 1, 2005), D.E. 45 (same).

3696. Order, Smith v. Ala. Republican Party, No. 05-13739 (11th Cir. July 26, 2005), *filed as* Order, *Smith*, No. 1:04-cv-360 (S.D. Ala. July 28, 2005), D.E. 50.

Independence Party's permission to run in the party's assembly primary election.

Topics: Getting on the ballot; primary election; party procedures; pro se party; recusal; case assignment.

A federal complaint filed in the Western District of New York's Buffalo courthouse on August 30, 2001, challenged the exclusion of the lead plaintiff from the Conservative Party's September 11 primary-election ballot for member of Tonawanda's town board.[3697] Candidates in a New York primary election had to be members of the party or receive the party's permission to run.[3698] The plaintiff, an incumbent and a member of the Republican Party, alleged that he was excluded as improper punishment aimed at the Republican Party; another candidate who was not a member of the Conservative Party was allowed to remain on the ballot.[3699] With their complaint, the would-be candidate and two voters filed a motion for a preliminary injunction[3700] and an ex parte motion for an expedited hearing.[3701]

Judge John T. Elfvin set the case for hearing on September 4.[3702] On September 6, he denied the plaintiffs immediate relief.[3703] He noted that the party's county chair "has a duty to the members of his party to prevent candidates from deceiving them into thinking that he or she is in line with their political philosophy when in fact they are not."[3704]

On April 22, 2002, Judge Elfvin dismissed the action for failure to prosecute.[3705]

On August 26, 2004, supporters of a prospective candidate's inclusion as a candidate in a September 14 Democratic primary election for New

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3697. Docket Sheet, Rider v. Mohr, No. 1:01-cv-610 (W.D.N.Y. Aug. 30, 2001) [hereinafter *Rider* Docket Sheet] (D.E. 1); Rider v. Mohr, No. 1:01-cv-610, 2001 WL 1117157, at *1 (W.D.N.Y. Sept. 6, 2001).

3698. N.Y. Elec. Law § 6-120.

3699. *Rider*, 2001 WL 1117157, at *1; *see* T.J. Pignataro, *Rider Presses Bid for Conservative Line*, Buffalo News, Sept. 6, 2001, at B3 (reporting that to appear in the party's primary election a person who was not a member of the party needed the party's endorsement, which the plaintiff did not obtain).

3700. *Rider* Docket Sheet, *supra* note 3697 (D.E. 3).

3701. *Id.* (D.E. 2).

3702. *Id.* (D.E. 4); *see id.* (Minutes, D.E. 13).

Judge Elfvin died on January 6, 2009. Federal Judicial Center Biographical Directory of Article III Federal Judges [hereinafter FJC Biographical Directory], www.fjc.gov/history/judges.

3703. *Rider*, 2001 WL 1117157; *see* T.J. Pignataro, *Rider Denied Conservative Party Slot*, Buffalo News, Sept. 7, 2001, at C3.

3704. *Rider*, 2001 WL 1117157, at *2.

3705. *Rider* Docket Sheet, *supra* note 3697 (D.E. 22).

York's assembly filed a federal complaint in the Southern District of New York.[3706] Judge Richard Conway Casey set the case for hearing on September 1.[3707]

The party denied another prospective candidate a spot on its primary ballot, so she named the plaintiff candidate as her replacement.[3708] Judge Casey ruled that a candidate never eligible to be on the ballot cannot name a replacement as if the candidate were removed by circumstance.[3709] Judge Casey found New York's restrictions on eligibility for a party's primary-election ballot to be reasonable.[3710]

An attorney member of the Democratic Party, who wished to run in the September 14, 2010, Independence Party primary election for state assembly, filed a pro se federal complaint in the Eastern District of New York on August 3 challenging the requirement that he file a certificate accepting the Independence Party's permission for him to run in its primary election.[3711]

Because of recusals by Judges David G. Trager and Eric N. Vitaliano, the court assigned the case to Judge Brian M. Cogan,[3712] who set the case for hearing on August 9.[3713] The parties agreed to a postponement until August 13, noting that there would be no Independence Party primary election for the assembly seat that the plaintiff wished to run for because no other candidate qualified for the ballot.[3714] Following an August 13 trial on the merits, Judge Cogan ruled in favor of the defendants.[3715]

3706. Docket Sheet, Sementilli v. Comm'rs of Elections, No. 1:04-cv-6936 (S.D.N.Y. Aug. 26, 2004) (D.E. 1); Injunction Denial, *id.* (Sept. 2, 2004), D.E. 6 [hereinafter *Rider* Injunction Denial].

3707. Order, *id.* (Aug. 26, 2004), D.E. 2.

Judge Casey died on March 22, 2007. FJC Biographical Directory, *supra* note 3702.

3708. *Rider* Injunction Denial, *supra* note 3706, at 2.

3709. *Id.*

3710. *Id.* at 3.

3711. Complaint, Soleil v. Bd. of Election, No. 1:10-cv-3565 (E.D.N.Y. Aug. 3, 2010), D.E. 1.

3712. Docket Sheet, *id.* (Aug. 3, 2010) [hereinafter *Soleil* Docket Sheet].

Judge Vitaliano recused himself because of his previous two decades of service in the state assembly. Interview with Judge Eric N. Vitaliano, Sept. 23, 2015; FJC Biographical Directory, *supra* note 3702.

Tim Reagan interviewed Judge Vitaliano for this report by telephone.

Judge Trager died on January 5, 2011. FJC Biographical Directory, *supra* note 3702.

3713. Order to Show Cause, *Soleil*, No. 1:10-cv-3565 (E.D.N.Y. Aug. 4, 2010), D.E. 4.

3714. Letter, *id.* (Aug. 5, 2010), D.E. 6.

3715. *Soleil* Docket Sheet, *supra* note 3712; Judgment, *Soleil*, No. 1:10-cv-3565 (E.D.N.Y. Aug. 16, 2010), D.E. 10.

Minor-Party State Faction Opposing the National Nominee

Browne v. Bayless (Robert C. Broomfield, D. Ariz. 2:00-cv-1774)

> Rival factions of Arizona's Libertarian Party named different presidential nominees for the 2000 election, and the national party's nominee was not the one selected to represent the party on the Arizona ballot. After unsuccessful state-court litigation, the national nominee filed an action in federal court, which the district judge dismissed one week later. The action was barred by (1) the *Rooker-Feldman* doctrine, which states that among federal courts only the Supreme Court has appellate jurisdiction over state-court proceedings; (2) *Younger* abstention, which avoids undue interference in state functions; (3) the plaintiffs' failure to name indispensable parties; and (4) laches.
>
> *Topics:* Getting on the ballot; matters for state courts; laches; party procedures.

The Libertarian Party's national nominee for President filed a federal complaint in the District of Arizona on Friday, September 15, 2000, challenging his exclusion from the general-election ballot in Arizona.[3716] Also named as plaintiffs were a voter who wished to serve as an Arizona elector for the candidate, another Arizona voter, and a Virginia voter who wanted to protect the value of her vote by ensuring that the candidate appeared on all states' ballots.[3717] The candidate was to be listed as an independent in North Dakota and as the Libertarian candidate in all other states and the District of Columbia.[3718]

Rival factions of Arizona's Libertarian Party selected different presidential nominees, and the rival nominee was selected for the Arizona ballot instead of the plaintiff.[3719] The plaintiff could have run as an independent, but presidential elector candidacy papers were due on June 14—for either a party or an independent candidate—and the plaintiff did not become a national Libertarian nominee until July 2.[3720]

3716. Docket Sheet, Browne v. Bayless, No. 2:00-cv-1774 (D. Ariz. Sept. 15, 2000) [hereinafter *Browne* Docket Sheet] (D.E. 1); Opinion at 1–2, 7, *id.* (Sept. 22, 2000), D.E. 12 [hereinafter *Browne* Opinion].

3717. *Browne* Opinion, *supra* note 3716, at 2.

3718. *Id.* at 3 & n.2; *see Libertarian Split Costs Candidate Ballot Spot*, Ariz. Republic, Sept. 26, 2000, at B1 [hereinafter *Libertarian Split*].

3719. *Browne* Opinion, *supra* note 3716, at 3 n.3; *see* Howard Fischer, *Arizona Ballot Will Omit Libertarians' Candidate*, Ariz. Daily Star, Sept. 24, 2000, at 5 ("The national party . . . chose last year to back the splinter faction.").

3720. *Browne* Opinion, *supra* note 3716, at 3–4.

The plaintiff candidate filed an action in Arizona's superior court on August 18 and received an adverse judgment on September 8, including a ruling that the elector candidacy deadline was not unconstitutional.[3721] The candidate did not file an appeal, and Arizona's supreme court denied discretionary review on September 12.[3722]

The federal court assigned its case to Judge Robert C. Broomfield,[3723] who held a telephonic scheduling hearing with the parties and set the case for arguments on September 20.[3724] On September 22, Judge Broomfield granted the defendants' motion to dismiss the case[3725] for several reasons: (1) the action was barred by the *Rooker-Feldman* doctrine, which states that among federal courts only the Supreme Court has appellate jurisdiction over state-court proceedings;[3726] (2) "[p]ursuant to the *Younger* abstention doctrine, courts may decline to exercise jurisdiction to avoid undue interference in state functions";[3727] (3) the plaintiffs failed to name county boards of supervisors as indispensable defendants under Arizona law;[3728] and (4) laches.[3729]

3721. *Id.* at 5–6.

3722. *Id.* at 6.

3723. *Browne* Docket Sheet, *supra* note 3716.

Judge Broomfield died on July 10, 2014. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

3724. *Browne* Opinion, *supra* note 3716, at 1.

Judge Broomfield issued an order to show cause on the morning of September 19. Order, Browne v. Bayless, No. 2:00-cv-1774 (D. Ariz. Sept. 19, 2000), D.E. 5.

3725. *Browne* Opinion, *supra* note 3716, at 32; *see* Fischer, *supra* note 3719; *Libertarian Split*, *supra* note 3718.

3726. *Browne* Opinion, *supra* note 3716, at 8–15; *see* D.C. Ct. of Appeals v. Feldman, 460 U.S. 462 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923); *see also* Martin A. Schwartz, Section 1983 Litigation 21–24 (Federal Judicial Center 3d ed. 2014).

3727. *Browne* Opinion, *supra* note 3716, at 15; *see* Younger v. Harris, 401 U.S. 37 (1971).

3728. *Browne* Opinion, *supra* note 3716, at 21–22; *see* Ariz. Rev. Stat. § 16-351.C (2007).

3729. *Browne* Opinion, *supra* note 3716, at 24–25 ("Where laches unquestionably comes into play is with Plaintiffs' decision to file a lawsuit first in the Superior Court, then wait an entire month before launching the present federal action. . . . The court finds that the filing of Plaintiffs' federal complaint in mid-September reflects a lack of necessary diligence.").

E. No Relief from State-Court Loss

As with other types of election relief sought in federal litigation, sometimes relief should be denied because the federal case is an effort to achieve relief that a state court has already denied. Federal relief may be barred by res judicata[3730] or the *Rooker-Feldman* doctrine.[3731]

In one 2013 case, the district judge sanctioned a frequent plaintiff $5,000 for filing a complaint in bad faith after losing three similar cases in state court.[3732]

The 1923 decision by the Supreme Court in *Rooker v. Fidelity Trust Company*[3733] arose from a district-court action challenging the constitutionality of a decision by Indiana's supreme court.[3734] The district court dismissed the suit as beyond its jurisdiction, and the Supreme Court agreed that the suit was "plainly not within the District Court's jurisdiction."[3735] "The jurisdiction possessed by the District Court is strictly original."[3736]

> If the [Indiana court's] decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding. . . . Under the legislation of Congress, no court of the United States other than this court could entertain a proceeding to reverse or modify the judgment for errors of that character.[3737]

U.S. Supreme Court review of the Indiana court's decision had already failed.[3738]

Sixty years later, in *District of Columbia Court of Appeals v. Feldman*,[3739] the Supreme Court was called upon to decide "what authority the

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3730. *See, e.g.*, "State-Court Loss as Res Judicata," *infra* page 494.

3731. *See, e.g.*, "Pro Se Challenge to Ballot Exclusion," *infra* page 495; "A Campaign Manager's Suit to Get His Candidate on the Ballot," *infra* page 498; "A Meritless Suit for a Spot on the Ballot Filed by Apparently Fictitious Plaintiffs," *infra* page 499; "Challenge to Removal from Ballot," *infra* page 500; "Refusal to Interfere with State-Court Litigation Over Control of a Minor Party," *infra* page 502.

3732. Order, Blakely v. City of Laurel Clerk Office, No. 2:13-cv-72 (S.D. Miss. Apr. 30, 2013), D.E. 20, *as reported in* "Bad-Faith Litigation by a Felon to Get on the Ballot," *infra* page 496.

3733. 263 U.S. 413 (1923).

3734. *Id.* at 414–15.

3735. *Id.* at 415.

3736. *Id.* at 416.

3737. *Id.* at 415–16.

3738. *Id.* at 414.

United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit have to review decisions of the District of Columbia Court of Appeals in bar admission matters."[3740] As with state courts, decisions by local courts in the District of Columbia can have appellate review by the U.S. Supreme Court, but not by the lower federal courts.[3741] The lower federal courts could have jurisdiction, however, over the same issue presented in an otherwise proper case.[3742]

State-Court Loss as Res Judicata

Kowalski v. Cook County Officers' Electoral Board (John W. Darrah, N.D. Ill. 1:16-cv-1891)

> The federal district judge denied relief to a prospective candidate for county recorder of deeds as barred by res judicata and unsuccessful efforts in state courts.
>
> *Topics:* Getting on the ballot; matters for state courts; pro se party; primary election.

A prospective candidate for Cook County's recorder of deeds filed a pro se federal complaint on February 2, 2016, in the Northern District of Illinois seeking damages and other relief for her exclusion from the March 15 primary-election ballot.[3743] On the following day, the plaintiff filed a motion for a temporary restraining order putting her on the ballot.[3744]

An attorney appeared on behalf of the plaintiff on February 9,[3745] and Judge John W. Darrah granted him permission to file an amended complaint on February 16.[3746] The amended complaint added a voter as a plaintiff.[3747]

3739. 460 U.S. 462 (1983).

3740. *Id.* at 463.

3741. *Id.* at 464, 476, 482, 486.

3742. *Id.* at 482–86.

3743. Complaint, Kowalski v. Cook Cty. Officers' Electoral Bd., No. 1:16-cv-1891 (N.D. Ill. Feb. 2, 2016), D.E. 1.

3744. Temporary-Restraining-Order Motion, *id.* (Feb. 3, 2016), D.E. 7; *see* Emergency Notice of Motion, *id.* (Feb. 3, 2016), D.E. 8 (specifying a hearing date of February 9, 2016).

3745. Attorney Appearance, *id.* (Feb. 9, 2016), D.E. 14.

3746. Order, *id.* (Feb. 16, 2016), D.E. 21.

Judge Darrah died on March 23, 2017. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

3747. Amended Complaint, *Kowalski*, No. 1:16-cv-1891 (N.D. Ill. Feb. 16, 2016), D.E. 23.

On March 1, Judge Darrah denied the plaintiffs immediate relief; res judicata barred relief in conflict with earlier state-court rulings.[3748] Following additional briefing, Judge Darrah dismissed the case on res judicata grounds on September 13.[3749]

Pro Se Challenge to Ballot Exclusion

Sloan v. Kellner (Mae A. D'Agostino, N.D.N.Y. 1:14-cv-1071)

> The district court denied an injunction putting plaintiffs on a primary-election ballot on the merits and because of issue preclusion.
>
> *Topics:* Getting on the ballot; matters for state courts; pro se party; primary election; interlocutory appeal.

A pro se federal complaint filed on August 29, 2014, in the Northern District of New York challenged the exclusion of four of the nine plaintiffs from the September 9 Democratic primary election for governor, lieutenant governor, comptroller, and attorney general.[3750] Judge Mae A. D'Agostino issued an order on September 2 that defendants show cause by September 5 why the candidate plaintiffs should not be on the ballot.[3751]

The federal complaint followed unsuccessful efforts in state court to overcome exclusion from the ballot for insufficient ballot-petition signatures.[3752] Following submissions by the defendants, Judge D'Agostino denied the plaintiffs a preliminary injunction: (1) according to the *Rooker-Feldman* doctrine, among federal courts only the Supreme Court has appellate jurisdiction over state-court proceedings; (2) the action was barred by issue preclusion; and (3) the complaint failed on the merits.[3753]

On March 24, 2015, the court of appeals dismissed an interlocutory appeal as moot.[3754] On November 16, Magistrate Judge Christian F. Hummel recommended dismissal of the action for failure to serve the defend-

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3748. Opinion, *id.* (Mar. 1, 2016), D.E. 29, 2016 WL 792333; Order, *id.* (Mar. 1, 2016), D.E. 28; *see* Minutes, *id.* (Mar. 11, 2016), D.E. 35 (denying reconsideration).

3749. Opinion, *id.* (Sept. 13, 2016), D.E. 54, 2016 WL 4765711.

3750. Complaint, Sloan v. Kellner, No. 1:14-cv-1071 (N.D.N.Y. Aug. 29, 2014), D.E. 1.

3751. Order, *id.* (Sept. 2, 2014), D.E. 6.

3752. Opinion, *id.* (Sept. 8, 2014), D.E. 10.

3753. *Id.*; *see* D.C. Ct. App. v. Feldman, 460 U.S. 462 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923); *see also* Martin A. Schwartz, Section 1983 Litigation 21–24 (Federal Judicial Center 3d ed. 2014).

3754. Order, Sloan v. N.Y. State Bd. of Elections, No. 14-3342 (2d Cir. Mar. 24, 2015), D.E. 128.

ants.[3755] Judge D'Agostino adopted that recommendation on December 14.[3756]

Bad-Faith Litigation by a Felon to Get on the Ballot

Blakely v. City of Laurel Clerk Office (Keith Starrett, S.D. Miss. 2:13-cv-72)

> A would-be candidate for city council filed a pro se federal complaint alleging wrongful disqualification of his candidacy on the basis of old felony convictions. The district judge set the case for hearing nine days later. Two weeks after that, the district judge found the case to have been filed in bad faith because the plaintiff had already lost three similar state-court cases, and the judge sanctioned the plaintiff $5,000. The court of appeals affirmed the dismissal and the sanction.
>
> *Topics:* Getting on the ballot; pro se party; matters for state courts; recusal.

On April 8, 2013, a would-be candidate for city council filed a pro se federal complaint alleging wrongful disqualification of his candidacy on the basis of old felony convictions.[3757] With his complaint, the plaintiff filed motions for leave to proceed in forma pauperis and for expedited hearing.[3758] Magistrate Judge Michael T. Parker granted the in forma pauperis motion on the following day.[3759] The court was familiar with the plaintiff, because he was a frequent litigant.[3760]

District Judge Keith Starrett issued an order on April 10 setting the case for hearing on April 17 to determine, among other things, whether the case should be dismissed.[3761] At the hearing, Judge Starrett heard testimony from the plaintiff, who offered evidence that his rights of suffrage had been restored.[3762] On the basis of the plaintiff's testimony, Judge Starrett determined who among the named defendants should receive sum-

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3755. Order, *Sloan*, No. 1:14-cv-1071 (N.D.N.Y. Nov. 16, 2015), D.E. 21.

3756. Order, *id.* (Dec. 14, 2015), D.E. 26.

3757. Complaint, Blakely v. City of Laurel Clerk Office, No. 2:13-cv-72 (S.D. Miss. Apr. 8, 2013), D.E. 1.

3758. Motion, *id.* (Apr. 8, 2013), D.E. 3; Docket Sheet, *id.* (Apr. 8, 2013) [hereinafter *Blakely* Docket Sheet].

3759. *Blakely* Docket Sheet, *supra* note 3758.

3760. Interview with Judge Keith Starrett and his law clerk Charles Blanchard, Nov. 26, 2013.

For this report, Tim Reagan interviewed Judge Starrett and his law clerk Charles Blanchard by telephone.

3761. Order, *Blakely*, No. 2:13-cv-72 (S.D. Miss. Apr. 10, 2013), D.E. 5.

3762. Order, *id.* (Apr. 18, 2013), D.E. 10; *Blakely* Docket Sheet, *supra* note 3758.

monses and who should be dismissed.[3763] On April 23, Judge Starrett set a hearing on the plaintiff's motion for a preliminary injunction for April 29.[3764]

On April 30, Judge Starrett issued an order finding the plaintiff's complaint to be filed in bad faith, because he had already lost three similar state-court cases.[3765] Judge Starrett sanctioned the plaintiff $5,000.[3766]

On June 30, the court of appeals dismissed an appeal as frivolous: "The record supports the district court's finding that Blakely's complaint raised claims that were duplicative of claims he had raised unsuccessfully in at least three prior state cases."[3767]

On September 8, Judge Starrett entered an order enforcing his $5,000 sanction order and additionally ordered the plaintiff to pay the original $350 filing fee.[3768]

On October 9, Judge Starrett recused himself because the plaintiff filed a pro se legal malpractice action concerning settlements in other cases, naming Judge Starrett as one of the defendants.[3769] Judge Daniel P. Jordan III dismissed the malpractice action, because Judge Starrett had judicial immunity and the other claims were state-law claims.[3770]

3763. Order, *Blakely*, No. 2:13-cv-72 (S.D. Miss. Apr. 18, 2013), D.E. 9.

3764. Order, *id.* (Apr. 23, 2013), D.E. 15; *see* Preliminary-Injunction Motion, *id.* (Apr. 17, 2013), D.E. 8.

3765. Order, *id.* (Apr. 30, 2013), D.E. 20 [hereinafter Apr. 30, 2013, *Blakely* Order], 2013 WL 1826255; *see* Defense Exhibits, *id.* (Apr. 30, 2013), D.E. 19 (including state-court holdings that restoration of the plaintiff's right of suffrage did not imply a right to hold public office).

3766. Apr. 30, 2013, *Blakely* Order, *supra* note 3765.

3767. Blakely v. Evans, 574 F. App'x 420, 420 (5th Cir. 2014).

3768. Order, *Blakely*, No. 2:13-cv-72 (S.D. Miss. Sept. 8, 2014), D.E. 49.

3769. Recusal Order, *id.* (Oct. 9, 2014), D.E. 50 (assigning the case to Judge Sul Ozerden); *see* Complaint, Blakely v. Thornton, No. 2:14-cv-118 (S.D. Miss. July 25, 2014), D.E. 1; Amended Complaint, *id.* (Jan. 5, 2015), D.E. 5; *see also* Docket Sheet, Blakely v. City of Laurel Police Dep't, No. 2:12-cv-154 (S.D. Miss. Sept. 10, 2012); Docket Sheet, Blakely v. Mississippi, No. 2:11-cv-148 (S.D. Miss. July 22, 2011).

3770. Opinion, *Blakely*, No. 2:14-cv-118 (S.D. Miss. Jan. 7, 2015), D.E. 12; Order, *id.* (Jan. 7, 2015), D.E. 13; *see also* Order, *id.* (Dec. 29, 2014), D.E. 9 (denying Judge Jordan's recusal); Order, *id.* (Dec. 29, 2014), D.E. 10 (denying Magistrate Judge Linda R. Anderson's recusal).

A Campaign Manager's Suit to Get His Candidate on the Ballot

Woodard v. Allegheny County Board of Elections (Nora Barry Fischer, W.D. Pa. 2:12-cv-535)

> The campaign manager for a special-election candidate for the state legislature filed a pro se federal complaint seeking relief from the disqualification of the candidate's ballot-petition signatures. At 4:00 p.m. on the day that the complaint was filed, the district judge conducted a forty-five-minute telephonic hearing. The judge dismissed the complaint because of the plaintiff's lack of standing to pursue his candidate's case and because the case sought relief from disappointing rulings already issued by the commonwealth's courts in contravention of the *Rooker-Feldman* doctrine, which states that among federal courts only the Supreme Court has appellate jurisdiction over state-court proceedings.
>
> *Topics:* Getting on the ballot; pro se party; matters for state courts.

The campaign manager for an April 24, 2012, special-election candidate for the state legislature filed a pro se federal complaint in the Western District of Pennsylvania on April 23 seeking relief from the disqualification of the candidate's ballot-petition signatures.[3771] Defendants included election officials and signature challengers.[3772] With the complaint, the manager filed a motion for a temporary restraining order.[3773]

At 4:00 p.m. on the day that the complaint was filed, Judge Nora Barry Fischer conducted a forty-five-minute telephonic hearing.[3774] Her chambers notified counsel for the election officials of the hearing.[3775] One attorney was not notified because his voicemail was full, but he learned of the

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3771. Complaint, Woodard v. Allegheny Cty. Bd. of Elections, No. 2:12-cv-535 (W.D. Pa. Apr. 23, 2012), D.E. 4 [hereinafter *Woodard* Complaint]; *see* Marc Levy, *Pa. High Court Orders 6 House Elections to Be Held*, Pittsburgh Post-Gazette, Mar. 1, 2012, at B3; Timothy McNulty, *Two Elections Set April 24 for District Voters to Decide Who Will Replace Outgoing Rep. Chelsa Wagner*, Pittsburgh Post-Gazette, Apr. 9, 2012, at B1.

3772. *Woodard* Complaint, *supra* note 3771.

3773. Temporary-Restraining-Order Motion, *Woodard*, No. 2:12-cv-535 (W.D. Pa. Apr. 23, 2012), D.E. 6.

3774. Minutes, *id.* (Apr. 23, 2012), D.E. 2 [hereinafter *Woodard* Minutes].

For this report, Tim Reagan interviewed Judge Fischer and her law clerk Tony Kovalchick by telephone on October 23, 2013.

3775. *Woodard* Minutes, *supra* note 3774.

hearing and was able to dial in before it was over.[3776] It is Judge Fischer's practice to have a court reporter record proceedings with a pro se party.[3777]

Judge Fischer dismissed the complaint because of the plaintiff's lack of standing to pursue his candidate's case and because the case sought relief from disappointing rulings already issued by the commonwealth's courts in contravention of the *Rooker-Feldman* doctrine, which states that among federal courts only the Supreme Court has appellate jurisdiction over state-court proceedings.[3778]

A Meritless Suit for a Spot on the Ballot Filed by Apparently Fictitious Plaintiffs

Cruz v. Board of Elections (Victor Marrero, S.D.N.Y. 1:05-cv-7679)

> A prospective candidate's unsuccessful pro se suit to be included in a primary election for city council was remarkable for the alleged voter plaintiffs who never appeared and whose mail was returned to the court unopened.
>
> *Topics:* Getting on the ballot; matters for state courts; pro se party; primary election; intervention.

A prospective candidate in the September 13, 2005, Democratic primary election for New York's city council filed a pro se federal complaint in the Southern District of New York on August 31, naming four voters as additional plaintiffs and seeking an order placing the prospective candidate's name on the ballot.[3779]

Judge Victor Marrero signed an order that the defendants show cause why relief should not be granted and set the case for hearing on September 6.[3780] Judge Marrero denied the plaintiffs immediate relief from the bench and issued a published opinion that same day.[3781] Not only did the candi-

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3776. Interview with Judge Nora Barry Fischer and her law clerk Tony Kovalchick, Oct. 23, 2013; *Woodard* Minutes, *supra* note 3774.

3777. Interview with Judge Nora Barry Fischer and her law clerk Tony Kovalchick, Oct. 23, 2013.

3778. Opinion, *Woodard*, No. 2:12-cv-535 (W.D. Pa. Apr. 23, 2012), D.E. 3; *Woodard* Minutes, *supra* note 3774; *see* D.C. Ct. App. v. Feldman, 460 U.S. 462 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923); Martin A. Schwartz, Section 1983 Litigation 21–24 (Federal Judicial Center 3d ed. 2014); *see also* Adam Brandolph, *Lunny No Longer in Race, but Name Will Be on Ballot*, Pittsburgh Trib. Rev., Apr. 14, 2012.

3779. Docket Sheet, Cruz v. Bd. of Elections, No. 1:05-cv-7679 (S.D.N.Y. Aug. 31, 2005) (D.E. 1); Cruz v. Bd. of Elections, 396 F. Supp. 2d 354, 354 (S.D.N.Y. 2005); Cruz v. Bd. of Elections, 386 F. Supp. 2d 500, 500 (S.D.N.Y. 2005).

3780. Order, *Cruz*, No. 1:05-cv-7679 (S.D.N.Y. Aug. 31, 2005), D.E. 2.

3781. *Cruz*, 386 F. Supp. 2d 500; *Cruz*, 396 F. Supp. 2d at 354–55.

date fail to state a valid federal cause of action, but his claims were precluded by the *Rooker-Feldman* doctrine, which states that among federal courts only the Supreme Court has appellate jurisdiction over state-court proceedings.[3782] The candidate's federal action followed unsuccessful efforts in state court.[3783]

Judge Marrero dismissed all of the candidate's claims and ordered the voters to show cause by September 9 why their claims should not be dismissed as well.[3784] At no time did the voters appear or file a paper.[3785] "In fact, all correspondence mailed to [the voter plaintiffs] was returned to the Court unopened."[3786] Following the primary election, Judge Marrero also ordered the voters to show cause why the case had not become moot.[3787] On October 12, Judge Marrero dismissed the action for failure to prosecute.[3788]

Challenge to Removal from Ballot

Singleton v. Alabama Democratic Party (Mark E. Fuller, M.D. Ala. 2:04-cv-1027)

> A candidate filed a federal action because a state court had removed her name from the ballot. The federal court denied her relief because she had not filed the action until after absentee voting had begun and because under the *Rooker-Feldman* doctrine only the Supreme Court has appellate jurisdiction over state-court proceedings.
>
> *Topics:* Getting on the ballot; laches; matters for state courts; section 5 preclearance; three-judge court; enjoining elections; enjoining certification.

One week before the 2004 general election, a Democratic candidate for trial judge in Alabama's district courts filed a federal action to have her

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3782. *Cruz*, 386 F. Supp. 2d at 500; *see* D.C. Ct. of Appeals v. Feldman, 460 U.S. 462 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923); *see also* Martin A. Schwartz, Section 1983 Litigation 21–24 (Federal Judicial Center 3d ed. 2014).

3783. *Cruz*, 386 F. Supp. 2d at 500.

3784. *Id.* at 501; *Cruz*, 396 F. Supp. 2d at 355; Cruz v. Bd. of Elections, 392 F. Supp. 2d 667, 667 (S.D.N.Y. 2005).

3785. *Cruz*, 392 F. Supp. 2d at 667 ("The Court did not receive any submission from the remaining plaintiffs in this action."); *Cruz*, 396 F. Supp. 2d at 355; *Cruz*, 386 F. Supp. 2d at 500 ("No plaintiff other than [the prospective candidate] appeared at the [September 6, 2005,] hearing.").

3786. *Cruz*, 392 F. Supp. 2d at 667.

3787. *Cruz*, 396 F. Supp. 2d at 355; *Cruz*, 392 F. Supp. 2d at 667.

3788. *Cruz*, 392 F. Supp. 2d at 667–68.

name restored to the ballot.[3789] The candidate's name was removed as a result of state-court action arising from a challenge based on her contributing $150 to the Republican incumbent.[3790] The federal complaint, which also included two voters as plaintiffs, included an application for a temporary restraining order against proceeding with the election for the office.[3791] Judge Mark E. Fuller denied the application on the day that it was filed, because the plaintiffs had not provided notice to the defendants.[3792]

On October 28, after the plaintiffs had provided the defendants with notice, Judge Fuller held a telephone conference.[3793] Again, on the day before the election, Judge Fuller denied the candidate immediate injunctive relief, because she had not filed the action to enjoin the election until after absentee voting had begun.[3794]

A week after the election, the candidate moved for a temporary restraining order against certification of the election,[3795] which Judge Fuller denied on the following day.[3796] On March 30, 2005, after full briefing, Judge Fuller dismissed the case.[3797]

Judge Fuller considered very carefully whether the case should be heard by a three-judge district court.[3798] The plaintiffs' claim that the procedure for removing her from the ballot had not been precleared pursuant to section 5 of the Voting Rights Act,[3799] however, was rebutted by undis-

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3789. Complaint, Singleton v. Ala. Democratic Party, No. 2:04-cv-1027 (M.D. Ala. Oct. 26, 2004), D.E. 1 [hereinafter *Singleton* Complaint].

3790. Opinion at 3–10, *id.* (Mar. 30, 2005), D.E. 30 [hereinafter Mar. 30, 2005, *Singleton* Opinion]; Order at 1, *id.* (Nov. 1, 2004), D.E. 11 [hereinafter Nov. 1, 2004, *Singleton* Order]; *see* Robert K. Gordon, *Democrats Disqualify Judicial Candidate*, Birmingham News, Sept. 22, 2004.

3791. *Singleton* Complaint, *supra* note 3789.

3792. Order, *Singleton*, No. 2:04-cv-1027 (M.D. Ala. Oct. 26, 2004), D.E. 2.

Tim Reagan interviewed Judge Fuller for this report by telephone on May 30, 2012. Judge Fuller resigned on August 1, 2015. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

3793. Nov. 1, 2004, *Singleton* Order, *supra* note 3790, at 2.

The election at issue was for an office in Jefferson County, *Singleton* Complaint, *supra* note 3789, which is approximately one hundred miles north of Judge Fuller's court. Interview with Judge Mark E. Fuller, May 31, 2012.

3794. Nov. 1, 2004, *Singleton* Order, *supra* note 3790, at 2–3.

3795. Temporary-Restraining-Order Motion, *Singleton*, No. 2:04-cv-1027 (M.D. Ala. Nov. 9, 2004), D.E. 13.

3796. Order, *id.* (Nov. 10, 2004), D.E. 14.

3797. Mar. 30, 2005, *Singleton* Opinion, *supra* note 3790.

3798. Interview with Judge Mark E. Fuller, May 31, 2012.

3799. *See* Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, § 5, 439, *as*

puted evidence to the contrary,[3800] so a three-judge court was not needed.[3801] Judge Fuller also carefully considered application of the *Rooker-Feldman* doctrine,[3802] which states that among federal courts only the Supreme Court has appellate jurisdiction over state-court proceedings.[3803]

On April 13, 2006, the court of appeals affirmed Judge Fuller's dismissal.[3804]

Refusal to Interfere with State-Court Litigation Over Control of a Minor Party

Essenberg v. Berman (Thomas J. McAvoy, N.D.N.Y. 1:00-cv-317)

> Applying the *Rooker-Feldman* doctrine, in light of pending state-court litigation over control of a minor party, the district judge dismissed a complaint challenging the exclusion of a candidate from the party's primary election. The court of appeals dismissed as moot an appeal filed after the election.
>
> *Topics:* Getting on the ballot; matters for state courts; primary election; party procedures.

Supporters of Donald Trump filed a federal complaint in the Northern District of New York on February 22, 2000, seeking an order placing Trump on the Independence Party ballot for the March 7 presidential primary election.[3805]

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amended, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination and requiring that preclearance disputes be heard by a three-judge district court).

On June 25, 2013, the Supreme Court declined to hold section 5 unconstitutional, but the Court did hold unconstitutional the criteria for which jurisdictions require section 5 preclearance. Shelby County v. Holder, 570 U.S. 529 (2013).

3800. Mar. 30, 2005, *Singleton* Opinion, *supra* note 3790, at 18.

3801. *Id.* at 17.

3802. Interview with Judge Mark E. Fuller, May 31, 2012; Mar. 30, 2005, *Singleton* Opinion, *supra* note 3790, at 11–13.

3803. D.C. Ct. App. v. Feldman, 460 U.S. 462 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923); *see* Martin A. Schwartz, Section 1983 Litigation 21–24 (Federal Judicial Center 3d ed. 2014).

3804. Order, Singleton v. Ala. Democratic Party, No. 05-13045 (11th Cir. Apr. 13, 2006), 2006 WL 952335.

3805. Docket Sheet, Essenberg v. Berman, No. 1:00-cv-317 (N.D.N.Y. Feb. 22, 2000) [hereinafter N.D.N.Y. *Eisenberg* Docket Sheet] (D.E. 1); *see* Appellant Brief at 2–4, Essenberg v. Berman, No. 00-7406 (2d Cir. May 31, 2000) [hereinafter *Eisenberg* Appellant Brief], 2000 WL 33983234. *But see* Frank Bruni, *McCain, Bush Renew Assaults*, Albany Times Union, Feb. 14, 2000, at A1 (reporting that Trump decided against running for President in 2000); Donald J. Trump, Op-Ed, *What I Saw at the Revolution*, N.Y. Times, Feb. 19, 2000, at A15 ("I . . . saw the underside of the Reform Party.").

The Independence Party, the name for the Reform Party in New York, was experiencing internal conflict between supporters of Trump and supporters of Pat Buchanan.[3806]

Judge Thomas J. McAvoy dismissed the complaint on March 2.[3807] Under the *Rooker-Feldman* doctrine, among federal courts only the Supreme Court has appellate jurisdiction over state-court proceedings.[3808]

The court of appeals dismissed the appeal, which was filed on April 10, 2000, as moot.[3809]

3806. *See* Eric Herman, *Rumblings in Reform Party*, N.Y. Daily News, Jan. 30, 2000, at 55.

3807. N.D.N.Y. *Eisenberg* Docket Sheet, *supra* note 3805 (D.E. 11); *see Eisenberg* Appellant Brief, *supra* note 3805, at 2–3 (identifying the *Rooker-Feldman* doctrine as an issue on appeal).

3808. D.C. Ct. App. v. Feldman, 460 U.S. 462 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923); *see* Martin A. Schwartz, Section 1983 Litigation 21–24 (Federal Judicial Center 3d ed. 2014).

3809. Essenberg v. Berman, 234 F.3d 1261 (2d Cir. 2000) (table), *summary order available at* 2000 WL 1551278.

7. Recall Elections

Recall elections and ballot measures are forms of direct democracy.[3810] Litigation over recall elections can involve legal issues that arise in other types of elections,[3811] but recall elections sometimes pose unique legal questions.

Recall elections are often special elections, and litigation can arise over an allegedly tactical combination of a special election with another pending election.[3812] Perhaps there is legal uncertainty over whether campaign contribution limits apply to recall elections.[3813]

In 2011, a district judge in Texas determined that although it was odd and perhaps unwise, it was not otherwise improper for Jasper, Texas, to permit voters in one city-council district to petition for recall of another district's council member, even if the petitioning voter would not be eligible to vote in the recall election.[3814] A district judge in Georgia endorsed a 2020 consent judgment declaring a requirement that petition circulators be eligible to vote in the election probably unconstitutional.[3815]

It was a recall election in California that ultimately resulted in a Ninth Circuit en banc decision that ballot petitions do not have to be presented in multiple languages even if ballots are, because the extra requirement could chill ballot-petition circulation.[3816]

3810. *See* Allan J. Lichtman, The Embattled Vote in America 114 (2018).

3811. *See, e.g.*, "Valid Recall Signatures," *infra* page 509 (a challenge to signature invalidations).

3812. *See, e.g.*, "Preclearance of a Gubernatorial Recall Election," *infra* page 510 (concerning a pending initiative election).

3813. *See, e.g.*, "Campaign Contribution Limits for Recall-Petition Signatures," *infra* page 515.

3814. Order, McBride v. City of Jasper, No. 1:11-cv-443 (E.D. Tex. Oct. 20, 2011), D.E. 37; *see* "Challenge to a Local Recall Election," *infra* page 506.

3815. Consent Judgment, Malone v. Raffensperger, No. 1:20-cv-2513 (N.D. Ga. June 19, 2020), D.E. 10; *see* "Consent Judgment That Circulators of a Ballot Petition Do Not Have to Be Eligible to Vote in the Election," *infra* page 506.

3816. Padilla v. Lever, 463 F.3d 1046 (9th Cir. 2006) (en banc); *see* "Ballot Petitions Do Not Have to Be Multilingual," *infra* page 517.

Consent Judgment That Circulators of a Ballot Petition Do Not Have to Be Eligible to Vote in the Election

Malone v. Raffensperger (Leigh Martin May, N.D. Ga. 1:20-cv-2513)

> Four days after a case was filed, a district judge issued a consent judgment that it was unconstitutional to require circulators of a recall petition to be eligible to vote in the recall election.
>
> *Topic:* Getting on the ballot.

"This is an action challenging the constitutionality of Georgia's requirement that circulators of a recall petition be registered voters eligible to vote in the recall election."[3817] The federal complaint was filed in the Northern District of Georgia on June 15, 2020, against Georgia's secretary of state by three voters seeking the recall of a district attorney who oversaw the investigation of the fatal shooting by White men of Ahmaud Arbery, an African American man.[3818] With their complaint, the plaintiffs filed a motion for a temporary restraining order.[3819]

On the day that the case was filed, Judge Leigh Martin May set the case for hearing on June 24.[3820] She added, "The Court will issue a separate order indicating whether this hearing will be held in person or via videoconference."[3821] On June 16, Judge May reset the hearing for June 25.[3822]

On June 19, however, Judge May approved a consent judgment on the parties' agreement that the challenged provision was probably unconstitutional.[3823]

Challenge to a Local Recall Election

McBride v. City of Jasper (Zack Hawthorn, E.D. Tex. 1:11-cv-443)

> City councilmembers sued to enjoin a recall election on the grounds that the recall effort was motivated by race and the city improperly allowed voters in multiple council districts to sign a recall petition although only voters in a councilmember's district

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3817. Complaint at 1, Malone v. Raffensperger, No. 1:20-cv-2513 (N.D. Ga. June 15, 2020), D.E. 1.

3818. Complaint, *id. See generally* Cleve R. Wootson, Jr. & Michael Brice-Saddler, *After Arrests in Ga. Killing, Many Ask Why It Took So Long*, Wash. Post, May 10, 2020, at A1.

3819. Temporary-Restraining-Order Motion, *Malone*, No. 1:20-cv-2513 (N.D. Ga. June 15, 2020), D.E. 2.

3820. Order, *id.* (June 15, 2020), D.E. 5.

3821. *Id.*

3822. Order, *id.* (June 16, 2020), D.E. 8.

3823. Consent Judgment, *id.* (June 19, 2020), D.E. 10; Consent Judgment Motion, *id.* (June 19, 2020), D.E. 9.

could vote in the recall election. The parties consented to a magistrate judge's presiding over preliminary-injunction proceedings. The injunction was denied.

Topics: Section 2 discrimination; enjoining elections; enforcing orders; intervention; case assignment.

On September 13, 2011, three members of the city council for Jasper, Texas, and six other residents filed a federal complaint in the Eastern District of Texas's Beaumont courthouse to enjoin a November 8 recall election against the councilmember plaintiffs on the grounds that the recall was motivated by their vote to hire a Black police chief.[3824] Ten days later, the plaintiffs filed a motion for a preliminary injunction.[3825]

The court assigned the case to District Judge Ron Clark.[3826] According to local procedures, 15% of Judge Clark's civil cases, other than patent infringement cases, were randomly selected for assignment to one of two magistrate judges for pretrial matters, and Magistrate Judge Zack Hawthorn drew this case.[3827] The parties consented to Judge Hawthorn's presiding over preliminary-injunction proceedings, keeping their options open for possible permanent-injunction proceedings later.[3828]

On September 26, Judge Hawthorn agreed to hear the motion on October 5.[3829] The hearing was later reset for October 7.[3830] On October 3, three voters, who were named as defendants in the original complaint[3831] but not included as defendants in an amended complaint,[3832] sought to intervene in defense of the recall election.[3833]

3824. Complaint, McBride v. City of Jasper, No. 1:11-cv-443 (E.D. Tex. Sept. 13, 2011), D.E. 1 [hereinafter *McBride* Complaint]; *see* Allan Turner, *Bitterness in an East Texas Town*, Hous. Chron., Sept. 4, 2011, at A1 (referring to the recall as "a political dispute of unprecedented bitterness").

3825. Preliminary-Injunction Motion, *McBride*, No. 1:11-cv-443 (E.D. Tex. Sept. 23, 2011), D.E. 5.

3826. Docket Sheet, *id.* (Sept. 13, 2011).

3827. Intervention Order at 1 n.1, *id.* (Oct. 6, 2011), D.E. 26.

Tim Reagan interviewed Judge Hawthorn for this report by telephone on August 29, 2012.

3828. Interview with Judge Zack Hawthorn, Aug. 29, 2012.

3829. Order, *McBride*, No. 1:11-cv-443 (E.D. Tex. Sept. 26, 2011), D.E. 6.

3830. Order, *id.* (Sept. 29, 2011), D.E. 9 (noting consent by the parties for a magistrate judge to hear the motion).

3831. *McBride* Complaint, *supra* note 3824.

3832. Amended Complaint, *McBride*, No. 1:11-cv-443 (E.D. Tex. Sept. 29, 2011), D.E. 8.

3833. Intervention Motion, *id.* (Oct. 3, 2011), D.E. 12.

Judge Hawthorn denied intervention on October 6, determining that the interests of the would-be intervenors were adequately represented by other parties.[3834] That same day, one of the would-be intervenors moved to quash a subpoena for his testimony at the October 7 hearing, claiming disability.[3835] Judge Hawthorn denied the motion to quash after 5:00 p.m. on October 6, and it was docketed on the following day.[3836] Because the motion was resolved after hours, Judge Hawthorn's chambers made a special effort to email the decision to counsel that evening.[3837]

When the witness did not appear for the hearing, the court issued a warrant for his arrest.[3838] The witness testified in the afternoon, after which he was released from custody.[3839]

The hearing continued on October 11,[3840] and Judge Hawthorn denied the plaintiffs preliminary injunctive relief on October 20.[3841]

> This dispute requires an intense examination of the City of Jasper's charter—a poorly written and conceived instrument that allows voters of one district to force a recall election of a neighboring district's representative. Common sense suggests that the ability to recall a single-member-district's representative should be restricted to only those voters with the authority to vote in the recall election itself. However, the City of Jasper's charter, as written and interpreted by Texas's Ninth Court of Appeals, provides that a small percentage of the city's qualified voters can force a recall election—every three months—of an elected council member for whom they can never actually vote to recall in the voting booth. Undoubtedly, this result cheapens the finality of a general election outcome and will deter conscientious citizens from serving as elected representatives in the future.

3834. Order, *id.* (Oct. 6, 2011), D.E. 26.

3835. Motion, *id.* (Oct. 6, 2011), D.E. 28.

3836. Order, *id.* (Oct. 7, 2011), D.E. 29; Interview with Judge Zack Hawthorn, Aug. 29, 2012.

3837. Interview with Judge Zack Hawthorn, Aug. 29, 2012.

3838. Warrant, *McBride*, No. 1:11-cv-443 (E.D. Tex. Oct. 7, 2011), D.E. 30; Transcript at 9, 52, 78, *id.* (Oct. 7, 2011, filed Oct. 14, 2011), D.E. 35 [hereinafter Oct. 7, 2011, *McBride* Transcript]; Minutes, *id.* (Oct. 7, 2011), D.E. 33 [hereinafter Oct. 7, 2011, *McBride* Minutes].

3839. Oct. 7, 2011, *McBride* Transcript, *supra* note 3838, at 203–22; Oct. 7, 2011, *McBride* Minutes, *supra* note 3838; Order, *McBride*, No. 1:11-cv-443 (E.D. Tex. Oct. 7, 2011), D.E. 32.

3840. Transcript, *McBride*, No. 1:11-cv-443 (E.D. Tex. Oct. 11, 2011, filed Oct. 14, 2011), D.E. 36; Minutes, *id.* (Oct. 11, 2011), D.E. 34.

3841. Order, *id.* (Oct. 20, 2011), D.E. 37 [hereinafter Oct. 20, 2011, *McBride* Order]; *see* Allan Turner, *Bid to Halt Jasper Recall Vote Fails*, Hous. Chron., Oct. 22, 2011, at B2.

> Nonetheless, a federal court cannot intervene and stop a local election merely because it was permitted by an arcane portion of a city charter.[3842]

One plaintiff survived the recall election, and two did not.[3843] The plaintiffs voluntarily dismissed the case on November 29.[3844]

Valid Recall Signatures

Davenport v. County of Genesee (Arthur J. Tarnow, E.D. Mich. 2:10-cv-13503)

> When it was determined that a petition to recall the mayor of Flint, Michigan, did not have enough valid signatures to qualify for a recall election, the recall campaign filed an action in state court challenging how signatures were invalidated. The county removed the action to federal court, which denied a preliminary injunction fifteen days after the case was removed.
>
> *Topics:* Getting on the ballot; case assignment.

On August 31, 2010, the Committee to Recall Dayne Walling, the mayor of Flint, Michigan, learned that it had not submitted enough valid signatures to place the recall of Mayor Walling on the November 2 ballot.[3845] That day, the Committee filed an action in Genesee County's circuit court seeking to place the recall on the ballot.[3846] Because the complaint included federal constitutional claims, the county removed the action to federal court in Detroit on September 2.[3847] The committee moved on September 3 for a preliminary injunction.[3848]

The court assigned the case to Eastern District of Michigan Judge Sean F. Cox, but he was out of town, so Judge Arthur J. Tarnow handled prelim-

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3842. Oct. 20, 2011, *McBride* Order, *supra* note 3841, at 25–26.

3843. *See Election Notebook*, Hous. Chron., Nov. 9, 2011, at B4.

3844. Notice, *McBride*, No. 1:11-cv-443 (E.D. Tex. Nov. 29, 2011), D.E. 39; Order, *id.* (Dec. 21, 2011), D.E. 41.

3845. Davenport v. Genesee County, 737 F. Supp. 2d 809, 811 (E.D. Mich. 2010) (noting that of over 14,000 signatures submitted 7,484 were determined to be valid, which was fewer than the 8,004 required); *see* Michael Cooper, *Angry Voters Shout "Recall" at City Halls*, N.Y. Times, Sept. 23, 2010, at A1 (reporting that the recall effort began after the mayor "laid off police officers and firefighters to try to make ends meet in a city with an unemployment rate of more than 25 percent").

3846. *Davenport*, 737 F. Supp. 2d at 810–11.

3847. Notice of Removal, Davenport v. County of Genesee, No. 2:10-cv-13503 (E.D. Mich. Sept. 2, 2010), D.E. 1; *Davenport*, 737 F. Supp. 2d at 810–11.

3848. Preliminary-Injunction Motion, *Davenport*, No. 2:10-cv-13503 (E.D. Mich. Sept. 3, 2010), D.E. 5; *Davenport*, 737 F. Supp. 2d at 810.

inary matters.[3849] Judge Tarnow handled all emergency cases the same: he waited until the other side was served before he conducted a proceeding.[3850] A law clerk or case manager typically communicated with the parties to set up the first proceeding.[3851]

Judge Tarnow set a hearing on the injunction motion for September 9.[3852] He also held hearings on September 10 and 14.[3853] On September 17, Judge Tarnow determined that, although "there may have been some errors by Defendants in removing valid signatures, Plaintiffs have not met their burden in showing that the issuance of a preliminary injunction in this case is warranted."[3854]

> Defendants are not required to use the best method of signature review. Human error is sometimes part of the process. Deference must be given to the local clerks. Even if the Clerk had wrongfully interpreted or misapplied the law, her actions would not rise to a Fourteenth Amendment violation, which could only be established with a showing of discrimination on her part.[3855]

The case was dismissed voluntarily on December 16.[3856]

Preclearance of a Gubernatorial Recall Election

Salazar v. Monterey County (5:03-cv-3584) and Oliverez v. California (5:03-cv-3658) (Jeremy Fogel, N.D. Cal.) and Hernandez v. Merced County (1:03-cv-6147) and Gallegos v. California (1:03-cv-6157) (Oliver W. Wanger, E.D. Cal.)

> When the state set a special election on whether to recall the governor, a ballot initiative was moved from a primary election to the earlier special election. Separate federal cases alleged that the recall and the early ballot initiative could not be held because

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3849. Docket Sheet, *Davenport*, No. 2:10-cv-13503 (E.D. Mich. Sept. 2, 2010) [hereinafter *Davenport* Docket Sheet]; Interview with Judge Arthur J. Tarnow, Oct. 3, 2012.

Tim Reagan interviewed Judge Tarnow for this report by telephone. Judge Tarnow died on January 21, 2022. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

3850. Interview with Judge Arthur J. Tarnow, Oct. 3, 2012.

3851. *Id.*

3852. Notice, *Davenport*, No. 2:10-cv-13503 (E.D. Mich. Sept. 7, 2010), D.E. 9.

3853. *Davenport* Docket Sheet, *supra* note 3849.

3854. Davenport v. Genesee County, 737 F. Supp. 2d 809, 815 (E.D. Mich. 2010); *see* Cooper, *supra* note 3845 (reporting that after Judge Tarnow's ruling "the mayor posted the news on his blog: 'Flint's recall fever has broken'").

3855. *Davenport*, 737 F. Supp. 2d at 814.

3856. Stipulated Order, *Davenport*, No. 2:10-cv-13503 (E.D. Mich. Dec. 16, 2010), D.E. 30 (signed by Judge Cox).

> they had not been precleared pursuant to section 5 of the Voting Rights Act as required for four of California's counties. The state obtained preclearance just as a three-judge district court met to review the case. The judge presiding over two similar cases in another of the state's districts allowed the court presiding over the cases filed earlier to decide the issues.
>
> *Topics:* Section 5 preclearance; three-judge court; enjoining elections; news media; ballot measure.

Three voters in Monterey County, California, filed a federal complaint in the Northern District of California's San Jose courthouse on August 1, 2003, complaining that it was invalid for the state to move a ballot initiative from a March 2, 2004, primary election to an October 7, 2003, special election because the change had not been precleared pursuant to section 5 of the Voting Rights Act, as required for elections in Monterey County.[3857] With their complaint, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction[3858] and a request for a three-judge district court.[3859] The court assigned the case to a magistrate judge.[3860] Three days later, in response to the plaintiffs' declination to proceed before a magistrate judge,[3861] the court assigned the case to District Judge Jeremy Fogel.[3862]

On August 5, another three Monterey County voters filed a federal complaint challenging on section 5 grounds the special election itself—an

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3857. Complaint, Salazar v. Monterey County, No. 5:03-cv-3584 (N.D. Cal. Aug. 1, 2003), D.E. 1; *see* Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination and requiring that preclearance disputes be heard by a three-judge district court).

On June 25, 2013, the Supreme Court declined to hold section 5 unconstitutional, but the Court did hold unconstitutional the criteria for which jurisdictions require section 5 preclearance. Shelby County v. Holder, 570 U.S. 529 (2013).

3858. Motion, *Salazar*, No. 5:03-cv-3584 (N.D. Cal. Aug. 1, 2003), D.E. 3.

3859. Request, *id.* (Aug. 1, 2003), D.E. 6.

3860. Scheduling Order, *id.* (Aug. 1, 2003), D.E. 2.

3861. Declination, *id.* (Aug. 4, 2003), D.E. 7.

3862. Reassignment Order, *id.* (Aug. 4, 2003), D.E. 9.

Tim Reagan interviewed Judge Fogel for this report at the Federal Judicial Center on August 2, 2012. Judge Fogel served as the Center's director from October 3, 2011, through his retirement from the bench on September 14, 2018. Federal Judicial Center Biographical Directory of Article III Federal Judges [hereinafter FJC Biographical Directory], www.fjc.gov/history/judges; *see* Supreme Court Press Release, July 25, 2018, www.fjc.gov/sites/default/files/07.25.18-Press%20Release-FJCAnnouncement.pdf (announcing General John Cooke as Judge Fogel's successor).

election on a petition to recall the governor.[3863] The court assigned the case to Judge Susan Illston in San Francisco.[3864] On August 6, the plaintiffs filed a notice that their case was related to Judge Fogel's case.[3865] On August 7, the recall plaintiffs filed a motion for a temporary restraining order and a preliminary injunction.[3866] On August 11, Judge Fogel determined that the second case was related to the one already before him, and so he took assignment of the second case.[3867]

On the morning of August 15, Judge Fogel heard the motions for immediate injunctive relief.[3868] Judge Fogel began by observing that absentee voting in the October 7 election would begin on September 8, and even earlier than that for overseas voters.[3869] After the hearing, Judge Fogel issued temporary restraining orders.[3870] He enjoined Monterey County "from mailing absentee ballots to overseas voters registered to vote in Monterey County until Section 5 preclearance has been obtained or until further order of the Court."[3871] Judge Fogel also set a hearing for August 29, at which the defendants would show cause, if any, why they should not be enjoined from accepting ballots in the special election absent preclearance.[3872]

3863. Complaint, Oliverez v. California, No. 5:03-cv-3658 (N.D. Cal. Aug. 5, 2003), D.E. 1; *see* Claire Cooper, *Big Names Prepare for Election*, Sacramento Bee, Aug. 6, 2003, at A3.

The cases before Judge Fogel did not concern California's three other counties covered by section 5: Kings, Merced, and Yuba. Temporary Restraining Order at 2 n.1, *Oliverez*, No. 5:03-cv-3658 (N.D. Cal. Aug. 15, 2003), D.E. 20 [hereinafter *Oliverez* Temporary Restraining Order], 2003 WL 22025009; Temporary Restraining Order at 2 n.1, *Salazar*, No. 5:03-cv-3584 (N.D. Cal. Aug. 15, 2003), D.E. 20 [hereinafter *Salazar* Temporary Restraining Order], 2003 WL 22025010.

3864. Scheduling Order, *Oliverez*, No. 5:03-cv-3658 (N.D. Cal. Aug. 5, 2003), D.E. 2.

3865. Notice of Related Cases, *id.* (Aug. 6, 2003), D.E. 3.

3866. Motion, *id.* (Aug. 7, 2003), D.E. 4.

3867. Order, *Salazar*, No. 5:03-cv-3584 (N.D. Cal. Aug. 11, 2003), D.E. 13.

3868. Transcript, *id.* (Aug. 15, 2003, filed Aug. 21, 2003), D.E. 28 [hereinafter *Salazar* Transcript]; Minutes, *id.* (Aug. 15, 2003), D.E. 19.

3869. *Salazar* Transcript, *supra* note 3868, at 10–11.

3870. *Oliverez* Temporary Restraining Order, *supra* note 3863; *Salazar* Temporary Restraining Order, *supra* note 3863; *see* Peter Fimrite, *Federal Judge Warns He May Postpone Election*, S.F. Chron., Aug. 16, 2003, at A1.

3871. *Oliverez* Temporary Restraining Order, *supra* note 3863, at 4; *Salazar* Temporary Restraining Order, *supra* note 3863, at 4.

3872. *Oliverez* Temporary Restraining Order, *supra* note 3863, at 4; *Salazar* Temporary Restraining Order, *supra* note 3863, at 3–4.

On August 21, Judge Fogel requested that the circuit's chief judge appoint a three-judge panel,[3873] which she did on the following day.[3874]

Judge Fogel's approaches to both the pending election and his work on the case before the three-judge panel would act were similar: apply the law, but do no harm.[3875] On the one hand, he wanted to interfere with the election as little as possible; on the other hand, he wanted to avoid tying the panel's hands unnecessarily.[3876]

The three-judge court heard argument on August 29[3877] and ordered additional argument for September 5.[3878] The defendants wanted more time, so the court gave them as much as it could while still allowing for the possibility of effective relief, if necessary.[3879]

The recall case drew a lot of public attention.[3880] Three-judge court proceedings were held in the ceremonial courtroom, and a second courtroom was used as an additional listening site.[3881] The circuit judge on the panel traveled from Sacramento for the proceedings.[3882]

On September 5, the court denied the plaintiffs injunctive relief, because by then California had received preclearance for all aspects of the special election except for the consolidation of polling places in Monterey County, and the county agreed to forego the consolidation and to provide additional bilingual poll workers at the polls.[3883] The court dismissed the actions as moot on November 12.[3884] On February 6, 2004, the parties filed an approved settlement agreement on an award of attorney fees.[3885]

3873. Letter, *Salazar*, No. 5:03-cv-3584 (N.D. Cal. Aug. 21, 2003), D.E. 25.

3874. Order, *id.* (Aug. 26, 2003), D.E. 40.

3875. Interview with Judge Jeremy Fogel, Aug. 2, 2012.

3876. *Id.*

3877. Minutes, Oliverez v. California, No. 5:03-cv-3658 (N.D. Cal. Aug. 29, 2003), D.E. 28; Minutes, *Salazar*, No. 5:03-cv-3584 (N.D. Cal. Aug. 29, 2003), D.E. 59.

3878. Order, *Oliverez*, No. 5:03-cv-3658 (N.D. Cal. Aug. 29, 2003), D.E. 27, 2003 WL 22047533; Order, *Salazar*, No. 5:03-cv-3584 (N.D. Cal. Aug. 29, 2003), D.E. 58, 2003 WL 22047535; *see* Claire Cooper, *Court Rulings Delayed a Week*, Sacramento Bee, Aug. 30, 2003, at A3.

3879. Interview with Judge Jeremy Fogel, Aug. 2, 2012.

3880. *Id.*

3881. *Id.*

3882. *Id.*

3883. Order *Oliverez*, No. 5:03-cv-3658 (N.D. Cal. Sept. 5, 2003), D.E. 30; Order, *Salazar*, No. 5:03-cv-3584 (N.D. Cal. Sept. 5, 2003), D.E. 75; *see* Herbert A. Sample, *Voting Rights Challenge Settled: Federal Officials, Judges and Monterey County Reach Accord Over Election Plans*, Sacramento Bee, Sept. 6, 2003, at A3; Mark Simon, *Judges Kill Rights Suit, Back Recall on Oct. 7*, S.F. Chron., Sept. 6, 2003, at A11.

3884. Order *Oliverez*, No. 5:03-cv-3658 (N.D. Cal. Nov. 12, 2003), D.E. 36; Order, *Sal-*

Meanwhile, actions concerning section 5 preclearance for the ballot initiative[3886] and the gubernatorial recall[3887] in Kings County and Merced County were filed in the Eastern District of California on August 25, 2003, and assigned to Judge Oliver W. Wanger.[3888] On August 29, Judge Wanger requested a three-judge court.[3889] He set a temporary-restraining-order hearing for September 3.[3890] Judge Wanger was mindful of the competing tensions of section 5's requirements and the lateness of the actions' filings, especially considering the substantial experience with election law by one of the plaintiffs' attorneys.[3891] Judge Wanger was aware of the earlier cases filed in the Northern District, but his cases included matters that applied specifically to the counties of Kings and Merced.[3892]

As with Judge Fogel's cases, preclearance mooted Judge Wanger's cases. Pursuant to a faxed letter from counsel, the September 3 hearing was canceled,[3893] and the plaintiffs voluntarily dismissed their actions.[3894]

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azar, No. 5:03-cv-3584 (N.D. Cal. Nov. 12, 2003), D.E. 83.

3885. Docket Sheet, *Oliverez*, No. 5:03-cv-3658 (N.D. Cal. Aug. 5, 2003) (D.E. 44); Docket Sheet, *Salazar*, No. 5:03-cv-3584 (N.D. Cal. Aug. 1, 2003) (D.E. 94). The agreement is not available on PACER.

3886. Complaint, Hernandez v. Merced County, No. 1:03-cv-6147 (E.D. Cal. Aug. 25, 2003), *filed as* Ex. 2, Notice, *Salazar*, No. 5:03-cv-3584 (N.D. Cal. Aug. 28, 2003), D.E. 46 [hereinafter Aug. 25, 2003, *Salazar* Related Case Notice] (noting related cases filed in another district); Docket Sheet, *id.* (Aug. 25, 2003) [hereinafter *Hernandez* Docket Sheet].

3887. Complaint, Gallegos v. California, No. 1:03-cv-6157 (E.D. Cal. Aug. 25, 2003), *filed as* Ex. 1, Aug. 25, 2003, *Salazar* Related Case Notice, *supra* note 3886; Docket Sheet, *id.* (Aug. 25, 2003) [hereinafter *Gallegos* Docket Sheet].

3888. *See* Order, *id.* (Aug. 27, 2003), D.E. 4 (determining that the two cases are related and should be assigned to the same judge); *see also* Aug. 25, 2003, *Salazar* Related Case Notice, *supra* note 3886.

Tim Reagan interviewed Judge Wanger for this report by telephone on August 13, 2012. Judge Wanger retired from the bench on October 1, 2011, to return to private practice. FJC Biographical Directory, *supra* note 3862; Wanger Jones Helsley PC, wjhattorneys.com; *see* John Ellis, *Loss of Judge Will Further Clog Fresno Court*, Fresno Bee, Sept. 16, 2011.

3889. Request, *Hernandez*, No. 1:03-cv-6147 (E.D. Cal. Aug. 25, 2003), D.E. 5.

3890. Order, *id.* (Aug. 31, 2003), D.E. 17.

3891. Interview with Oliver W. Wanger, Aug. 13, 2012 (noting how important it is for the court to understand the history of an election case, including its prelitigation history and the history of related litigation, and how difficult it is to master this history in a short period of time).

3892. *Id.*

3893. *Gallegos* Docket Sheet, *supra* note 3887 (D.E. 18); *Hernandez* Docket Sheet, *supra* note 3886 (D.E. 18).

3894. Dismissal, Gallegos v. California, No. 1:03-cv-6157 (E.D. Cal. Sept. 22, 2003),

On October 7, the ballot initiative, proposition 54, which would have stopped the state from collecting most racial and ethnic data, failed.[3895] In addition, Governor Gray Davis was recalled and Arnold Schwarzenegger was elected as his replacement.[3896]

Campaign Contribution Limits for Recall-Petition Signatures

Citizens for Clean Government v. San Diego (Napoleon A. Jones, Jr., S.D. Cal. 3:03-cv-1215)

> A June 20, 2003, federal complaint challenged contribution limits for a city council recall effort. In an interlocutory appeal, the court of appeals affirmed the denial of immediate relief. The recall effort did not qualify for the ballot, and the incumbent was reelected. On appeal from the final judgment, the court of appeals ruled in 2007 that the district court had not required sufficient justification for the contribution limits.
>
> *Topics:* Campaign finance; intervention; interlocutory appeal; case assignment.

On Thursday, June 19, 2003, a committee of concerned citizens published a notice of intent to circulate recall petitions against a member of San Diego's city council.[3897] On June 20, the committee filed a federal complaint in the Southern District of California challenging as a First Amendment violation San Diego's individual contribution limits for the recall effort.[3898] With its complaint, the committee filed an application for a temporary restraining order.[3899]

On behalf of District Judge Napoleon A. Jones, Jr., Magistrate Judge Roger C. McKee issued a briefing order on June 23 setting argument for

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D.E. 23; Dismissal, *Hernandez*, No. 1:03-cv-6147 (E.D. Cal. Aug. 25, 2003), D.E. 23.

3895. *See* Stephen Magagnini, *Prop. 54 Soundly Beaten*, Sacramento Bee, Oct. 8, 2003, at 9; *Propositions 53 and 54*, L.A. Times, Oct. 8, 2003, at 26; Tanya Schevitz, *Prop. 54 Defeated Soundly*, S.F. Chron., Oct. 8, 2003, at A12.

3896. *See* Michael Finnegan, *Gov. Davis Is Recalled; Schwarzenegger Wins*, L.A. Times, Oct. 8, 2003, at 1; Margaret Talev, *It's Arnold: Schwarzenegger Coasts to Victory as Davis Is Ousted in Historic Vote*, Sacramento Bee, Oct. 8, 2003, at 1.

3897. Citizens for Clean Gov't v. San Diego, 474 F.3d 647, 649 (9th Cir. 2007); Opinion at 2, Citizens for Clean Gov't v. San Diego, No. 3:03-cv-1215 (S.D. Cal. July 7, 2003), D.E. 22 [hereinafter S.D. Cal. *Citizens for Clean Gov't* Opinion]; *see* Complaint at 2–3, *id.* (June 20, 2013), D.E. 1 [hereinafter *Citizens for Clean Gov't* Complaint].

3898. *Citizens for Clean Gov't* Complaint, *supra* note 3897; *Citizens for Clean Gov't*, 474 F.3d at 649.

3899. Temporary Restraining Order Application, *Citizens for Clean Gov't*, No. 3:03-cv-1215 (S.D. Cal. June 20, 2003), D.E. 3.

July 1.[3900] At the hearing, Judge Jones granted a June 30 motion to intervene by supporters of the incumbent.[3901]

On July 3, Judge Jones denied the committee immediate injunctive relief.[3902] Concluding that "the recall process must be treated as a candidate campaign," Judge Jones observed that "it is well-established under federal law that governments may enact candidate campaign contribution limits such that First Amendment freedoms remain intact."[3903] The recall campaign did not obtain enough signatures for the ballot.[3904] On November 14, the court of appeals, in an interlocutory appeal, affirmed Judge Jones's ruling.[3905]

On July 23, 2004, one month after District Judge Roger T. Benitez joined the bench, the case was transferred to him.[3906] On October 5, 2004, Judge Benitez approved a stipulated and appealable final judgment.[3907] The incumbent was reelected in 2004.[3908]

On January 19, 2007, the court of appeals decided that Judge Jones

> erred by deciding, apparently as a matter of law, that the City had a sufficient interest justifying the application of its contribution limits to the signature-gathering phase of a recall election. We hold that the City must

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3900. Order, *id.* (June 24, 2003), D.E. 8.

Judge Jones died on December 12, 2009. Federal Judicial Center Biographical Directory of Article III Federal Judges [hereinafter FJC Biographical Directory], www.fjc.gov/history/judges. Judge McKee retired in 2006 and died on May 29, 2020. Judge Roger Curtis McKee, www.legacy.com/us/obituaries/sandiegouniontribune/name/roger-mckee-obituary?id=7990615.

3901. Order, *Citizens for Clean Gov't*, No. 3:03-cv-1215 (S.D. Cal. July 3, 2003), D.E. 21; Minutes, *id.* (July 1, 2003), D.E. 20; *see* Intervention Motion, *id.* (June 30, 2003), D.E. 12.

3902. S.D. Cal. *Citizens for Clean Gov't* Opinion, *supra* note 3897 (noting, "Because Defendant was notified of Plaintiff's motion and afforded an opportunity to respond, the Court will treat the TRO application as a motion for a preliminary injunction."); *Citizens for Clean Gov't*, 474 F.3d at 649–50.

3903. S.D. Cal. *Citizens for Clean Gov't* Opinion, *supra* note 3897, at 6–7.

3904. *Citizens for Clean Gov't*, 474 F.3d at 650.

3905. Citizens for Clean Gov't v. San Diego, 81 F. App'x 240 (9th Cir. 2003); *Citizens for Clean Gov't*, 474 F.3d at 650.

3906. Transfer Order, *Citizens for Clean Gov't*, No. 3:03-cv-1215 (S.D. Cal. July 23, 2004), D.E. 40; FJC Biographical Directory, *supra* note 3900 (noting Judge Benitez's commission on June 21, 2004).

3907. Stipulated Judgment, *Citizens for Clean Gov't*, No. 3:03-cv-1215 (S.D. Cal. Oct. 6, 2004), D.E. 45; *Citizens for Clean Gov't*, 474 F.3d at 650.

3908. *Citizens for Clean Gov't*, 474 F.3d at 650.

provide evidence demonstrating a sufficiently important government interest, such as the risk of corruption, in this context.[3909]

Judge Benitez granted a stipulated dismissal on October 15, 2008.[3910]

Ballot Petitions Do Not Have to Be Multilingual

Padilla v. Lever (Alicemarie H. Stotler, 8:02-cv-1145), Imperial v. Castruita (R. Gary Klausner, 2:05-cv-8940), and Chinchay v. Verjil (Audrey B. Collins, 2:06-cv-1637) (C.D. Cal.) and Madrigal v. County of Monterey (5:06-cv-1407), Melendez v. Board of Supervisors (5:06-cv-1730), Rangel v. County of Monterey (5:06-cv-2202), and Rancho San Juan Opposition Coalition v. Board of Supervisors (5:06-cv-2369) (James Ware) and Heredia v. Santa Clara County (Ronald M. Whyte, 5:06-cv-4718) (N.D. Cal.)

After nearly four years of litigation, the U.S. Court of Appeals for the Ninth Circuit determined that recall petitions do not have to be offered in multiple languages. The litigation began with a December 12, 2002, complaint challenging a petition to recall a member of the school board for Santa Ana, California, in a February 4 election. Ultimately, the litigation included complaints filed in 2005 and 2006 as well.

Topics: Ballot language; ballot measure; recusal.

After nearly four years of litigation, the U.S. Court of Appeals for the Ninth Circuit determined that recall petitions do not have to be offered in multiple languages. District courts ultimately applied the same rationale to initiative and referendum petitions.

Santa Ana: Recall

A December 12, 2002, federal complaint filed in the Central District of California's Santa Ana courthouse challenged a petition to recall a member of Santa Ana's school board who supported bilingual education.[3911] On the day after the plaintiffs filed a December 23 amended complaint, Judge Alicemarie H. Stotler denied the plaintiffs a temporary restraining order, but she ordered the defendants to show cause at a January 6, 2003, hearing why the February 4 recall election should not be enjoined.[3912] At the hear-

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3909. *Id.*

3910. Order, *Citizens for Clean Gov't*, No. 3:03-cv-1215 (S.D. Cal. Oct. 16, 2008), D.E. 88 (noting that the parties agreed to the "payment of certain sums by the City to Plaintiff").

3911. Padilla v. Lever, 463 F.3d 1046, 1049 (9th Cir. 2006); Docket Sheet, Padilla v. Lever, No. 8:02-cv-1145 (C.D. Cal. Dec. 12, 2002) [hereinafter C.D. Cal. *Padilla* Docket Sheet]; *see* Daniel Yi, *Group Sues to Block Lopez Recall Election*, L.A. Times, Orange Cty., Dec. 13, 2002, Cal. Metro, at 3.

3912. Order, *Padilla*, No. 8:02-cv-1145 (C.D. Cal. Dec. 24, 2002), D.E. 8; C.D. Cal. *Pa-*

ing, Judge Stotler denied the plaintiffs immediate relief.[3913] On January 10, Judge Stotler largely adopted the defendants' proposed findings of fact and conclusions of law.[3914] The recall election was successful.[3915]

Multilingual Petitions Required

On November 23, 2005, in a two-to-one decision, the court of appeals determined that the Voting Rights Act required multilingual recall petitions.[3916]

Rosemead: Recall

A December 27, 2005, federal complaint filed in the Central District's Los Angeles courthouse by the mayor of Rosemead and a Chinese-speaking voter challenged a planned February 7, 2006, election on whether to recall the mayor and a member of the city council, because the ballot petitions were not multilingual.[3917] The recall election was intended to remove from office supporters of Wal-Mart.[3918] With their complaint, the plaintiffs filed an application for a temporary restraining order.[3919]

Rosemead was under a September 6, 2005, consent decree mandating legally required accommodations for voters speaking Chinese, Vietnamese, and Spanish.[3920] Paramount and Azusa were under similar consent de-

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dilla Docket Sheet, *supra* note 3911; *Padilla*, 463 F.3d at 1049.

Judge Stotler died on June 9, 2014. Federal Judicial Center Biographical Directory of Article III Federal Judges [hereinafter FJC Biographical Directory], www.fjc.gov/history/judges.

3913. C.D. Cal. *Padilla* Docket Sheet, *supra* note 3911; *see* Daniel Yi, *Santa Ana Recall Vote to Proceed, Judge Says*, L.A. Times, Orange Cty., Jan. 7, 2003, Cal. Metro, at 3.

3914. Opinion, *Padilla*, No. 8:02-cv-1145 (C.D. Cal. Jan. 13, 2003), D.E. 23.

3915. *See* Daniel Yi & Claire Luna, *Lopez Walloped in Schools Recall Vote*, L.A. Times, Feb. 5, 2003, Cal. Metro, at 1; Ray F. Herndon & Jennifer Mena, *Ousted Santa Ana Trustee Lost Even His Latino Base*, L.A. Times, Orange Cty., Feb. 6, 2003, Cal. Metro, at 1.

3916. Padilla v. Lever, 429 F.3d 910 (9th Cir. 2005), *vacated*, 446 F.3d 963 (9th Cir. 2006); *see* H.G. Rexa, *Santa Ana Recall Petitions Faulted*, L.A. Times, Nov. 24, 2005, Cal. Metro, at 1.

3917. Docket Sheet, Imperial v. Castruita, No. 2:05-cv-8940 (C.D. Cal. Dec. 27, 2005) [hereinafter C.D. Cal. *Imperial* Docket Sheet]; Imperial v. Castruita, 418 F. Supp. 2d 1174, 1176–77 (C.D. Cal. 2006); *see* Jason Kosareff, *Judge Deals Blow to Recall*, San Gabriel Valley Trib., Jan. 5, 2006.

3918. *See* Christina L. Esparza, *Wal-Mart Helped by Recall Defeat*, San Gabriel Valley Trib., Sept. 21, 2006; Jason Kosareff, *Wal-Mart Foes to Resume Rosemead Recall Effort*, San Gabriel Valley Trib., Jan. 23, 2006.

3919. C.D. Cal. *Imperial* Docket Sheet, *supra* note 3917; *Imperial*, 418 F. Supp. 2d at 1176–77.

3920. Consent Decree, United States v. City of Rosemead, No. 2:05-cv-5131 (C.D. Cal. Sept. 8, 2005), D.E. 8; *see Imperial*, 418 F. Supp. 2d at 1177.

crees as a result of similar actions also brought by the Justice Department in 2005 concerning Spanish.[3921]

The court issued, on January 4, 2006, a temporary restraining order and an order to show cause on January 17 why a preliminary injunction against the Rosemead recall should not be granted.[3922] On January 6, in response to an application for clarification, Judge Dale S. Fischer said that preparations for the election could continue while the legality of the election was under review.[3923] On January 12, Judge R. Gary Klausner informed the parties that he would decide the matter on papers alone.[3924]

On January 17, Judge Klausner issued a preliminary injunction.[3925] He relied on, and retroactively applied, the court of appeals' decision in the Santa Ana case.[3926]

Loma Linda: Initiative and Referendum

Two Loma Linda voters and a property owner filed a federal complaint on March 17 challenging two referenda and an initiative because the ballot petitions were circulated only in English.[3927] On March 21, Judge Mariana R. Pfaelzer recused herself, and the case was reassigned to Judge Audrey B. Collins.[3928] On March 24, Judge Collins issued a temporary restraining order and an order to show cause at an April 7 hearing why the election should not be enjoined.[3929]

3921. Consent Decree, United States v. City of Azusa, No. 2:05-cv-5147 (C.D. Cal. Aug. 25, 2005), D.E. 8; Consent Decree, United States v. City of Paramount, No. 2:05-cv-5132 (C.D. Cal. Aug. 19, 2005), D.E. 9.

3922. C.D. Cal. *Imperial* Docket Sheet, *supra* note 3917; *Imperial*, 418 F. Supp. 2d at 1176–77.

3923. C.D. Cal. *Imperial* Docket Sheet, *supra* note 3917; *Imperial*, 418 F. Supp. 2d at 1176–77 n.1.

3924. Minutes, Imperial v. Castruita, No. 2:05-cv-8940 (C.D. Cal. Jan. 12, 2006), D.E. 22.

3925. *Imperial*, 418 F. Supp. 2d 1174; *see* Kosareff, *supra* note 3918.

3926. *Imperial*, 418 F. Supp. 2d at 1179–80; *see* Padilla v. Lever, 429 F.3d 910 (9th Cir. 2005), *vacated*, 446 F.3d 963 (9th Cir. 2006).

3927. Docket Sheet, Chinchay v. Verjil, No. 2:06-cv-1637 (C.D. Cal. Mar. 17, 2006); Preliminary-Injunction Opinion at 1–3, *id.* (Apr. 10, 2006), D.E. 30 [hereinafter *Chinchay* Preliminary-Injunction Opinion].

3928. Reassignment Order, *id.* (Mar. 21, 2006), D.E. 10.

Judge Collins retired on August 1, 2014, and Judge Pfaelzer died on May 14, 2015. FJC Biographical Directory, *supra* note 3912.

3929. Order, *Chinchay*, No. 2:06-cv-1637 (C.D. Cal. Mar. 24, 2006), D.E. 11; Minutes, *id.* (Mar. 24, 2006), D.E. 22; *Chinchay* Preliminary-Injunction Opinion, *supra* note 3927, at 3.

Judge Collins issued a preliminary injunction on April 10 with respect to the initiative, retroactively applying the Santa Ana case.[3930] Noting that the referendum-petition process includes less state involvement, Judge Collins did not enjoin the referenda.[3931] "[A] given referendum petition is neither submitted to, received by nor supplemented in any way by the state until *after* it has been circulated and all signatures have been collected . . . ."[3932]

(On April 12, 2006, plaintiffs voluntarily dismissed an April 4 action filed in the Eastern District respecting a Kern County initiative on biosolids.[3933])

Multilingual Petitions Not Required

On September 19, over the dissent of one judge, a fifteen-judge en banc panel of the court of appeals reached a conclusion different from the three-judge panel's and affirmed Judge Stotler's ruling: recall petitions are not provided by the government, and a multilingual requirement would only chill their distribution.[3934]

On May 8, 2006, Judge Klausner denied an application to intervene in support of the Rosemead recall.[3935] Following a rescheduled recall election held on September 19, which was unsuccessful, Judge Klausner accepted, on October 24, a stipulation of dismissal.[3936]

3930. *Chinchay* Preliminary Injunction Opinion, *supra* note 3927; Preliminary Injunction, *Chinchay*, No. 2:06-cv-1637 (C.D. Cal. May 2, 2006), D.E. 37; Findings of Fact and Conclusions of Law, *id.* (Apr. 28, 2006), D.E. 36.

3931. *Chinchay* Preliminary-Injunction Opinion, *supra* note 3927, at 13–16, 18.

"The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them." *Id.* at 7. "The referendum is the power of the electors to approve or reject statutes or parts of statutes." *Id.* at 8.

3932. *Id.* at 14.

3933. Dismissal Order, Bonilla v. Barnett, No. 1:06-cv-375 (E.D. Cal. Apr. 13, 2006), D.E. 18; *see* Amended Complaint, *id.* (Apr. 11, 2006), D.E. 15; Docket Sheet, *id.* (Apr. 4, 2006) (noting a hearing on April 7, 2006); Complaint, *id.* (Apr. 4, 2006), D.E. 1.

3934. Padilla v. Lever, 463 F.3d 1046 (9th Cir. 2006) (en banc); *see* Larry Parsons, *Court Says Spanish Not Necessary for Petitions*, Monterey Herald, Sept. 20, 2006; H.G. Reza, *Ruling on O.C. Petitions Reversed*, L.A. Times, Sept. 20, 2006, Cal. Metro, at 1.

En banc panels in the Ninth Circuit usually include eleven judges, but at the time of this case the court was experimenting with en banc panels of fifteen judges. *See* Pamela Ann Rymer, *The "Limited" En Banc: Half Full, or Half Empty?*, 48 Ariz. L. Rev. 317, 319 n.18 (2006).

3935. Order, Imperial v. Castruita, No. 2:05-cv-8940 (C.D. Cal. May 8, 2006), D.E. 51.

3936. Stipulation, *id.* (Oct. 24, 2006), D.E. 66; *see* Christina L. Esparza, *Council Recall Election Vote Today to Be Monitored by Department of Justice*, San Gabriel Valley Trib., Sept. 19, 2006; Esparza, *supra* note 3918.

On June 19, Judge Collins granted intervenors' motion for reconsideration pending the court of appeals' rehearing the Santa Ana case.[3937] On October 4, Judge Collins granted a stipulated dismissal of the Loma Linda case.[3938]

Monterey County: Initiative and Referendum

Before the en banc decision, three Monterey County voters filed a federal complaint in the Northern District of California's San Jose courthouse on February 24, 2006, seeking to keep a Monterey County initiative opposing a golf-and-residential development off of the June 6 ballot, because the ballot petition had not been circulated in Spanish as well as English.[3939] Four days later, the county's board of supervisors voted to keep the initiative off of the ballot.[3940] On the day after that, supporters of the initiative filed a mandamus action in state court to overturn the board's decision.[3941] The county removed the action to federal court on March 7.[3942] Magistrate Judge Richard Seeborg determined that the two cases were related,[3943] and the court assigned them to Judge James Ware.[3944] On March 23, in light of the court of appeals' first ruling in the Santa Ana case, Judge Ware issued a permanent injunction against the development initiative.[3945] The initiative supporters filed a notice of appeal on March 27.[3946]

3937. Opinion, Chinchay v. Verjil, No. 2:06-cv-1637 (C.D. Cal. June 19, 2006), D.E. 57; *see* Padilla v. Lever, 446 F.3d 922 (9th Cir. 2006) (granting rehearing en banc); *see also* Stephen Wall, *Ruling Delights Loma Linda Slow-Growth Group*, San Bernardino Cty. Sun, June 21, 2006; Juliet Chung, *Court Will Rehear O.C. Petition Case*, L.A. Times, Apr. 21, 2006, Cal. Metro, at 3.

3938. Stipulated Dismissal, *Chinchay*, No. 2:06-cv-1637 (C.D. Cal. Oct. 4, 2006), D.E. 61.

3939. Complaint, Madrigal v. County of Monterey, No. 5:06-cv-1407 (N.D. Cal. Feb. 24, 2006), D.E. 1; *In re* Cty. of Monterey Initiative Matter, 427 F. Supp. 2d 958, 959 (N.D. Cal. 2006); *see* Larry Parsons, *Defeat for General Plan Initiative*, Monterey Herald, Apr. 6, 2006.

3940. *In re Initiative Matter*, 427 F. Supp. 2d at 959.

3941. *Id.*

3942. Docket Sheet, Melendez v. Board of Supervisors, No. 5:06-cv-1730 (N.D. Cal. Mar. 7, 2006); *In re Initiative Matter*, 427 F. Supp. 2d at 959–60.

3943. Order, *Melendez*, No. 5:06-cv-1730 (N.D. Cal. Mar. 13, 2006), D.E. 5.

Judge Seeborg became a district judge on January 4, 2010. FJC Biographical Directory, *supra* note 3912.

3944. Order, *Melendez*, No. 5:06-cv-1730 (N.D. Cal. Mar. 14, 2006), D.E. 9; Order, *Madrigal*, No. 5:06-cv-1407 (N.D. Cal. Mar. 14, 2006), D.E. 5; *In re Initiative Matter*, 427 F. Supp. 2d at 960.

Judge Ware retired on August 31, 2012. FJC Biographical Directory, *supra* note 3912.

3945. *In re Initiative Matter*, 427 F. Supp. 2d 958; *see* Larry Parsons, *Measure C Ballot*

Also on March 27, two of the three voters opposing the initiative filed a new federal action seeking to enjoin a related referendum planned for the June 6 ballot, again because the ballot petitions were not circulated in Spanish.[3947] On April 6, the county removed an April 3 action filed in state court seeking mandamus reversal of the board of supervisor's March 28 decision to take the referendum off of the ballot.[3948] These cases were both assigned to Judge Ware as related to the first two Monterey cases.[3949]

In light of its ultimate holding in the Santa Ana case, the court of appeals vacated Judge Ware's March 23 decision.[3950] On March 29, 2007, Judge Ware ruled that the Monterey initiative and the Monterey referendum should be placed on the June 5 ballot.[3951] The development proposal was defeated by the voters.[3952] On November 9, Judge Ware determined that supporters of the initiative and supporters of the referendum were entitled to attorney fees.[3953] In 2008, the parties settled the amount of the fee recovery.[3954]

Santa Clara County: Initiative

On September 1, 2006, Judge Ronald M. Whyte, another judge in the Northern District's San Jose courthouse, denied preliminary injunctive relief to opponents of a ballot initiative while the court of appeals' en banc decision was pending.[3955] Four voters filed a federal action on August 3 to

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Bump Possible, Monterey Herald, Mar. 25, 2006.

3946. Notice of Appeal, *Madrigal*, No. 5:06-cv-1407 (N.D. Cal. Mar. 27, 2006), D.E. 31.

3947. Complaint, Rangel v. County of Monterey, No. 5:06-cv-2202 (N.D. Cal. Mar. 27, 2006), D.E. 1.

3948. Notice of Removal, Rancho San Juan Opposition Coal. v. Bd. of Supervisors, No. 5:06-cv-2369 (N.D. Cal. Apr. 6, 2006), D.E. 1.

3949. Order, *id.* (May 9, 2006), D.E. 9; Order, *Rangel*, No. 5:06-cv-2202 (N.D. Cal. May 9, 2006), D.E. 4.

3950. Order, *In re* Cty. of Monterey Initiative Matter, No. 06-15531 (9th Cir. Nov. 20, 2006), *filed as* Order, *Madrigal*, No. 5:06-cv-1407 (N.D. Cal. Nov. 22, 2006), D.E. 35.

3951. Summary-Judgment Opinion, *Madrigal*, No. 5:06-cv-1407 (N.D. Cal. Mar. 29, 2007), D.E. 66.

3952. *See* Jim Johnson, *Developer Plans Legal Challenge*, Monterey Herald, June 6, 2007, at A1.

3953. Order, Melendez v. Board of Supervisors, No. 5:06-cv-1730 (N.D. Cal. Nov. 9, 2007), D.E. 87.

3954. Order, *Madrigal*, No. 5:06-cv-1407 (N.D. Cal. Mar. 18, 2008), D.E. 85; Order, *Melendez*, No. 5:06-cv-1730 (N.D. Cal. Jan. 11, 2008), D.E. 94.

3955. Opinion, Heredia v. Santa Clara County, No. 5:06-cv-4718 (N.D. Cal. Sept. 1, 2006), D.E. 32, 2006 WL 2547816; Minutes, *id.* (Sept. 1, 2006), D.E. 33; *see Judge Rejects Challenge Based on Civil Rights*, San Jose Mercury News, Sept. 3, 2006, at A1.

enjoin a Santa Clara County ballot measure promoting conservation and opposing development in parts of the county unless petitions were offered in English, Chinese, Spanish, Tagalog, and Vietnamese.[3956] On August 18, Judge Whyte approved stipulated intervention of the initiative's proponents.[3957] After the court of appeals' en banc decision, Judge Whyte granted a stipulated dismissal on October 13.[3958] In November, the initiative failed.[3959]

3956. Complaint, *Heredia*, No. 5:06-cv-4718 (N.D. Cal. Aug. 3, 2006), D.E. 1; *see* Preliminary-Injunction Motion, *id.* (Aug. 4, 2006), D.E. 3; *see also* Mary Anne Ostrom, *Suit Filed Over Land Petition*, San Jose Mercury News, Aug. 12, 2006, at B1.

3957. Order, *Heredia*, No. 5:06-cv-4718 (N.D. Cal. Aug. 18, 2006), D.E. 27.

3958. Stipulated Dismissal, *id.* (Oct. 13, 2006), D.E. 37.

3959. *See* Paul Rogers & Leigh Poitinger, *Complexity Likely Killed Green Measure*, Contra Costa Times, Dec. 31, 2006, at F4.

8. Ballot Measures

Ballot measures can cover a range of topics: marijuana,[3960] gaming,[3961] domestic partnerships,[3962] zoning,[3963] billboard restrictions,[3964] incorporation of a city,[3965] creation of a hospital district,[3966] annexation to a water district,[3967] transfer of assets to a water-and-sewer board,[3968] and the nature of a mayor's job,[3969] for example.

As with human candidates, getting a measure on the ballot generally requires the submission of a sufficient number of ballot-petition signatures.[3970] Litigation that began in Washington in 2009 concerned whether the identities of petition signers could be released to the public.[3971] Litigation in Arkansas in 2020 concerned the propriety of criminal-background checks for ballot-petition canvassers.[3972]

3960. *See, e.g.*, "Injunction Against Content-Based Removal of a Ballot Initiative," *infra* page 551; "Requiring Meaningful Review for Keeping an Initiative Off the Ballot," *infra* page 552.

3961. *See, e.g.*, "Constitutionality of a Ballot Measure," *infra* page 571; "Overturning State-Court Blocking of a Ballot Initiative," *infra* page 594.

3962. *See, e.g.*, "Public Disclosure of Referendum Petition Signatures," *infra* page 565.

3963. *See, e.g.*, "Preclearance for a Zoning Election," *infra* page 588.

3964. *See, e.g.*, "Propriety of an Advisory Question on the Ballot in Washington," *infra* page 593.

3965. *See, e.g.*, "Votes on City Incorporation by Voters Who Might Not Be in the New City," *infra* page 557; "Preclearance of an Election to Incorporate a City," *infra* page 569.

3966. *See, e.g.*, "Preclearance of an Election to Create a Hospital District," *infra* page 578.

3967. *See, e.g.*, "Enjoining a Water-District Annexation for Want of Section 5 Preclearance," *infra* page 596.

3968. *See, e.g.*, "Enjoining a Referendum on a Property Transfer," *infra* page 599.

3969. *See, e.g.*, "Grievance About a Change in Mayoral Power," *infra* page 570.

3970. *See, e.g.*, "Signature Requirements for a Ballot Question," *infra* page 573; "Minimum County Requirements for Ballot Petitions," *infra* page 582.

3971. *See* Doe v. Reed, 561 U.S. 186, 191 (2010) (holding that disclosure of referendum petitions in general does not violate the First Amendment); Doe v. Reed, 823 F. Supp. 2d 1195 (W.D. Wash. 2011) (denying an as-applied challenge), *appeal denied as moot*, 697 F.3d 1235 (9th Cir. 2012), *as reported in* "Public Disclosure of Referendum Petition Signatures," *infra* page 565.

3972. Miller v. Thurston, 486 F. Supp. 3d 1256 (W.D. Ark. 2020), *as reported in* "Criminal Background Checks for Ballot-Petition Canvassers," *infra* page 529.

In 2020, at the beginning of the Covid-19 global infectious pandemic, social distancing made gathering ballot-petition signatures unusually challenging. Some lower courts granted initiative proponents relief from signature requirements with adjustments to the number required or the date that they were due.[3973] Efforts to require the acceptance of electronic signatures in Nevada[3974] and Arizona[3975] were unsuccessful. Successful district-court efforts in Idaho[3976] and Ohio[3977] were stayed by higher courts. Judges typically required a showing of diligence in collecting signatures before amending the requirements.[3978] The Supreme Court was reluctant to endorse these adjustments,[3979] and some courts determined that signature-requirement adjustments might be appropriate for candidates but not for ballot measures.[3980] Also, some judges reasoned that as pandemic risks are not state action, they do not justify judicial remedies.[3981]

3973. People Not Politicians Or. v. Clarno, 472 F. Supp. 3d 890 (D. Or.), *stayed*, 591 U.S. ___, 141 S. Ct. 206 (2020), *as reported in* "Ballot-Petition Signature Requirements in Oregon During a Pandemic," *infra* page 530; Reclaim Idaho v. Little, 469 F. Supp. 3d 988 (D. Idaho 2020) (ordering state election officials to propose remedies), *as reported in* "Initiative Ballot-Petition Signature Requirements in Idaho During an Infectious Pandemic," *infra* page 534.

3974. *See* "Suits to Extend Deadlines for Ballot-Petition Signatures in Nevada During a Pandemic," *infra* page 539.

3975. Arizonans for Fair Elections v. Hobbs, 454 F. Supp. 3d 910, 916 (D. Ariz. 2020), *as reported in* "No Relief from the Ballot-Petition Signature Requirements for Arizona Initiatives During a Pandemic," *infra* page 547.

3976. Little v. Reclaim Idaho, 591 U.S. ___, 140 S. Ct. 2616 (2020), *as reported in* "Initiative Ballot-Petition Signature Requirements in Idaho During an Infectious Pandemic," *infra* page 534.

3977. Thompson v. DeWine, 461 F. Supp. 3d 712 (S.D. Ohio 2020), *stayed*, Thompson v. DeWine, 959 F.3d 804 (6th Cir.), *vacation denied*, 591 U.S. ___, ___ S. Ct. ___, 2020 WL 3456705 (2020), *and rev'd*, Thompson v. DeWine, 976 F.3d 610 (6th Cir. 2020), *cert. denied*, 593 U.S. ___, 41 S. Ct. 2512 (2021), *as reported in* "Ohio's Ballot-Petition Signature Requirements During a Pandemic," *infra* page 542.

3978. Fight for Nev. v. Cegavske, 460 F. Supp. 3d 1049 (D. Nev. 2020), *as reported in* "Suits to Extend Deadlines for Ballot-Petition Signatures in Nevada During a Pandemic," *infra* page 539.

3979. Clarno v. People Not Politicians Or., 591 U.S. ___, 141 S. Ct. 206 (2000); Little v. Reclaim Idaho, 591 U.S. ___, 140 S. Ct. 2616 (2020).

3980. Morgan v. White, 964 F.3d 649, 651–52 (7th Cir. 2020); Bambenek v. White, 613 F. Supp. 3d 1112, 1115 (C.D. Ill. 2020), *as reported in* "Ballot-Petition Signature Requirements in Illinois During a Pandemic," *supra* page 299.

3981. *E.g.*, Thompson v. DeWine, 976 F.3d 610, 617 (6th Cir. 2020), *as reported in* "Ohio's Ballot-Petition Signature Requirements During a Pandemic," *infra* page 542.

In light of legislative sessions being canceled because of the Covid-19 pandemic, a case in Illinois sought relief from a requirement of six months between the legislature's approving a constitutional amendment and the amendment's appearing on a general-election ballot; the district judge denied immediate relief, because the legislature had not yet approved the amendment.[3982]

Getting an initiative or a referendum[3983] on a ballot generally requires submission of not just the language of the measure[3984] but text explaining what the measure will accomplish,[3985] and sometimes there is litigation over whether the explanatory text is misleading.[3986] And election officials' decisions whether to include a proposed measure on the ballot can be litigated. A district judge in Nebraska found no constitutional problem with the state's single-subject rule.[3987] A district judge in Ohio and the court of appeals found no constitutional infirmity in splitting a two-topic initiative into two initiatives.[3988] A district judge in West Virginia enjoined removal

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3982. *See* "No Relief from a Constitutional-Amendment Waiting-Time Requirement During a Pandemic," *infra* page 538.

3983. "In the first decade of the twentieth century, states began to adopt direct democracy. In some, citizens had the power of initiative, to vote for new laws, and in others, the power of referendum to repeal a law passed by legislators." Michael Waldman, The Fight to Vote 111 (2016).

3984. *See, e.g.*, "Discrepancies Between Ballot Petitions and Ballot Text," *infra* page 575 (litigation over a change in the measure's text).

3985. *See, e.g.*, "Verbal Requirements in Initiative Advertising," *infra* page 558 (litigation over the amount of advertising that had to be devoted to the summary).

3986. *See, e.g.*, Opinion, Oregonians for Accountability v. Bradbury, No. 3:04-cv-1170 (D. Or. Sept. 2, 2004), D.E. 25, 2004 WL 1969405 (holding that in context the summary was not misleading), *as reported in* "Challenge to a Ballot-Initiative Financial Impact Estimate," *infra* page 581; Caruso v. Yamhill County, 422 F.3d 848 (9th Cir. 2005) (holding that a statutory requirement that the summary include a warning about an increase in property taxes did not result in a misleading summary in context), *as reported in* "Required Ballot Notice for a Levy Initiative," *infra* page 585.

3987. Opinion, Anderson v. Gale, No. 4:02-cv-3257 (D. Neb. Sept. 25, 2002), D.E. 12, *as reported in* "Overturning State-Court Blocking of a Ballot Initiative," *infra* page 594.

3988. Comm. to Impose Term Limits on the Ohio Supreme Court & to Preclude Special Legal Status for Members and Emps. of the Ohio Gen. Assembly v. Ohio Ballot Bd., 885 F.3d 443 (6th Cir. 2018), *aff'g* Comm. to Impose Term Limits on the Ohio Supreme Court & to Preclude Special Legal Status for Members and Emps. of the Ohio Gen. Assembly v. Ohio Ballot Bd., 275 F. Supp. 3d 849 (S.D. Ohio 2017); Comm. to Impose Term Limits on the Ohio Supreme Court & to Preclude Special Legal Status for Members and Emps. of the Ohio Gen. Assembly v. Ohio Ballot Bd., 218 F. Supp. 3d 589 (S.D. Ohio 2016); *see* "Breaking an Initiative Into Separate Subjects Is Content Neutral," *infra* page 555.

of a marijuana decriminalization initiative as an improper content-based decision.[3989] The U.S. Court of Appeals for the Sixth Circuit determined in 2019 that mandamus review of election officials' decisions was adequate; nothing more searching was required.[3990]

Both a district judge and the court of appeals upheld required funding disclosures in ballot-measure advertisements, except for short advertisements that would otherwise be all disclosure and no message.[3991]

In 2016, a district judge enjoined as unconstitutionally vague a statute that forbade election officials from making public statements about pending ballot measures.[3992] Litigation in 2004 was about whether a change in how Electoral College votes are determined could apply to the presidential election with the measure on the ballot; the district judge determined that the pro se complaint was too speculative.[3993]

A California city held an advisory election by mail in 2003 on whether to retain a set of traffic barriers; the barriers kept traffic out of a neighborhood of detached homes, but made it more difficult to get in and out of a neighborhood of apartment buildings.[3994] A district judge enjoined the election because each building, whether it was a house containing one family or an apartment building containing many homes, was given one vote.[3995] Later, the judge ordered the barriers removed, because the vote to install them had the same flaw.[3996]

Emergency litigation over ballot measures is often unsuccessful because of procedural defects[3997] or because relief could be granted after the

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3989. Hyman v. City of Salem, 396 F. Supp. 3d 666 (N.D. W. Va. 2019), *as reported in* "Injunction Against Content-Based Removal of a Ballot Initiative," *infra* page 551.

3990. Schmitt v. LaRose, 933 F.3d 628, 636 (6th Cir. 2019), *as reported in* "Requiring Meaningful Review for Keeping an Initiative Off the Ballot," *infra* page 552.

3991. No on E v. Chiu, 62 F.4th 529 (9th Cir. 2023), *aff'g* San Franciscans Supporting Prop B v. Chiu, 604 F. Supp. 3d 903 (N.D. Cal. 2022), *as reported in* "Constitutionality of Campaign-Material Disclaimers," *infra* page 549.

3992. Opinion, Taylor v. Johnson, No. 5:16-cv-10256 (E.D. Mich. Feb. 5, 2016), D.E. 27, 2016 WL 447539, *as reported in* "Nullifying an Initiative Gag Order," *infra* page 559.

3993. *See* "Initiative to Reallocate Electoral Votes," *infra* page 579.

3994. *See* "Enjoining Nonbinding Voting That Allots One Vote Per House or Apartment Building," *infra* page 589.

3995. Preliminary Injunction, Andrade v. Pulido, No. 8:03-cv-1157 (C.D. Cal. Aug. 4, 2003), D.E. 10.

3996. Opinion, *id.* (Dec. 16, 2004).

3997. *See, e.g.*, "State-Court Ballot Litigation and the Federal Deadline for Overseas Ballots," *infra* page 560; "Defective Suit to Stop an Annexation Election," *infra* page 592; "Unsuccessful Pro Se Challenge to a Fluoride Ballot Initiative," *infra* page 600.

election.[3998] Immediate relief might be denied as *Pullman* abstention,[3999] which avoids federal constitutional scrutiny of uncertain state law that could be resolved in state court.[4000]

Some cases, and these do not tend to be successful, cleverly frame policy objections as election challenges. For example, a complaint in Alabama challenged police action against bingo operations as a violation of the rights of voters who approved establishment of the operations.[4001] Relief can be denied if it is determined that the complaint is just a general grievance about the wisdom of the measure[4002] or too speculative.[4003]

Criminal Background Checks for Ballot-Petition Canvassers

Miller v. Thurston (Timothy L. Brooks, W.D. Ark. 5:20-cv-5163)

> Ballot measures were disqualified because their sponsors did not certify that ballot-petition canvassers had passed criminal background checks. A federal complaint alleged that the disqualification was improper because background checks did not have grades of pass or fail. The federal district-court judge denied the plaintiffs relief on res judicata grounds; a similar claim already had failed in the state's supreme court.
>
> *Topics:* Ballot measure; getting on the ballot; matters for state courts.

A September 2, 2020, federal complaint filed in the Western District of Arkansas challenged exclusion from the November 3 general-election ballot two ballot measures that were disqualified because their sponsor did not certify that ballot-petition canvassers had passed criminal background checks.[4004] Among the plaintiffs' allegations were the argument that it was

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3998. Opinion, Ajax Gaming Ventures, LLC v. Brown, No. 1:06-cv-336 (D.R.I. Aug. 8, 2006), D.E. 17, *as reported in* "Constitutionality of a Ballot Measure," *infra* page 571.

3999. Railroad Commission v. Pullman Co., 312 U.S. 496 (1941).

4000. *See, e.g.*, Opinion at 5–10, Personhood Miss. v. Hood, No. 3:10-cv-71 (S.D. Miss. Feb. 9, 2010), D.E. 11, 2010 WL 538302, *as reported in* "Certification Deadline for Ballot-Initiative Signatures," *infra* page 564.

4001. *See* "Electronic Bingo and Voting Rights," *infra* page 563.

4002. *See, e.g.*, Opinion, Winstead v. Stodola, No. 4:07-cv-682 (E.D. Ark. Sept. 13, 2007), D.E. 65, 2007 WL 2710096, *as reported in* "Grievance About a Change in Mayoral Power," *infra* page 570; Nogueras Cartagena v. María Calderón, 150 F. Supp. 2d 338 (D.P.R. 2001), *as reported in* "Unconstitutionality of a Referendum," *infra* page 597; Opinion at 2, Espronceda v. Krier, No. 5:00-cv-1259 (W.D. Tex. Jan. 8, 2002), D.E. 173, *as reported in* "Unsuccessful Pro Se Challenge to a Fluoride Ballot Initiative," *infra* page 600.

4003. *See, e.g.*, "Initiative to Reallocate Electoral Votes," *infra* page 579.

4004. Complaint, Miller v. Thurston, No. 5:20-cv-5163 (W.D. Ark. Sept. 2, 2020), D.E. 2 [hereinafter *Miller* Complaint]; Miller v. Thurston, 486 F. Supp. 3d 1256, 1261 (W.D.

not possible to certify that someone had passed a background check, because background checks do not result in grades of pass or fail.[4005] With their complaint, the plaintiffs filed a motion for a preliminary injunction[4006] and a motion to expedite briefing, requesting oral argument by September 14.[4007]

On September 4, Judge Timothy L. Brooks agreed to hear the case on September 14, advising the defendant secretary of state "that if a preliminary injunction is granted, any ballots without the initiatives at issue here will need to be reprinted."[4008]

Judge Brooks denied the plaintiffs immediate relief on September 15.[4009] The complaint was filed six days after Arkansas's supreme court ruled that a statement that the sponsor had obtained background checks for the canvassers was not sufficient to certify that the canvassers had passed background checks.[4010] Judge Brooks found that the doctrine of res judicata therefore barred the federal claim.[4011]

Ballot-Petition Signature Requirements in Oregon During a Pandemic

People Not Politicians Oregon v. Clarno (Michael J. McShane, D. Or. 6:20-cv-1053)

> A district judge granted relief to proponents of an initiative with respect to the number of ballot-petition signatures required and the deadline for submission. But the Supreme Court stayed the injunction. The court of appeals determined that the stay made resolution of the case in time for the election impractical.
>
> *Topics:* Getting on the ballot; ballot measure; Covid-19; laches.

After an evidentiary hearing, a district judge concluded that an infectious pandemic had prevented the qualification of a ballot initiative, so he grant-

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Ark. 2020).

4005. *Miller* Complaint, *supra* note 4004.

4006. Preliminary-Injunction Motion, *Miller*, No. 5:20-cv-5163 (W.D. Ark. Sept. 2, 2020), D.E. 3; *Miller*, 486 F. Supp. 3d at 1259.

4007. Motion to Expedite Briefing, *Miller*, No. 5:20-cv-5163 (W.D. Ark. Sept. 2, 2020), D.E. 5.

4008. Order at 1 n.1, *id.* (Sept. 4, 2020), D.E. 13; *see Miller*, 486 F. Supp. 3d at 1259.

4009. *Miller*, 486 F. Supp. 3d 1256.

4010. Miller v. Thurston, 2020 Ark. 267, 605 S.W.3d 255 (2020); *see The Court on Aug. 27 Blocked Two Proposed Constitutional Amendments*, Ft. Smith Times Rec., Sept. 6, 2020, at A9.

4011. *Miller*, 486 F. Supp. 3d at 1265–66.

ed an injunction relaxing the ballot-petition signature requirements. But the Supreme Court stayed the injunction, and the court of appeals concluded that the stay essentially mooted the case. Relief was denied a pro se plaintiff seeking relief on behalf of an organization supporting another initiative, because pro se parties cannot represent organizations and he had not shown diligent attempts to meet the signature requirements.

A Stayed Injunction

In light of social distancing made necessary by the global Covid-19 infectious pandemic, proponents of a November 2020 ballot initiative and other organizations filed on June 30 in the District of Oregon a federal complaint against Oregon's secretary of state seeking relief from a ballot-petition signature requirement and a July 2 deadline.[4012] With their complaint, the plaintiffs filed a motion for a temporary restraining order, requesting an expedited hearing and relief on or before July 2.[4013]

On July 1, the court assigned the case to Judge Michael J. McShane.[4014] Following communication with the parties, Judge McShane set the case for telephonic oral argument on July 9, with contact information to be provided to the parties by email.[4015] Oral argument was reset for July 10 on July 7 at the request of the parties.[4016] On July 9, Judge McShane set videoconference as the medium of the July 10 oral argument.[4017]

Also on July 9, another organization and its executive director, who opposed the initiative, moved to intervene in the case.[4018] Judge McShane permitted amicus participation.[4019]

At the Friday, July 10 proceeding—an evidentiary hearing—Judge McShane presided via video, robed in an empty courtroom.[4020] Among

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4012. Complaint, People Not Politicians Or. v. Clarno, No. 6:20-cv-1053 (D. Or. June 30, 2020), D.E. 1; *see* People Not Politicians Or. v. Clarno, 472 F. Supp. 3d 890, 893 (D. Or. 2020).

4013. Temporary-Restraining-Order Motion, *People Not Politicians Or.*, No. 6:20-cv-1053 (D. Or. June 30, 2020), D.E. 2; *see People Not Politicians Or.*, 472 F. Supp. 3d at 893.

4014. Order, *People Not Politicians Or.*, No. 6:20-cv-1053 (D. Or. July 1, 2020), D.E. 7.

For this report, Tim Reagan interviewed Judge McShane and his law clerks Brooks Kern and David Svelund by telephone on September 30, 2020.

4015. Docket Sheet, *People Not Politicians Or.*, No. 6:20-cv-1053 (D. Or. June 30, 2020) [hereinafter *People Not Politicians Or.* Docket Sheet] (D.E. 12).

4016. *Id.* (D.E. 13).

4017. *Id.* (D.E. 14).

4018. Intervention Motion, *id.* (July 9, 2020), D.E. 17.

4019. *People Not Politicians Or.* Docket Sheet, *supra* note 4015 (minutes, D.E. 22); Transcript at 21, 50, *People Not Politicians Or.*, No. 6:20-cv-1053 (D. Or. July 10, 2020, filed Sept. 18, 2020), D.E. 35 [hereinafter *People Not Politicians Or.* Transcript].

other things, the screen in the courtroom was bigger than the judge's screens elsewhere, making for better viewing of the attorneys and the witnesses.[4021] Members of the public, including news media and persons affiliated with the parties, could listen to the hearing.[4022] Judge McShane did not rely exclusively on the attorneys' questioning of witnesses; he questioned them himself as well, so that he would be sure to get the information he needed to rule.[4023] A major fact question was how diligent the plaintiffs had been in seeking signatures.[4024]

The video technology improvements made necessary by the pandemic facilitated moving the case forward quickly, because it made it less necessary for attorneys and witnesses to travel to Eugene.[4025] The law clerk assisting Judge McShane with this case was working from home; he and the judge could communicate with each other during the proceeding.[4026]

Judge McShane orally granted the plaintiffs a preliminary injunction, ordering the secretary to either certify the initiative for the ballot or lower the signature threshold by half and extend the deadline to August 17.[4027] An opinion followed on Monday.[4028] "The Court . . . finds that Plaintiffs submitted considerable evidence reflecting that but for the pandemic-related restrictions, they would have gathered the required signatures by the July 2 deadline."[4029] The secretary was given until 5:00 p.m. on July 13 to select between the alternative remedies.[4030]

The secretary declined to merely certify the initiative for the ballot: "Given that decision the Secretary understands that the Court's Opinion and Order directs the Secretary to deem Initiative Petition 57 qualified for the ballot if its chief petitioners submit 58,789 valid signatures by August

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4020. Interview with Judge Michael J. McShane and his law clerks Brooks Kern and David Svelund, September 30, 2020.

4021. *Id.*

4022. *Id.*

4023. *Id.*; *People Not Politicians Or.* Transcript, *supra* note 4019.

4024. Interview with Judge Michael J. McShane and his law clerks Brooks Kern and David Svelund, September 30, 2020.

4025. *Id.*

4026. *Id.*

4027. *People Not Politicians Or.* Transcript, *supra* note 4019, at 120–21; People Not Politicians Or. v. Clarno, 472 F. Supp. 3d 890, 893, 900 (D. Or. 2020); *People Not Politicians Or.* Docket Sheet, *supra* note 4015 (minutes, D.E. 22).

4028. *People Not Politicians Or.*, 472 F. Supp. 3d 890.

4029. *Id.* at 898.

4030. *Id.* at 900.

17, 2020."[4031] The parties reported on July 30 that the revised signature threshold was met.[4032]

The court of appeals expedited an appeal[4033] and, over a dissent, declined to stay Judge McShane's injunction.[4034] The Supreme Court, however, did stay the injunction.[4035]

The court of appeals observed on September 1,

> The practical effect of the stay is that even if we affirm the district court's injunction, the Supreme Court is not likely to lift the stay until after the September 3, 2020 deadline to place the initiative on the November 2020 ballot, likely rendering this action moot as to this election cycle.[4036]

Over a dissent, the court remanded the case to the district court to determine whether the controversy was capable of repetition yet evading review.[4037] In 2021, Judge McShane determined that because of vaccinations and experience with the pandemic, future ballot-petition challenges would be different, so the case was moot.[4038]

A Denied Injunction

On July 20, 2020, Judge McShane denied relief to a pro se plaintiff supporting a different initiative.[4039] The June 30 complaint was brought by the plaintiff "in his official capacity" as head of an organization seeking to get an initiative on the ballot.[4040] A motion for a temporary restraining order

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4031. Notice, People Not Politicians Or. v. Clarno, No. 6:20-cv-1053 (D. Or. July 13, 2020), D.E. 24.

4032. Status Report, *id.* (July 30, 2020), D.E. 30.

4033. Order, People Not Politicians Or. v. Clarno, No. 20-35630 (9th Cir. July 22, 2020), D.E. 13.

4034. Order, *id.* (July 23, 2020), D.E. 14; *see* Hillary Borrud, *Court Rejects Bid by Rosenblum to Halt Signature Gathering*, Oregonian, July 24, 2020, at A6.

4035. Clarno v. People Not Politicians, 591 U.S. ___, 141 S. Ct. 206 (2020); *see* Robert Barnes, *Court Halts Election Order Tied to Virus*, Wash. Post, Aug. 12, 2020, at A4; Adam Liptak, *Supreme Court Won't Allow Oregon to Ease Procedure for Referendum Voting*, N.Y. Times, Aug. 12, 2020, at A23.

4036. People Not Politicians Or. v. Clarno, 826 F. App'x 581, 582 (9th Cir. 2020); *see* Hillary Borrud, *Proposed Ballot Measure to Take Politics Out of Redistricting Will Not Go to Voters*, Oregonian, Sept. 4, 2020, at A2.

4037. *People Not Politicians Or.*, 826 F. App'x at 583.

4038. Opinion, People Not Politicians Or. v. Clarno, No. 6:20-cv-1053 (D. Or. June 10, 2021), D.E. 53, 2021 WL 2386118.

4039. Opinion, McCarter v. Brown, No. 6:20-cv-1048 (D. Or. July 20, 2020), D.E. 33 [hereinafter *McCarter* Opinion], 2020 WL 4059698; *see* Maxine Bernstein, *Judge Says Petition by Move Oregon's Border Was Not "Reasonably Diligent,"* Oregonian, July 22, 2020, at A4.

4040. Complaint, *McCarter*, No. 6:20-cv-1048 (D. Or. June 30, 2020), D.E. 1; *see* Cari-

or a preliminary injunction followed six days later.[4041] Judge McShane gave the plaintiff permission to file electronically two days after that.[4042]

On the one hand, the relief sought appeared to relate to an organization rather than to the plaintiff.[4043] On the other hand, "because Plaintiff has not demonstrated reasonable diligence in collecting the required signatures, he fails to demonstrate any likelihood of success on the merits of his claims."[4044]

Following a second motion for a temporary restraining order or a preliminary injunction,[4045] Judge McShane dismissed the case for failure to show representation of the organization by an attorney.[4046]

Initiative Ballot-Petition Signature Requirements in Idaho During an Infectious Pandemic

Reclaim Idaho v. Little (B. Lynn Winmill, D. Idaho 1:20-cv-268)

> Because of social distancing made necessary by the global infectious Cvoid-19 pandemic, sponsors of a ballot initiative sought modifications to the ballot-petition signature requirements. A district judge decided that the plaintiffs were entitled to relief and suggested two possibilities. The state instead sought a stay of the injunction. Although the district court and the court of appeals denied the state a stay, the Supreme Court granted one, and online signature-collection efforts ceased. The plaintiffs then determined that court resolution of their case through the federal court's three levels would take too long to make certification of their initiative for the ballot possible.
>
> *Topics:* Covid-19; getting on the ballot; ballot measure; enforcing orders; interlocutory appeal; laches.

Reclaim Idaho—an organization supporting a ballot initiative—and its founder filed a federal complaint in the District of Idaho on June 6, 2020, seeking modifications to the ballot-petition signature requirement and the

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sa Cegavske, *Man Hoping to Establish "Greater Idaho" Files Suit*, Oregonian, July 18, 2020, at A3.

4041. Injunction Motion, *McCarter*, No. 6:20-cv-1048 (D. Or. July 6, 2020), D.E. 7.

4042. Order, *id.* (July 8, 2020), D.E. 9.

4043. *McCarter* Opinion, *supra* note 4039, at 1.

4044. *Id.* at 1.

4045. Second Injunction Motion, *McCarter*, No. 6:20-cv-1048 (D. Or. July 22, 2020), D.E. 35; *see* Bill Bradshaw, *Border-Move Petition Tries Again in Court*, Wallowa Cty. Chieftain, July 29, 2020, at A3.

4046. Amended Judgment, *McCarter*, No. 6:20-cv-1048 (D. Or. Sept. 17, 2020), D.E. 48; Judgment, *id.* (Sept. 7, 2020), D.E. 47.

May 1 deadline in light of social distancing made necessary by the global Covid-19 infectious pandemic.[4047] With their complaint, the plaintiffs filed an expedited motion for a preliminary injunction.[4048]

On June 8, Judge B. Lynn Winmill ordered briefing complete by June 22,[4049] and on June 10, he set the case for a video hearing on June 23, posting connection information on the public docket sheet so that members of the public and news media could audit the hearing.[4050]

Judge Winmill began the hearing by noting that he might rule from the bench and issue a written decision later.[4051] He appeared robed on video and reminded those listening to keep their phones mute.[4052] At the close of argument, Judge Winmill concluded that "absent a preliminary injunction, . . . the plaintiff will be unable to get the initiative on the ballot in November."[4053]

"As stated during the hearing, oral decision was warranted given the expedited nature of the situation and the rights at issue."[4054] "If the State had been willing to extend the submission deadline or accept electronic signatures as urged by Reclaim Idaho, the State could have redressed the alleged injury."[4055]

Judge Winmill ordered Idaho to provide him by June 26 with "a notice detailing the reasonable accommodation they have chosen to make to preserve Plaintiffs' core political speech rights."[4056]

> The Court struggled in determining what would be an appropriate remedy. The Court is disinclined to tell the State how to run the initiative process. However, as the analysis herein explains, the First and Fourteenth Amendments do place some restrictions on the State's authority through the preservation of constitutional rights.

4047. Complaint, Reclaim Idaho v. Little, No. 1:20-cv-268 (D. Idaho June 6, 2020), D.E. 1; Reclaim Idaho v. Little, 469 F. Supp. 3d 988, 992 (D. Idaho 2020).

4048. Preliminary-Injunction Motion, *Reclaim Idaho*, No. 1:20-cv-268 (D. Idaho June 6, 2020), D.E. 2; *Reclaim Idaho*, 469 F. Supp. 3d at 992.

4049. Docket Sheet, *Reclaim Idaho*, No. 1:20-cv-268 (D. Idaho June 6, 2020) (D.E. 4).

4050. *Id.* (D.E. 7); *see Reclaim Idaho*, 469 F. Supp. 3d at 992.

4051. Transcript at 3–4, *Reclaim Idaho*, No. 1:20-cv-268 (D. Idaho June 23, 2020, filed June 26, 2020), D.E. 15.

4052. *Id.* at 4–6.

4053. *Id.* at 39.

4054. *Reclaim Idaho*, 469 F. Supp. 3d at 992; *see* Betsy Z. Russell, *Reclaim Idaho Wins Lawsuit, Gets 2nd Chance to Get School Funding Initiative on Nov Ballot*, Idaho Press-Trib., June 24, 2020, at A1.

4055. *Reclaim Idaho*, 469 F. Supp. 3d at 998.

4056. *Id.* at 1003.

> The Court considered the following facts when fashioning its remedy and order of accommodations. First, Reclaim Idaho and its volunteers were well on their way in obtaining the signatures necessary for inclusion of the initiative on the November 2020 ballot. Due to Reclaim Idaho's projected chance of success in obtaining the necessary signatures absent the extraordinary event of the COVID-19 pandemic, the first remedy the State can choose to provide is to certify the signatures that have been collected and place the initiative on the November 2020 ballot for voter consideration. In fashioning this remedy, the Court also considered, as argued by Reclaim Idaho during the hearing, that Idaho's ballot conditions are more stringent than those found in other states. As such, the State providing some leeway in its requirements in this extraordinary moment is a viable option.
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> However, recognizing the State's interest in upholding its conditions, specifically the numerical and geographical requirements, the Court provided that the State may instead choose to allow Reclaim Idaho an additional 48-days to gather signatures through online solicitation and submission. The Court declined to issue relief simply allowing the additional time for in-person signature collection. There is ongoing uncertainty surrounding the current and future spread of COVID-19. Close personal encounters still pose ongoing and substantial risks to health of Idaho's citizens and Reclaim Idaho's volunteers who would be contacting and communicating with them. Finally, the State has demonstrated it is comfortable relying on digital signature collection in both the voter registration and online ballot collection processes. Neither of these processes is different from the initiative process in that all require the verification and certification of the digital signature.[4057]

Instead of complying with Judge Winmill's order, Idaho filed a motion to stay it,[4058] which Judge Winmill denied on June 29.[4059] The plaintiffs moved on June 29 for an order certifying their initiative, observing, "Defendants have made it clear that they do not intend to comply with either option that the Court ordered them to choose."[4060] On June 30, Judge Winmill instead ordered Idaho to modify the deadline and accept elec-

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4057. *Id.* at 1002–03.

4058. Stay Motion, *Reclaim Idaho*, No. 1:20-cv-268 (D. Idaho June 26, 2020), D.E. 16; *see* Rachel Spacek, *State Chooses Neither Option in Judge's Order to Give Reclaim Idaho a 2nd Chance at Ballot Initiative*, Idaho Press-Trib., June 27, 2020, at A3.

4059. Order, *Reclaim Idaho*, No. 1:20-cv-268 (D. Idaho June 29, 2020), D.E. 17; *see* Betsy Z. Russell, *Judge Rejects State's Bid to Stay Reclaim Idaho Decision*, Idaho Press-Trib., June 30, 2020, at A1.

4060. Enforcement Motion, *Reclaim Idaho*, No. 1:20-cv-268 (D. Idaho June 29, 2020), D.E. 18.

tronic-signature collections.[4061] Idaho filed a notice of appeal that day challenging the original injunction.[4062]

According to the *Idaho Press-Tribune*, "Just three hours in, Idaho's first online signature drive for a voter initiative already had gathered 1,500 signatures on Monday morning."[4063]

Over a dissent, the court of appeals denied Idaho a stay of Judge Winmill's orders and ordered briefing completed by August 3.[4064] The Supreme Court, however, granted Idaho a stay on July 30 with two justices dissenting.[4065]

The plaintiffs complied with the Supreme Court's stay by suspending their online signature drive, and then they determined that their case could never be resolved in time to qualify their initiative for the ballot.[4066] But Idaho was unwilling to voluntarily dismiss its appeal without an order vacating Judge Winmill's orders.[4067]

Again over a dissent, the court of appeals remanded the case to Judge Winmill on September 1.[4068]

> The practical effect of the [Supreme Court's] stay is that even if we affirm the district court's injunction, the Supreme Court is not likely to lift the stay until after the September 7, 2020 deadline to place the Initiative on the November 2020 ballot, likely rendering this action moot as to this election cycle.
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> . . .
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> . . . [W]e remand to allow the parties to develop the record and brief the district court on whether this controversy is "capable of repetition,

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4061. Order, *id.* (June 30, 2020), D.E. 19; *see* Betsy Z. Russell, *Judge: State Must Allow Reclaim Idaho to Collect Signatures Electronically*, Idaho Press-Trib., July 1, 2020, at A3.

4062. Notice of Appeal, *Reclaim Idaho*, No. 1:20-cv-268 (D. Idaho June 30, 2020), D.E. 20; *see* Docket Sheet, Reclaim Idaho v. Little, No. 20-35584 (July 1, 2020).

4063. Betsy Z. Russell, *Initiative Drive to Boost School Funding Goes Online*, Idaho Press-Trib., July 14, 2020, at A5.

4064. Order, *Reclaim Idaho*, No. 20-35584 (July 9, 2020), D.E. 14; *see* Nathan Brown, *Signature Gathering to Restart on Education Measure*, Idaho Press-Trib., July 10, 2020, at A1.

4065. Little v. Reclaim Idaho, 591 U.S. ___, 140 S. Ct. 2616 (2020); *see* Betsy Z. Russell, *Idaho Asks U.S. Supreme Court to Block Online Initiatives Signature Drive*, Idaho Press-Trib., July 16, 2020, at A8.

4066. *See* Order, *Reclaim Idaho*, No. 20-35584 (Aug. 14, 2020), D.E. 46; *see also* Betsy Z. Russell, *Reclaim Idaho Ends Online Petition Drive for School Funding Measure*, Idaho Press-Trib., Aug. 14, 2020, at A9.

4067. Notice, *Reclaim Idaho*, No. 20-35584 (Aug. 24, 2020), D.E. 47.

4068. Reclaim Idaho v. Little, 826 F. App'x 592 (9th Cir. 2020).

yet evading review," and so the district court can decide this issue in the first instance.[4069]

Judge Winmill granted the plaintiffs a voluntary dismissal on December 11.[4070]

No Relief from a Constitutional-Amendment Waiting-Time Requirement During a Pandemic

Fight Back Fund v. Illinois State Board of Elections (Rebecca R. Pallmeyer, N.D. Ill. 1:20-cv-2791)

> During a global infectious pandemic, supporters of a state constitutional amendment sought relief from a requirement that proposed amendments be passed by the legislature at least six months before an election, in light of interruptions to the legislature's work because of the pandemic. The district judge denied immediate relief, because the legislature had not yet passed the plaintiffs' proposal.
>
> *Topics:* Ballot measure; getting on the ballot; Covid-19; case assignment.

A May 8, 2020, federal complaint filed in the Northern District of Illinois sought relief from a requirement by Illinois's constitution "that proposed amendments . . . be passed by the legislature at least six months prior to the next general election" in light of canceled general-assembly sessions because of the global Covid-19 infectious pandemic.[4071] A week later, the plaintiffs filed a motion for a temporary restraining order or a preliminary injunction.[4072]

Acting as an emergency judge, Judge Rebecca R. Pallmeyer set the case for a telephonic hearing on May 19.[4073] To accommodate disruptions to court operations resulting from the pandemic, a few district judges rotated duty days for emergency matters.[4074]

At the hearing, Judge Pallmeyer declared the motion premature because the legislature had not approved the constitutional amendment pro-

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4069. *Id.* at 594–95.

4070. Order, Reclaim Idaho v. Little, No. 1:20-cv-268 (D. Idaho Dec. 11, 2020), D.E. 38.

4071. Complaint, Fight Back Fund v. Ill. State Bd. of Elections, No. 1:20-cv-2791 (N.D. Ill. May 8, 2020), D.E. 1.

4072. Motion, *id.* (May 15, 2020), D.E. 8.

4073. Minutes, *id.* (May 15, 2020), D.E. 10.

Tim Reagan interviewed Judge Pallmeyer for this report by telephone on October 7, 2020.

4074. Interview with Judge Rebecca R. Pallmeyer, Oct. 7, 2020.

posed by the plaintiffs.[4075] "THE COURT: Go down there to Springfield and get this thing through. If you get it through, you come back to me and tell me I should enter a [temporary restraining order] that lifts the six-month restriction."[4076]

The plaintiffs dismissed their case voluntarily on June 30.[4077]

Suits to Extend Deadlines for Ballot-Petition Signatures in Nevada During a Pandemic

Fair Maps Nevada v. Cegavske (Miranda M. Du, 3:20-cv-271) and Fight for Nevada v. Cegavske (Richard F. Boulware II, 2:20-cv-837) (D. Nev.)

> An organization collecting signatures to put a constitutional amendment on Nevada's ballot received a court-ordered extension of the due date during a global infectious pandemic, which triggered state-ordered social distancing, on a finding of diligence in collecting signatures before social distancing went into effect. An organization seeking the recall of Nevada's governor did not receive a deadline extension on a finding that it collected few signatures before social-distancing requirements.
>
> *Topics:* Ballot measure; Covid-19; getting on the ballot.

Because of required social distancing in Nevada early in the global Covid-19 infectious pandemic, an organization seeking a proposed amendment to Nevada's constitution received court-ordered relief from the ballot-petition filing deadline from a Reno district judge, but an organization seeking recall of the governor did not receive relief from a Las Vegas district judge. The organizations' different levels of success in obtaining ballot-petition signatures while they could was a difference in the two cases.

Reno

Fair Maps Nevada—which was proposing an amendment to Nevada's constitution to create an independent redistricting commission for Nevada's legislature and its representation in Congress—and three voters filed a federal complaint in the District of Nevada's Reno courthouse on May 6, 2020, seeking modifications to ballot-petition requirements: (1) an extension of the deadline, (2) permission to circulate petitions electronically, and (3) the validity of electronic signatures.[4078] With their complaint, the

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4075. Minutes, *Fight Back Fund*, No. 1:20-cv-2791 (N.D. Ill. May 19, 2020), D.E. 14.

4076. Transcript at 12, *id.* (May 19, 2020, filed May 19, 2020), D.E. 15.

4077. Voluntary Dismissal, *id.* (June 30, 2020), D.E. 26; *see* Minutes, *id.* (July 27, 2020), D.E. 28 (closing case).

4078. Complaint, Fair Maps Nev. v. Cegavske, No. 3:20-cv-271 (D. Nev. May 6, 2020), D.E. 1. *See generally* Bill Dentzer, *Nevada Redistricting Group Files Amended Petition*, Las

plaintiffs filed a motion for a preliminary injunction[4079] and a motion to expedite briefing.[4080]

On the following day, Judge Miranda M. Du granted the motion to expedite briefing and ordered briefing completed by May 19.[4081] An organization and a voter moved to intervene as defendants on May 13,[4082] and Judge Du ordered a response to the motion by May 18.[4083]

Judge Du granted intervention on May 20[4084] and held a telephonic hearing on the injunction motion on May 21.[4085] The hearing was telephonic because of the Covid-19 pandemic.[4086]

On May 29, Judge Du granted the plaintiffs relief with respect to the deadline but not with respect to modifications in signature technology.[4087] (1) "[T]he Court finds Plaintiffs have been reasonably diligent in attempting to collect signatures given the circumstances."[4088] (2) "Fair Maps will not get its Initiative on the November ballot without an extension of the Deadline and/or a waiver of the In-Person Requirements because it has not collected enough signatures."[4089] (3) "Plaintiffs were prohibited from collecting signatures during [the state's stay-at-home order because of the pandemic], so it is both unreasonable and unfair not to extend a statutory deadline for a corresponding period of time."[4090] (4) Constitutional harm outweighs the defendants' proffered interest of severe inconvenience.[4091] (5) But the defendants' "proffered governmental interest of preventing fraud is more clearly articulated and better supported as to the In-Person Requirements. . . . Even though there are some five months until the elec-

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Vegas Rev.-J., Jan. 8, 2020, at B3 (reporting on earlier state-court litigation over whether a description of the proposal was vague and misleading).

4079. Preliminary-Injunction Motion, *Fair Maps Nev.*, No. 3:20-cv-271 (D. Nev. May 6, 2020), D.E. 2.

4080. Briefing Motion, *id.* (May 6, 2020), D.E. 3.

4081. Docket Sheet, *id.* (May 6, 2020) [hereinafter *Fair Maps Nev.* Docket Sheet] (minute order, D.E. 6).

4082. Intervention Motion, *id.* (May 13, 2020), D.E. 15.

4083. *Fair Maps Nev.* Docket Sheet, *supra* note 4081 (minute order, D.E. 18).

4084. Opinion, *Fair Maps Nev.*, No. 3:20-cv-271 (D. Nev. May 20, 2020), D.E. 36, 2020 WL 8188427.

4085. *Fair Maps Nev.* Docket Sheet, *supra* note 4081 (minute order, D.E. 38).

4086. Interview with Hon. Miranda M. Du, Aug. 20, 2020.

4087. Opinion, *Fair Maps Nev.*, No. 3:20-cv-271 (D. Nev. May 29, 2020), D.E. 44, 2020 WL 2798018.

4088. *Id.* at 21.

4089. *Id.* at 24.

4090. *Id.* at 44.

4091. *Id.*

tion, rolling out and testing a new electronic system for signature collection and verification between now and then will take some time."[4092]

The parties sought Judge Du's approval of a consent decree on June 8.[4093] She issued the consent decree on the following day; it extended the deadline from June 24 to August 3.[4094]

Las Vegas

In Las Vegas, Fight for Nevada, which sought the recall of Nevada's governor, filed a federal complaint on Monday, May 11, seeking an extension of time to file ballot-petition signatures to put the recall question on the ballot: "an extension of the May 14 deadline by a number of days equal to the duration of the State of Emergency declared on March 12, 2020."[4095] On Tuesday, May 12, the plaintiff organization filed a motion for a preliminary injunction or a temporary restraining order.[4096] That day, Judge Richard F. Boulware II ordered the defendant secretary of state to respond by 10:00 a.m. on Wednesday.[4097] On Wednesday, Judge Boulware ordered a reply by 4:00 p.m. that day.[4098] On Thursday, Judge Boulware set the case for oral argument at 4:00 p.m. that day.[4099]

Judge Boulware observed that conducting the argument on video worked well.[4100] Because of Covid-19, video arguments became routine, and they had some advantages.[4101] Remarks tended to be shorter and interrupted less often.[4102] They often were easier for court reporters to transcribe.[4103]

Judge Boulware denied the plaintiff immediate relief on May 26.[4104] He was not convinced that the plaintiff had a federally protected right to file a

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4092. *Id.* at 29–30.

4093. Consent-Decree Motion, *id.* (June 8, 2020), D.E. 47.

4094. Consent Decree, *id.* (June 9, 2020), D.E. 48.

4095. Complaint at 5, Fight for Nev. v. Cegavske, No. 2:20-cv-837 (D. Nev. May 11, 2020), D.E. 1; Fight for Nev. v. Cegavske, 460 F. Supp. 3d 1049, 1052 (D. Nev. 2020).

4096. Motion, *Fight for Nev.*, No. 2:20-cv-837 (D. Nev. May 12, 2020), D.E. 5; *Fight for Nev.*, 460 F. Supp. 3d at 1052.

4097. Docket Sheet, *Fight for Nev.*, No. 2:20-cv-837 (D. Nev. May 11, 2020) (minute order, D.E. 7).

4098. *Id.* (minute order, D.E. 12).

4099. *Id.* (minute order, D.E. 15); *Fight for Nev.*, 460 F. Supp. 3d at 1052.

4100. Interview with Hon. Richard F. Boulware II, Aug. 19, 2020.

4101. *Id.*

4102. *Id.*

4103. *Id.*

4104. *Fight for Nev.*, 460 F. Supp. 3d 1049; *see* Colton Lochhead, *Judge Denies Sisolak Recall Group More Time to Gather Signatures*, Las Vegas Rev.-J., May 16, 2020, at B1.

recall petition, and the deadline was not a severe burden to an organization that had collected only 6.5% of the signatures necessary during the first half of the ninety-day collection period.[4105]

The plaintiff voluntarily dismissed the case on the day of the ruling.[4106]

On reflection, Judge Boulware concluded that Covid-19 cases presented unique circumstances, but not so unique that there were not answers in the law.[4107]

Ohio's Ballot-Petition Signature Requirements During a Pandemic

Thompson v. DeWine (Edmund A. Sargus, Jr., 2:20-cv-2129), Duncan v. LaRose (Michael H. Watson, 2:20-cv-2295), and Hawkins v. DeWine (James L. Graham, 2:20-cv-2781) (S.D. Ohio)

> Federal actions sought modifications of Ohio's requirements for getting candidates and measures on the ballot in a time of social distancing to prevent transmission of Covid-19 during a global pandemic: acceptance of electronic signatures, a reduced signature requirement, and extended deadlines. One district judge ordered acceptance of electronic signatures and an extension of the deadline but not a reduction in the number of signatures required. The court of appeals, however, stayed the injunction, finding ballot-access requirements modest even during the pandemic. A second judge denied relief to a pro se minor presidential candidate. A third judge denied relief, reasoning in part that social distancing is not state action.
>
> *Topics:* Getting on the ballot; Covid-19; intervention; ballot measure; pro se party; case assignment.

Federal courts largely denied relief from ballot-petition signature requirements during the global Covid-19 infectious pandemic of 2020.

Ballot-Access Requirements for Local Initiatives and Referenda

Three voters challenged Ohio's ballot-access requirements for local initiatives and referenda during the governor's stay-at-home order issued because of the Covid-19 pandemic, filing a federal complaint in the Southern District of Ohio on Monday, April 27, 2020.[4108] Specifically, the complaint challenged the in-person signature and witness requirements and the

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4105. *Fight for Nev.*, 460 F. Supp. 3d at 1052, 1054, 1058.

4106. Notice, *Fight for Nev.*, No. 2:20-cv-837 (D. Nev. May 26, 2020), D.E. 18.

4107. Interview with Hon. Richard F. Boulware II, Aug. 19, 2020.

4108. Complaint, Thompson v. DeWine, No. 2:20-cv-2129 (S.D. Ohio Apr. 27, 2020), D.E. 1 [hereinafter *Thompson* Complaint]; *see* Thompson v. DeWine, 461 F. Supp. 3d 712, 720–21 (S.D. Ohio 2020).

deadlines.[4109] With their complaint, the plaintiffs filed a motion for a temporary restraining order or a preliminary injunction.[4110] The court set the case for a telephone conference with Judge Edmund A. Sargus, Jr., at 10:30 a.m. on April 28.[4111] Judge Sargus set another telephone conference for May 8 and ordered a response brief from Ohio by May 7.[4112]

On April 30, Ohioans for Secure and Fair Elections moved to intervene as a plaintiff,[4113] also filing a motion for a temporary restraining order or a preliminary injunction.[4114] On the next day, Ohioans for Raising the Wage and four voters also moved to intervene as plaintiffs.[4115] That afternoon, Judge Sargus held another telephone conference and granted both intervention motions.[4116]

Judge Sargus modified his conference-and-briefing order:[4117] he set another telephone conference for May 6 and ordered a joint status report by then, and he ordered briefing on the injunction motions completed by May 15.[4118]

The parties filed stipulated facts on May 6.[4119] At the conference, the parties agreed that the injunction motions could be decided without testimony or oral argument.[4120] Judge Sargus informed the parties that he

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4109. *Thompson* Complaint, *supra* note 4108, at 1.

4110. Motion, *Thompson*, No. 2:20-cv-2129 (S.D. Ohio Apr. 27, 2020), D.E. 4.

4111. Notice, *id.* (Apr. 28, 2020), D.E. 5; Docket Sheet, *id.* (Apr. 27, 2020) [hereinafter *Thompson* Docket Sheet] (minutes, D.E. 9).

Tim Reagan interviewed Judge Sargus for this report by telephone on August 24, 2020.

4112. Order, *Thompson*, No. 2:20-cv-2129 (S.D. Ohio Apr. 28, 2020), D.E. 12; Notice, *id.* (Apr. 28, 2020), D.E. 10.

4113. Intervention Motion, *id.* (Apr. 30, 2020), D.E. 13; *see* Intervention Complaint, *id.* (Apr. 30, 2020), D.E. 14.

4114. Motion, *id.* (Apr. 30, 2020), D.E. 15; *see* Thompson v. DeWine, 461 F. Supp. 3d 712, 721 (S.D. Ohio 2020).

4115. Intervention Motion, *Thompson*, No. 2:20-cv-2129 (S.D. Ohio May 1, 2020), D.E. 17; *see Thompson*, 461 F. Supp. 3d at 721.

4116. Order, *Thompson*, No. 2:20-cv-2129 (S.D. Ohio May 4, 2020), D.E. 29; *Thompson* Docket Sheet, *supra* note 4111 (minutes, D.E. 22); *see* Notice, *Thompson*, No. 2:20-cv-2129 (S.D. Ohio May 1, 2020), D.E. 21.

4117. Order, *Thompson*, No. 2:20-cv-2129 (S.D. Ohio May 7, 2020), D.E. 37.

4118. Order, *id.* (May 4, 2020), D.E. 28; Order, *id.* (May 1, 2020), D.E. 28; *see* Notice, *id.* (May 1, 2020), D.E. 23.

4119. Stipulations, *id.* (May 6, 2020), D.E. 35; *see Thompson*, 461 F. Supp. 3d at 717.

4120. Order, *Thompson*, No. 2:20-cv-2129 (S.D. Ohio May 6, 2020), D.E. 36.

would decide the case on live testimony or stipulations but not affidavits, which afford no opportunity for cross-examination.[4121]

Judge Sargus issued a preliminary injunction on May 19.[4122] He ruled that in light of the stay-at-home order and public-health concerns, it would be unconstitutional not to adopt a procedure for electronic signatures and extend filing deadlines.[4123] But with electronic signatures permitted and an extension of deadlines, a change in the number of signatures required was not constitutionally necessary.[4124]

The court of appeals stayed the injunction on May 26.[4125]

> There is no doubt that the COVID-19 pandemic and Ohio's responsive restrictions to halt the spread of that disease have made it difficult for all Ohioans to carry on with their lives. But for the most part we are letting our elected officials, with input from public health experts, decide when and how to apply those restrictions. The election context is no different. And while the Constitution provides a backstop, as it must—we are unwilling to conclude that the State is infringing upon Plaintiffs' First Amendment rights in this particular case.[4126]

The court of appeals concluded that the burdens on collecting signatures during the pandemic were modest:

> Plaintiffs' claim effectively boils down to frustration over failing to procure as many signatures for their petitions (because of social distancing and reduced public crowds) as they would without the pandemic. But that's not necessarily true. There's no reason that Plaintiffs can't advertise their initiatives within the bounds of our current situation such as through social or traditional media inviting interested electors to contact them and bring the petitions to the electors' homes to sign. Or Plaintiffs could bring their petitions to the public by speaking with electors and witnessing the signatures from a safe distance, and sterilizing writing instruments between signatures.[4127]

On July 13, the court of appeals declined to modify its stay,[4128] and on September 16, the court of appeals reversed Judge Sargus's injunction.[4129]

4121. Interview with Judge Edmund A. Sargus, Jr., Aug. 24, 2020.

4122. *Thompson*, 461 F. Supp. 3d 712; *see* Opinion, *Thompson*, No. 2:20-cv-2129 (S.D. Ohio May 22, 2020), D.E. 50, 2020 WL 2614447 (denying a stay pending appeal).

4123. *Thompson*, 461 F. Supp. 3d at 733–36.

4124. *Id.* at 734–36.

4125. Thompson v. DeWine, 959 F.3d 804 (6th Cir.), *vacation denied*, 591 U.S. ___, ___ S. Ct. ___, 2020 WL 3456705 (2020).

4126. *Thompson*, 959 F.3d at 813.

4127. *Id.* at 810.

4128. Order, Thompson v. DeWine, No. 20-3526 (6th Cir. July 13, 2020), D.E. 71.

Among other things, voluntary social distancing is not state action.[4130] Also, "We don't have the power to tell states how they should run their elections. . . . So when the district court here ordered Ohio to accept electronically signed and witnessed petitions and extended the deadline for submitting petitions, it overstepped its bounds."[4131]

On August 6, 2021, the court of appeals endorsed Judge Sargus's June 3, 2021, dismissal of the action.[4132]

Pro Se Minor Presidential Candidate

On May 6, 2020, a prospective presidential candidate, claiming a ninth-place finish in the most recent presidential election, filed a pro se federal complaint in the Southern District, seeking relaxation of the signature requirements for getting on the ballot because of Covid-19.[4133] One week later, the plaintiff filed a motion for an emergency preliminary injunction.[4134] Because the one-page motion was not accompanied by a brief explaining the plaintiff's claimed right to relief, Judge Michael H. Watson denied it two days later.[4135]

The plaintiff tried a preliminary-injunction motion again on May 29, with a seven-page brief.[4136] Judge Watson conducted a telephone conference on June 3 and, relying on the court of appeals' decision in Judge Sargus's case, orally denied the plaintiff immediate relief.[4137] A written opin-

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4129. Thompson v. DeWine, 976 F.3d 610 (6th Cir. 2020), *cert. denied*, 593 U.S. ___, 41 S. Ct. 2512 (2021).

4130. *Id.* at 617.

4131. *Id.* at 620.

4132. Thompson v. DeWine, 7 F.4th 521 (6th Cir. 2021) ("[The] election has come and gone—and with it the prospect that plaintiffs can get any of the relief they asked for. This case is thus moot."), *amending* Opinion, Thompson v. DeWine, No. 21-3514 (6th Cir. July 28, 2021), D.E. 27, 2021 WL 3183692 (originally expressed as an affirmance instead of as a vacation with instructions to dismiss), *and aff'g in substance* Opinion, Thompson v. DeWine, No. 2:20-cv-2129 (S.D. Ohio June 3, 2021), D.E. 78, 2021 WL 2264449, *cert. denied*, 595 U.S. ___, 142 S. Ct. 1233 (2022); *see* Order, *Thompson*, No. 21-3514 (6th Cir. Aug. 18, 2021), D.E. 42 (denying the appellants' bill of costs).

4133. Complaint, Duncan v. LaRose, No. 2:20-cv-2295 (S.D. Ohio May 6, 2020), D.E. 1.

4134. Preliminary-Injunction Motion, *id.* (May 13, 2020), D.E. 5.

4135. Order, *id.* (May 15, 2020), D.E. 6.

Tim Reagan interviewed Judge Watson for this report by telephone on August 26, 2020.

4136 Preliminary-Injunction Motion, *Duncan*, No. 2:20-cv-2295 (S.D. Ohio May 29, 2020), D.E. 13.

4137. Opinion at 1, *id.* (June 4, 2020), D.E. 16 [hereinafter *Duncan* Opinion], 2020 WL 660627; *see* Docket Sheet, *id.* (May 6, 2000) (notice of hearing, June 1, 2020).

ion followed on the next day.[4138] The pro se plaintiff preferred a conference by telephone to one by video, and the remote conference went well.[4139]

On July 1, the district court decided that the plaintiff's case was not so related to an unsuccessful 2013 case decided in 2015 by Judge Algenon L. Marbley, a case that also challenged Ohio's signature requirements, so that the 2020 case should have been reassigned to Judge Marbley.[4140] The district generally did not designate election cases from different election cycles as related.[4141]

Judge Watson granted the defendants' motions to dismiss the case on August 24, 2020.[4142]

Candidate Qualifications

Two prospective candidates for President and five voters with experience obtaining signatures for ballot petitions filed a federal complaint in the Southern District on Friday, May 29, 2020, challenging Ohio's requirements for in-person signatures for party recognition and candidate qualification during the Covid-19 pandemic, seeking certification of the presidential aspirants for the November 3 general-election ballot and recognition of the Green Party as an established minor party.[4143] With their complaint, the plaintiffs filed a motion for a temporary restraining order or a preliminary injunction.[4144]

On Monday, the court set the case for a telephone conference with Judge James L. Graham on Tuesday morning.[4145] At the conference, Judge Graham decided that briefing on the plaintiffs' motion and the defendants' planned motion to dismiss the complaint would be completed by June 17.[4146] Following the plaintiffs' filing on June 9 an amended complaint[4147] and an amended motion for a temporary restraining order or a prelimi-

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4138. *Duncan* Opinion, *supra* note 4137.

4139. Interview with Judge Michael H. Watson, Aug. 26, 2020.

4140. Related-Case Memorandum, *Duncan*, No. 2:20-cv-2295 (S.D. Ohio July 1, 2020), D.E. 20; *see* Duncan v. Husted, 125 F. Supp. 3d 674 (S.D. Ohio 2015), *aff'd*, Opinion, Duncan v. Husted, No. 15-4017 (6th Cir. Mar. 7, 2016), D.E. 10; Docket Sheet, Duncan v. Husted, No. 2:13-cv-1157 (S.D. Ohio Nov. 18, 2013).

4141. Interview with Judge Michael H. Watson, Aug. 26, 2020.

4142. Opinion, *Duncan*, No. 2:20-cv-2295 (S.D. Ohio Aug. 24, 2020), D.E. 21, 2020 WL 4933914.

4143. Complaint, Hawkins v. DeWine, No. 2:20-cv-2781 (S.D. Ohio May 29, 2020), D.E. 1; *see* Hawkins v. DeWine, 968 F.3d 603, 604 (6th Cir. 2020).

4144. Motion, *Hawkins*, No. 2:20-cv-2781 (S.D. Ohio May 29, 2020), D.E. 2.

4145. Docket Sheet, *id.* (May 29, 2020) (D.E. 5).

4146. Order, *id.* (June 2, 2020), D.E. 7.

4147. Amended Complaint *id.* (June 9, 2020), D.E. 8.

nary injunction,[4148] Judge Graham extended the briefing deadline by two days.[4149]

On June 24, Judge Graham denied the plaintiffs immediate relief.[4150] The state's social-distancing orders issued to protect the public from infection and spread of the virus explicitly exempted First Amendment activity, and voluntary social distancing is not state action.[4151] The court of appeals affirmed the decision on August 3.[4152]

No Relief from the Ballot-Petition Signature Requirements for Arizona Initiatives During a Pandemic

Arizonans for Fair Elections v. Hobbs (Dominic W. Lanza, D. Ariz. 2:20-cv-658)

> A district judge declined to order Arizona to accept electronic signatures to get initiatives on the November ballot during social distancing made necessary by a global infectious pandemic. The judge was not confident that the proposed remedy would not conflict with Arizona's constitution, which the plaintiffs had not challenged. Moreover, the judge was not convinced that the pandemic would persist or that the plaintiffs could not have qualified their initiatives for the ballot had they collected the signatures required before the pandemic.
>
> *Topics:* Ballot measure; getting on the ballot; Covid-19; intervention; matters for state courts; laches.

Two organizations formed to promote two ballot initiatives and a voter filed in the District of Arizona a federal complaint against state and county election officials on the afternoon of April 2, 2020, seeking relief from ballot-petition signature requirements for initiatives in light of social distancing necessary because of the global Covid-19 infectious pandemic.[4153] In particular, the plaintiffs sought an injunction requiring the defendants to

4148. Amended Motion, *id.* (June 9, 2020), D.E. 9.

4149. Order, *id.* (June 9, 2020), D.E. 10.

4150. Opinion, *id.* (June 24, 2020), D.E. 14, 2020 WL 3448228.

4151. *Id.* at 7–9.

4152. Hawkins v. DeWine, 968 F.3d 603 (6th Cir. 2020).

4153. Complaint, Arizonans for Fair Elections v. Hobbs, No. 2:20-cv-658 (D. Ariz. Apr. 2, 2020), D.E. 1 [hereinafter *Arizonans for Fair Elections* Complaint]; Scheduling Order, *id.* (Apr. 3, 2020), D.E. 9 [hereinafter *Arizonans for Fair Elections* Scheduling Order]; Arizonans for Fair Elections v. Hobbs, 454 F. Supp. 3d 910, 916 (D. Ariz. 2020).

accept electronic signatures.[4154] With their complaint, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction.[4155]

On the next day, Judge Dominic W. Lanza set the case for hearing on April 14.[4156] On April 10, he issued a docket-text order providing the news media and other members of the public with instructions on how to listen to the telephonic hearing, cautioning that audiotaping the proceeding would be prohibited.[4157] There were approximately sixty persons on the call, although only a few needed to speak, and the telephonic hearing went well.[4158] Judge Lanza began with an allusion to the ground rules:

> I know that before we came on board the courtroom deputy spoke to you about the ground rules so that we can all understand each other. But please keep your phone on mute unless you are speaking. And I will let each party know when it's their turn to speak so that there's no confusion.[4159]

On April 9, Judge Lanza granted Arizona's April 6 motion to intervene.[4160] "Although the Court understands Plaintiffs' objection to the State's intervention request from a tactical standpoint, the issues raised here are too important to be resolved through a one-sided process where all parties agree with each other."[4161] On April 10, Judge Lanza denied an April 8 motion to intervene by the leaders of Arizona's legislature, because the legislature's interests were already adequately represented by the state.[4162]

4154. *Arizonans for Fair Elections* Complaint, *supra* note 4153, at 13–14, 21.

4155. Motion, *Arizonans for Fair Elections*, No. 2:20-cv-658 (D. Ariz. Apr. 2, 2020), D.E. 29; *Arizonans for Fair Elections*, 454 F. Supp. 3d at 916.

4156. *Arizonans for Fair Elections* Scheduling Order, *supra* note 4153; *Arizonans for Fair Elections*, 454 F. Supp. 3d at 917; Arizonans for Fair Elections v. Hobbs, 335 F.R.D. 261, 265 (D. Ariz. 2020); *see* Transcript, *Arizonans for Fair Elections*, No. 2:20-cv-658 (D. Ariz. Apr. 14, 2020, filed Apr. 15, 2020), D.E. 102 [hereinafter *Arizonans for Fair Elections* Transcript].

Tim Reagan interviewed Judge Lanza for this report by telephone on August 17, 2020.

4157. Docket Sheet, *Arizonans for Fair Elections*, No. 2:20-cv-658 (D. Ariz. Apr. 2, 2020) (D.E. 68); *see Arizonans for Fair Elections*, 454 F. Supp. 3d at 917.

4158. Interview with Judge Dominic W. Lanza, Aug. 17, 2020 (noting appreciation for the authorization to invite public auditing of the hearing).

4159. *Arizonans for Fair Elections* Transcript, *supra* note 4156, at 6.

4160. *Arizonans for Fair Elections*, 335 F.R.D. 261; Intervention Motion, *Arizonans for Fair Elections*, No. 2:20-cv-658 (D. Ariz. Apr. 6, 2020), D.E. 46; *see* Arizonans for Fair Elections v. Hobbs, 335 F.R.D. 269, 273 (D. Ariz. 2020).

4161. *Arizonans for Fair Elections*, 335 F.R.D. at 269.

4162. *Arizonans for Fair Elections*, 335 F.R.D. 269; Intervention Motion, *Arizonans for Fair Elections*, No. 2:20-cv-658 (D. Ariz. Apr. 8, 2020), D.E. 60.

Judge Lanza dismissed the action on April 17.[4163] Although the plaintiffs argued that their proposed remedies would substantially comply with Arizona's constitution, Judge Lanza could not be certain that they were right, and the plaintiffs did not seek an injunction against constitutional provisions in their complaint.[4164] In addition, "although it is impossible to predict how the pandemic will play out in the coming weeks and months, it is possible that conditions will abate to the point that in-person signature gathering again becomes viable before the July 2020 submission deadline for signatures."[4165] Judge Lanza also noted that the plaintiff organizations could have collected the required number of signatures before the pandemic hit.[4166]

After Arizona's supreme court also declined to order Arizona to accept electronic signatures,[4167] the federal plaintiffs dismissed an appeal voluntarily.[4168]

Constitutionality of Campaign-Material Disclaimers

Yes on Prop B v. City and County of San Francisco (3:20-cv-630) and San Franciscans Supporting Prop B v. Chiu (3:22-cv-2785) (Charles R. Breyer, N.D. Cal.)

> A district judge held that campaign disclosures required as part of campaign materials for a ballot measure were unconstitutionally burdensome for short advertisements but not for longer advertisements.
>
> *Topics:* Campaign materials; ballot measure; case assignment.

Proponents of an earthquake-safety and emergency-response bond on San Francisco's ballot of March 3, 2020, filed a federal complaint in the Northern District of California on January 28 against San Francisco, alleging that new campaign disclaimer regulations unconstitutionally burdened free speech because the amount of text required would swamp the advocacy

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4163. Arizonans for Fair Elections v. Hobbs, 454 F. Supp. 3d 910, 910 (D. Ariz. 2020); *see* Howard Fischer, *Judge Throws Out Petition Groups' Request to Collect Signatures Online*, Ariz. Daily Star, Apr. 18, 2020, at B1.

4164. *Arizonans for Fair Elections*, 454 F. Supp. 3d at 917–20.

4165. *Id.* at 915.

4166. *Id.* at 925–26.

4167. Opinion, Arizonans for Second Chances v. Hobbs, No. CV-20-98-SA (Ariz. Sept. 4, 2020); *see id.* at 4 (noting a May 13, 2020, decision); *see also* Andrew Oxford, *Arizona Supreme Court Rejects Bid for Gathering Signatures Online*, Ariz. Republic, May 14, 2020, at A10.

4168. Order, Arizonans for Fair Elections v. Hobbs, No. 20-15719 (9th Cir. May 19, 2020).

message.[4169] With their complaint, the plaintiffs filed a motion for a preliminary injunction.[4170]

Although San Francisco would not agree to an order shortening the time to consider the plaintiffs' motion, neither would it oppose a motion for a February 14 hearing.[4171] Judge Charles R. Breyer agreed to hear the injunction motion then.[4172]

But two days before the hearing, about three weeks before the election, Judge Breyer issued a partial preliminary injunction prohibiting San Francisco from enforcing the disclaimer requirements "against Yes on Prop B's proposed [5 in. by 5 in.] newspaper advertisements, smaller 'ear' advertisements, and spoken disclaimers on digital or audio advertisements of thirty seconds or less. The Court will rule on the remainder of Yes on Prop B's requested relief after full briefing and a hearing."[4173]

On February 20, Judge Breyer determined that the disclaimer requirements were improper as applied to short ads, but proper as applied to longer ads:

> The Court agrees that the disclaimer rules are unconstitutional as applied to some smaller or shorter types of advertising, because they leave effectively no room for pro-earthquake safety messaging. But the rules are not an unconstitutional burden on larger or longer advertising, and requiring the committee to disclose not only its own donors but also the individuals and organizations who give money to committees that in turn support Yes on Prop B is not an unconstitutional forced association or burden on campaign contributions.[4174]

On October 21, the court of appeals dismissed the plaintiffs' appeal because the case was moot.[4175]

4169. Complaint, Yes on Prop B v. City and County of San Francisco, No. 3:20-cv-630 (N.D. Cal. Jan. 28, 2020), D.E. 1.

4170. Preliminary-Injunction Motion, *id.* (Jan. 28, 2020), D.E. 5.

4171. Motion at 2, *id.* (Jan. 29, 2020), D.E. 9.

4172. Order, *id.* (Jan. 31, 2020), D.E. 14; *see* Transcript, *id.* (Feb. 14, 2020, filed Mar. 4, 2020), D.E. 34.

4173. Order, *id.* (Feb. 12, 2020), D.E. 23.

4174. Yes on Prop B v. City and County of San Francisco, 440 F. Supp. 3d 1049, 1051 (N.D. Cal. 2020); *see* No on E v. Chiu, 85 F.4th 493, 499 (9th Cir. 2023); *see also* Bob Egelko, *Judge Upholds Most of S.F.'s Campaign Ad Disclosure Rule*, S.F. Chron., Feb. 21, 2020, at C1.

4175. Opinion, Yes on Prop B v. City and County of San Francisco, 826 F. App'x 648 (9th Cir. 2020); *No on E*, 85 F.4th at 499; San Franciscans Supporting Prop B v. Chiu, 604 F. Supp. 3d 903, 906 (N.D. Cal. 2022).

On May 17, 2022, Judge Breyer decided that the case was related to an action filed on May 11.[4176] The new action alleged, "San Francisco coopts speakers' messages about political candidates and ballot measures, forcing speakers not just to replace their message with what the City wants said, but to put the City's message front and center, before listeners hear anything else."[4177] On May 12, the plaintiffs in the second case filed a motion for a temporary restraining order and a preliminary injunction.[4178] Judge Breyer set the second case for a virtual hearing on May 24.[4179]

On June 1, Judge Breyer denied plaintiffs in the second case immediate relief,[4180] a decision that the court of appeals affirmed on March 8, 2023.[4181]

Injunction Against Content-Based Removal of a Ballot Initiative

Hyman v. City of Salem (Thomas S. Kleeh, N.D. W. Va. 1:19-cv-75)

> A district judge enjoined removal of a marijuana decriminalization initiative from a city's ballot as content-based discretion to remove an initiative that might be in conflict with state law.
>
> *Topics:* Ballot measure; getting on the ballot.

Proponents of an initiative to decriminalize marijuana in Salem, West Virginia, filed a federal complaint against the city in the Northern District of West Virginia on April 10, 2019, challenging the apparent removal of the initiative from a June 4 ballot according to oral representations made by city officials beginning on March 28.[4182] With their complaint, the plaintiffs filed a motion for a preliminary injunction or a temporary restraining order.[4183]

> The decision by Defendant to exclude the initiative from the June 4, 2019, election ballot was premised on a March 28, 2019, memorandum

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4176. Order, *Yes on Prop B*, No. 3:20-cv-630 (N.D. Cal. May 17, 2022), D.E. 48; Complaint at 2, San Franciscans Supporting Prop B v. Chiu, No. 3:22-cv-2785 (N.D. Cal. May 11, 2022), D.E. 1 [hereinafter *San Franciscans Supporting Prop B* Complaint]; *see No on E*, 85 F.4th at 500.

4177. *San Franciscans Supporting Prop B* Complaint, *supra* note 4176, at 2.

4178. Motion, *San Franciscans Supporting Prop B*, No. 3:22-cv-2785 (N.D. Cal. May 12, 2022), D.E. 9; *No on E*, 85 F.4th at 500.

4179. Order, *Yes on Prop B*, No. 3:20-cv-630 (N.D. Cal. May 17, 2022), D.E. 26.

4180. *San Franciscans Supporting Prop B*, 604 F. Supp. 3d 903; *No on E*, 85 F.4th at 497.

4181. *No on E*, 85 F.4th 493, *amending* 62 F.4th 529 (9th Cir. 2023).

4182. Complaint, Hyman v. City of Salem, No. 1:19-cv-75 (N.D. W. Va. Apr. 10, 2019), D.E. 1.

4183. Motion, *id.* (Apr. 10, 2019), D.E. 2.

> from an attorney in the office of the West Virginia Secretary of State's Office to Defendants' attorney.
>
> . . .
>
> . . . The memorandum explained that Plaintiffs' proposed decriminalization ordinance, presented to Defendant as an initiative, would "[l]ikely" "violate the WV Constitution," since possession of marijuana remains criminal under West Virginia State law. . . . The memorandum did not direct Defendant to remove Plaintiffs' initiative from the June 4, 2019, election ballot.[4184]

On April 16, Judge Thomas S. Kleeh set the case for hearing on April 19 and ordered defense briefing by the day before.[4185] At the hearing, Judge Kleeh concluded,

> The Court . . . does find that the City's notice, in whatever form it took, to the plaintiffs that this initiative will not be included on the ballot is an unconstitutional prior restraint of the First Amendment rights of the plaintiffs. There has been no compelling interest identified by the City that would satisfy the strict scrutiny standard that is applicable in this situation.[4186]

On June 4, Judge Kleeh issued a preliminary injunction against the city's exercise of content-based discretion.[4187]

In the election, the initiative failed.[4188] Judge Kleeh dismissed the action as settled on March 24, 2020.[4189]

Requiring Meaningful Review for Keeping an Initiative Off the Ballot

Schmitt v. Husted (Edmund A. Sargus, Jr., S.D. Ohio 2:18-cv-966)

> As an election approached, a district judge enjoined local election-board discretion—reviewable only by a writ of mandamus—to keep an initiative off the ballot. The court of appeals, however, concluded that mandamus relief was not so insurmountable as to require federal judicial intervention.
>
> *Topics:* Ballot measure; getting on the ballot; attorney fees.

4184. Hyman v. City of Salem, 396 F. Supp. 3d 666, 668–69 (N.D. W. Va. 2019).

4185. Order, *Hyman*, No. 1:19-cv-75 (N.D. W. Va. Apr. 16, 2019), D.E. 9.

4186. Transcript at 33, *id.* (Aug. 4, 2019, filed Aug. 4, 2019), D.E. 21.

4187. *Hyman*, 396 F. Supp. 3d 666.

4188. *See Salem Voters Defeat Marijuana Decriminalization Ordinance, Choose City Council*, WBOY 12, June 5, 2019, www.wboy.com/news/politics/update-salem-voters-defeat-marijuana-decriminalization-ordinance-choose-city-council/.

4189. Order, *Hyman*, No. 1:19-cv-75 (N.D. W. Va. Mar. 24, 2020), D.E. 36.

Two "drafters and circulators of initiatives calling for reductions of penalties in local ordinances in Ohio for those charged with possessing marijuana" and a signer of one of their initiatives filed a federal complaint in the Southern District of Ohio on August 28, 2018, challenging the discretion of local elections boards to act as gatekeepers in deciding what initiatives to accept for the ballot.[4190] Named as defendants were three members of a county board of elections and Ohio's secretary of state.[4191] With their complaint, the plaintiffs filed a motion for a temporary restraining order or a preliminary injunction.[4192] Judge Edmund A. Sargus, Jr., held a telephone conference on the following day.[4193]

Judge Sargus set the case for oral argument on September 17.[4194] At argument, Judge Sargus and the parties agreed that a decision by September 19 would not be too late for any remedy the judge provided to be effective.[4195]

On September 19, Judge Sargus issued a temporary restraining order provisionally placing on two municipal ballots the plaintiffs' initiatives.[4196] Ohio had not justified providing initiative proponents with no avenue for review of ballot denial but the high burden of mandamus relief.[4197]

Following an October 4 telephonic status conference, Judge Sargus converted the temporary restraining order to a preliminary injunction to run through the election, and he set oral argument on how the case should proceed after that for December.[4198] The initiative failed in one municipali-

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4190. Complaint, Schmitt v. Husted, No. 2:18-cv-966 (S.D. Ohio Aug. 28, 2018), D.E. 1 [hereinafter *Schmitt* Complaint]; Schmitt v. Husted, 363 F. Supp. 3d 842, 847 (S.D. Ohio 2019); Schmitt v. Husted, 341 F. Supp. 3d 784, 788 (S.D. Ohio 2018).

4191. *Schmitt* Complaint, *supra* note 4190.

4192. Motion, *Schmitt*, No. 2:18-cv-966 (S.D. Ohio Aug. 28, 2018), D.E. 3; *Schmitt*, 363 F. Supp. 3d at 847; *Schmitt*, 341 F. Supp. 3d at 788.

4193. Docket Sheet, *Schmitt*, No. 2:18-cv-966 (S.D. Ohio Aug. 28, 2018) [hereinafter *Schmitt* Docket Sheet].

4194. Order, *id.* (Aug. 29, 2018), D.E. 9; Notice, *id.* (Aug. 31, 2018), D.E. 15; *see Schmitt*, 341 F. Supp. 3d at 788; Minutes, *Schmitt*, No. 2:18-cv-966 (S.D. Ohio Sept. 17, 2018), D.E. 21.

4195. Transcript at 26–29, *Schmitt*, No. 2:18-cv-966 (S.D. Ohio Sept. 17, 2018, filed Apr. 23, 2019), D.E. 52.

4196. *Schmitt*, 341 F. Supp. 3d at 792–93; Order, *Schmitt*, No. 2:18-cv-966 (S.D. Ohio Oct. 3, 2018), D.E. 26; Schmitt v. LaRose, 933 F.3d 628, 636 (6th Cir. 2019); *see* Dave O'Brien, *Judge Orders Marijuana Issues on Portage County Ballots*, Akron Beacon J., Sept. 23, 2018, at B10.

4197. *Schmitt*, 341 F. Supp. 3d at 791.

4198. Order, *Schmitt*, No. 2:18-cv-966 (S.D. Ohio Oct. 4, 2018), D.E. 28; Notice, *id.* (Oct. 6, 2018), D.E. 33 (resetting oral argument for December 19); *Schmitt*, 933 F.3d at

ty and passed in the other, in addition to passing in other municipalities in the state.[4199]

"At the December 19, 2018 hearing, the parties stipulated that Plaintiffs' motion for injunctive relief is ripe for review because Plaintiffs intend to submit identical initiative petitions in upcoming voting cycles."[4200]

On February 11, 2019, Judge Sargus granted the plaintiffs permanent relief.[4201]

> In the ballot initiative process, . . . the State of Ohio has not provided Plaintiffs an adequate review process. Instead, the gatekeeping function enables a board of elections—an executive body—to make legal determinations without providing denied petitioners a right to review. The only possibility of review requires an aggrieved petitioner to convince a court of appeals or the Supreme Court of Ohio to exercise its discretion under heightened standards.[4202]

The court of appeals vacated the injunction on August 7, determining that mandamus relief was not a severe enough burden to invalidate the board's discretion.[4203]

> It is reasonable to conclude that the cost of obtaining legal counsel and seeking a writ of mandamus disincentivizes some ballot proponents from seeking to overturn the board's decision, thereby limiting ballot access. As a result, the burden imposed by the Ohio ballot-initiative process is somewhere between minimal and severe . . . .[4204]

The court observed,

> Plaintiffs have identified no case in which the Ohio Supreme Court questioned the legal determination of a board of elections but nevertheless deferred to its discretion. Rather, the cases show that notwithstanding the stated standard of review, the court considers the proposed initiative and

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636; Schmitt v. Husted, 363 F. Supp. 3d 842, 847 (S.D. Ohio 2019); *see Schmitt* Docket Sheet, *supra* note 4193 (minutes, D.E. 36); Notice, *Schmitt*, No. 2:18-cv-966 (S.D. Ohio Oct. 4, 2018), D.E. 27 (setting oral argument for December 18).

4199. *See* Michael Sangiacomo, *Marijuana Reform Passed, but . . .*, Cleveland Plain Dealer, Nov. 19, 2018, at A1.

4200. *Schmitt*, 363 F. Supp. 3d at 847; Transcript at 3, *Schmitt*, No. 2:18-cv-966 (S.D. Ohio Dec. 19, 2018, filed Apr. 23, 2019), D.E. 53 ("THE COURT: . . . So we all understand then that at least at this stage, you're all agreeing that there is an issue of repetition here and it is an election case so we'll go forward on the merits."); *see* Order, *id.* (Apr. 15, 2019), D.E. 50, 2019 WL 1599040 (clarifying relief).

4201. *Schmitt*, 363 F. Supp. 3d 842; *Schmitt*, 933 F.3d at 637.

4202. *Schmitt*, 363 F. Supp. 3d at 849.

4203. *Schmitt*, 933 F.3d 628, *cert. denied*, 590 U.S. ___, 140 S. Ct. 2803 (2020).

4204. *Id.* at 641.

> makes an independent reasoned determination whether it is within the Ohio Constitution's grant of legislative authority. . . .
>
> . . . We also note that because Ohio Supreme Court rules provide for expedited briefing and decision in election cases, aggrieved citizens who challenge an adverse decision are able to seek timely redress.[4205]

The court of appeals determined, moreover, that it was proper for the elections boards to determine whether the proposed initiatives were for valid legislation and not merely administrative proposals in light of state law on the use of marijuana.[4206]

On June 15, 2021, the court of appeals affirmed Judge Sargus's December 4, 2019, denial of a fees award.[4207]

Breaking an Initiative Into Separate Subjects Is Content Neutral

Committee to Impose Term Limits on the Ohio Supreme Court and to Preclude Special Legal Status for Members and Employees of the Ohio General Assembly v. Ohio Ballot Board (James L. Graham, S.D. Ohio 2:16-cv-1030)

> Proponents of a state constitutional-amendment initiative filed a federal complaint alleging that the state's breaking the two provisions of the proposed initiative into separate initiatives was impermissibly content based. The district court and the court of appeals held that it was content neutral.
>
> *Topics:* Ballot language; ballot measure.

The Committee to Impose Term Limits on the Ohio Supreme Court and to Preclude Special Legal Status for Members and Employees of the Ohio General Assembly and three members of the committee filed a federal complaint in the Southern District of Ohio on Wednesday, October 26, 2016, challenging the constitutionality of government review of their proposed constitutional amendment to (1) impose term limits on the state's supreme-court justices and (2) apply Ohio laws to members of the state's general assembly, specifically challenging the authority of Ohio election

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4205. *Id.* at 639–40.

4206. *Id.* at 641.

4207. Opinion, Schmitt v. LaRose, No. 20-4025 (6th Cir. June 15, 2021), D.E. 15, 2021 WL 4592524 ("The rejection of a party's key legal argument on appeal counts at a minimum as a special circumstance justifying a district court's decision to deny fees."), *aff'g* Opinion, Schmitt v. Husted, No. 2:18-cv-966 (S.D. Ohio Dec. 4, 2019), D.E. 71, 2019 WL 6527976, *cert. denied*, 595 U.S. ___, 142 S. Ct. 466 (2021); *see* Opinion, *Schmitt*, No. 2:18-cv-966 (S.D. Ohio Sept. 21, 2020), D.E. 79, 2020 WL 5626891 (denying reconsideration).

officials to separate the proposal into two separate initiatives.[4208] With their complaint, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction, noting that they had submitted their proposed initiative that day, and a ten-day review period was therefore beginning.[4209]

Judge James L. Graham set the case for a telephone conference on Friday.[4210] Following the conference, Judge Graham ordered briefing completed by Tuesday.[4211] On Thursday, November 3, Judge Graham denied the plaintiffs immediate relief.[4212] "Here, no material facts are in dispute; the Court need not make any credibility determinations. Neither Plaintiffs nor Defendants request a hearing. Therefore, the Court will decide the motion for [temporary restraining order] and preliminary injunction on the briefs."[4213]

Although a decision by election officials to break a proposed initiative into separate initiatives for its separate provisions considers the content of the proposed initiative, it is content neutral and not unconstitutional.[4214]

On July 28, 2017, Judge Graham dismissed an amended complaint.[4215] The court of appeals affirmed this decision on March 20, 2018.[4216]

4208. Complaint, Comm. to Impose Term Limits on the Ohio Supreme Court & to Preclude Special Legal Status for Members and Emps. of the Ohio Gen. Assembly v. Ohio Ballot Bd., No. 2:16-cv-1030 (S.D. Ohio Oct. 26, 2016), D.E. 1; Comm. to Impose Term Limits on the Ohio Supreme Court & to Preclude Special Legal Status for Members and Emps. of the Ohio Gen. Assembly v. Ohio Ballot Bd., 275 F. Supp. 3d 849, 853–54 (S.D. Ohio 2017); Comm. to Impose Term Limits on the Ohio Supreme Court & to Preclude Special Legal Status for Members and Emps. of the Ohio Gen. Assembly v. Ohio Ballot Bd., 218 F. Supp. 3d 589, 590 (S.D. Ohio 2016).

4209. Motion, *Committee*, No. 2:16-cv-1030 (S.D. Ohio Oct. 26, 2016), D.E. 2; *Committee*, 275 F. Supp. 3d at 853–54; *Committee*, 218 F. Supp. 3d at 590–92.

4210. Docket Sheet, *Committee*, No. 2:16-cv-1030 (S.D. Ohio Oct. 26, 2016) (notice, D.E. 7); *see Committee*, 218 F. Supp. 3d at 592.

4211. Order, *Committee*, No. 2:16-cv-1030 (S.D. Ohio Oct. 28, 2016), D.E. 8.

4212. *Committee*, 218 F. Supp. 3d 589.

4213. *Id.* at 592.

4214. *Id.* at 592–96.

4215. Comm. to Impose Term Limits on the Ohio Supreme Court & to Preclude Special Legal Status for Members and Emps. of the Ohio Gen. Assembly v. Ohio Ballot Bd., 275 F. Supp. 3d 849 (S.D. Ohio 2017); *see Committee*, No. 2:16-cv-1030 (S.D. Ohio Dec. 6, 2016), D.E. 14 (adding a petition signer as a plaintiff).

4216. Comm. to Impose Term Limits on the Ohio Supreme Court & to Preclude Special Legal Status for Members and Emps. of the Ohio Gen. Assembly v. Ohio Ballot Bd., 885 F.3d 443 (6th Cir. 2018).

Votes on City Incorporation by Voters Who Might Not Be in the New City

Davis v. Cooney (Eleanor L. Ross, N.D. Ga. 1:16-cv-3844)

A voter filed a suit to stop a referendum on the incorporation of a new city because two regions of the proposed city might not be included in the new city, depending on the results of other litigation, and so voters in those regions allegedly would dilute the plaintiff's vote. The district judge determined that the Equal Protection Clause did not restrict who could vote on incorporation as the plaintiff alleged.

Topics: Enjoining elections; equal protection; ballot measure.

On October 14, 2016, three days before the beginning of early voting in the general election, a voter filed a federal complaint in the Northern District of Georgia against officers of the board of registration and elections for Fulton County, the county that includes Atlanta.[4217] The voter claimed that his vote in a referendum on the incorporation of the City of South Fulton would be diluted by votes from residents of two potential parts of the new city that might not be part of the city, depending on how other litigation came out.[4218]

A potential part of the new city was the Fulton County Industrial District.[4219] A superior court judge invalidated a restriction on the district's becoming part of a city, but Georgia's supreme court vacated that ruling on ripeness grounds.[4220] Another potential part of the new city was the Cascade Annexation Area, the subject of pending litigation over whether Atlanta had annexed it.[4221]

With his complaint, the voter filed a motion for a temporary restraining order.[4222] Five days later, Judge Eleanor L. Ross set the case for hearing on October 27.[4223] At the conclusion of the hearing, Judge Ross denied the voter immediate relief.[4224]

4217. Complaint, Davis v. Cooney, No. 1:16-cv-3844 (N.D. Ga. Oct. 14, 2016), D.E. 1.

4218. *Id.*

4219. Opinion at 4, *id.* (Nov. 2, 2016), D.E. 26 [hereinafter *Davis* Opinion].

4220. Fulton County v. City of Atlanta, 299 Ga. 676, 791 S.E.2d 821 (2016); *Davis* Opinion, *supra* note 4219, at 4 & n.1.

4221. *Davis* Opinion, *supra* note 4219, at 5.

4222. Temporary-Restraining-Order Motion, *Davis*, No. 1:16-cv-3844 (N.D. Ga. Oct. 14, 2016), D.E. 2.

4223. Order, *id.* (Oct. 19, 2016), D.E. 13; *see* Arielle Kass, *Court Will Hear Case to Stop S. Fulton Vote*, Atlanta J.-Const., Oct. 22, 2016, at 5B.

4224. Minutes, *Davis*, No. 1:16-cv-3844 (N.D. Ga. Oct. 27, 2016), D.E. 25; *see* Arielle Kass, *Judge Won't Block Vote on South Fulton*, Atlanta J.-Const., Oct. 28, 2016, at 2B.

Five days later, Judge Ross issued a ten-page opinion noting a lack of "authority for the proposition that the Equal Protection Clause is violated where those outside the proposed city limits are allowed to vote on a referendum incorporating a new city."[4225]

Voters approved the creation of South Fulton.[4226] Three days later, the parties stipulated dismissal of the case.[4227]

Verbal Requirements in Initiative Advertising

Residents for The Beverly Hills Garden & Open Space Initiative v. City of Beverly Hills (Fernando M. Olguin, C.D. Cal. 2:16-cv-5532)

> On July 25, six days after a condominium-development initiative was approved for a city ballot in the November 8 general election, proponents of the initiative sought a temporary restraining order against a requirement that a substantial portion of their initiative advertising be devoted to a summary of the initiative prepared by city officials. On the following day, the district judge ordered the city to respond six days after that. On the day that the response was due, the parties stipulated an injunction reducing the amount of specified text required in advertising for the initiative. In the event, the initiative failed.
>
> *Topics:* Ballot measure; campaign materials.

Proponents of a Beverly Hills initiative in the November 8, 2016, general election concerning a condominium tower development filed a federal complaint in the Central District of California on July 25, six days after the initiative was approved for the ballot, challenging a requirement that the proponents devote so much of their advertising to a description of the initiative prepared by city officials.[4228] With their complaint, the plaintiffs filed an application for a temporary restraining order.[4229]

On the following day, Judge Fernando M. Olguin ordered the city to respond to the application by August 1, with an optional reply filed by August 3.[4230] Instead, the parties filed a proposed stipulated injunction on August 1 reducing the amount of specified text required in the plaintiffs'

4225. *Davis* Opinion, *supra* note 4219, at 6.

4226. *See* Arielle Kass & Mark Niesse, *Cityhood Efforts Yield 2 New Cities*, Atlanta J.-Const., Nov. 13, 2016, at 1B.

4227. Stipulation, *Davis*, No. 1:16-cv-3844 (N.D. Ga. Nov. 11, 2016), D.E. 29.

4228. Complaint, Residents for The Beverly Hills Garden & Open Space Initiative v. City of Beverly Hills, No. 2:16-cv-5532 (C.D. Cal. July 25, 2016), D.E. 1.

4229. Temporary-Restraining-Order Application, *id.* (C.D. Cal. July 25, 2016), D.E. 6.

4230. Minutes, *id.* (July 26, 2016), D.E. 13 (also ordering service of the complaint on the city by 5:00 p.m. on July 27).

advertising.[4231] Judge Olguin issued the stipulated injunction on August 2.[4232]

On November 8, the initiative failed.[4233] The parties stipulated dismissal of the action on November 14.[4234]

Nullifying an Initiative Gag Order

Taylor v. Johnson (John Corbett O'Meara, E.D. Mich. 5:16-cv-10256)

> A district judge issued a preliminary injunction against a new statute that forbade local officials from providing any information on pending initiatives within sixty days of an election.
>
> *Topics:* Ballot measure; campaign materials; campaign finance.

On January 26, 2016, seventeen local officials in Michigan and one voter filed a federal complaint in the Eastern District of Michigan against the state and its secretary of state challenging the constitutionality of a "gag order on public bodies and public officials that prohibits them from communicating with and informing their constituents about ballot questions in an objectively neutral way during the two months before an election."[4235] Effective January 6, Michigan's election laws provided,

> Except for an election official in the performance of his or her duties under the Michigan election law, 1954 PA 116, MCL 168.1 to 168.992, a public body, or a person acting for a public body, shall not, during the period 60 days before an election in which a local ballot question appears on a ballot, use public funds or resources for a communication by means of radio, television, mass mailing, or prerecorded telephone message if that communication references a local ballot question and is targeted to the relevant electorate where the local ballot question appears on the ballot.[4236]

With their complaint, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction.[4237]

4231. Stipulation, *id.* (Aug. 1, 2016), D.E. 22.

4232. Order, *id.* (Aug. 2, 2016), D.E. 23.

4233. *See* Sarah Parvini, *Two Development Measures Rejected*, L.A. Times, Nov. 10, 2016, at B8.

4234. Stipulation, *Residents*, No. 2:16-cv-5532 (C.D. Cal. Aug. 14, 2016), D.E. 24.

4235. Complaint at 2, Taylor v. Johnson, No. 5:16-cv-10256 (E.D. Mich. Jan. 26, 2016), D.E. 1; *see Lawsuit: "Gag Order" Unconstitutional*, Cheboygan Daily Trib., Jan. 27, 2016, at A3; Caleb Whitmer, *Lawsuit Filed Against Controversial Ballot Question Restrictions*, Holland Sentinel, Jan. 27, 2016, Mich. News, at 3.

4236. Mich. Comp. Laws § 169.257(3); *see* Opinion at 2, *Taylor*, No. 5:16-cv-10256 (E.D. Mich. Feb. 5, 2016), D.E. 27 [hereinafter *Taylor* Opinion], 2016 WL 447539.

4237. Motion, *Taylor*, No. 5:16-cv-10256 (E.D. Mich. Jan. 26, 2016), D.E. 3.

Judge John Corbett O'Meara set the case for hearing on February 4.[4238] He accepted four amicus curiae briefs.[4239]

On February 5, he ruled that the provision was void as unconstitutionally vague.[4240] "Public officials deserve clarity on this issue so that they may serve the public in the normal course without fear of arbitrary sanction or prosecution."[4241] "For example, Plaintiff Douglas Alexander, City Manager for the City of Algonac, was planning to communicate factual, neutral information regarding a ballot proposal in the city's quarterly newsletter."[4242]

Pursuant to the parties' agreement, Judge O'Meara converted the preliminary injunction to a permanent injunction, thereby resolving the case, on April 28.[4243]

State-Court Ballot Litigation and the Federal Deadline for Overseas Ballots

Board of County Commissioners v. Duran (1:14-cv-844) and New Mexico ex rel. Salazar v. Duran (1:14-cv-848) (Karen B. Molzen, D.N.M.)

> A state's secretary of state removed two actions to federal court that challenged her refusal to put nonbinding ballot questions on two counties' ballots, citing federal requirements that she transmit absentee ballots to overseas voters imminently. The parties consented to a magistrate judge's presiding over the cases, and the judge determined that she did not have federal jurisdiction over the cases, applying the well-pleaded complaint rule. The state court ruled promptly against the secretary of state.
>
> *Topics:* Getting on the ballot; ballot measure; absentee ballots; case assignment; matters for state courts; Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA).

Three days before the September 20, 2014, federal deadline for mailing absentee ballots overseas for the 2014 general election, New Mexico's secre-

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4238. Notice, *id.* (Jan. 29, 2016), D.E. 14; *see* Notice, *id.* (Jan. 28, 2016), D.E. 13 (initially setting the hearing for February 3).

4239. Brief, *id.* (Feb. 3, 2016), D.E. 26; Brief, *id.* (Feb. 2, 2016), D.E. 24; Docket Sheet, *id.* (Jan. 26, 2016).

4240. *Taylor* Opinion, *supra* note 4236, at 9; *see* Jonathan Oosting, *Judge Halts "Gag Order" Law on Ballot Info*, Detroit News, Feb. 6, 2016, at A3; *see also* Jackie Smith, *Officials Hurry Ballot Issue Info Out to Voters*, Port Huron Times Herald, Feb. 22, 2016, at A6.

4241. *Taylor* Opinion, *supra* note 4236, at 9; *see* Amy Biolchini & Caleb Whitmer, *Temporary Reprieve*, Holland Sentinel, Feb. 7, 2016, Mich. News, at 1.

4242. *Taylor* Opinion, *supra* note 4236, at 3.

4243. Consent Judgment, *Taylor*, No. 5:16-cv-10256 (E.D. Mich. Apr. 28, 2016), D.E. 35.

tary of state filed an injunction motion in the District of New Mexico challenging a state-court action by Bernalillo's county clerk as improperly delaying the printing of ballots in Bernalillo County.[4244]

The clerk had filed a mandamus petition with New Mexico's supreme court on September 15, challenging the secretary of state's refusal to place advisory questions on Bernalillo's ballots.[4245] New Mexico's supreme court set the matter for hearing on September 23 and stayed final printing of ballots for Bernalillo County.[4246] The secretary removed this action to federal court on September 16.[4247] On the following day, the county clerk moved for a remand.[4248] Magistrate Judge Karen B. Molzen set the motions for hearing at 4:00 that afternoon.[4249]

In the District of New Mexico, civil cases other than prisoner petitions were assigned to magistrate judges, who presided over the cases with the parties' consent.[4250] In this case, the parties consented.[4251]

Overseas ballots were the subject of litigation for 2010 and 2012 elections. On October 14, 2010, Judge Martha Vázquez issued a consent decree[4252] binding New Mexico and the U.S. Justice Department to remedies for New Mexico election officials' sending some overseas voters late absentee ballots in violation of the Uniformed and Overseas Citizens Absentee

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4244. Injunction Motion, Bd. of Cty. Comm'rs v. Duran, No. 1:14-cv-844 (D.N.M. Sept. 17, 2014), D.E. 5 [hereinafter *Bd. of Cty. Comm'rs* Injunction Motion].

4245. Mandamus Petition, Bd. of Cty. Comm'rs v. Duran, No. 34,890 (N.M. Sept. 15, 2014), *also filed as* Ex. A, Notice of Removal, *Bd. of Cty. Comm'rs*, No. 1:14-cv-844 (D.N.M. Sept. 16, 2014), D.E. 1 [hereinafter Bernalillo County Notice of Removal].

"One of the two non-binding Bernalillo County questions would center on marijuana decriminalization, while the other would be on raising taxes for mental-health programs." Dan Boyd, *Debate Heats Up on Easing Pot Penalties*, Albuquerque J., Sept. 17, 2014, at A1.

4246. Order, *Bd. of Cty. Comm'rs*, No. 34,890 (N.M. Sept. 16, 2014), *also filed as* Ex. B, Bernalillo County Notice of Removal, *supra* note 4245; *see* Dan McKay, *High Court Will Hear Bern. Ballot Arguments*, Albuquerque J., Sept. 16, 2014, at A1.

4247. Bernalillo County Notice of Removal, *supra* note 4245.

4248. Remand Motion, *Bd. of Cty. Comm'rs*, No. 1:14-cv-844 (D.N.M. Sept. 17, 2014), D.E. 7.

4249. Order, *id.* (Sept. 17, 2014), D.E. 8.

Tim Reagan interviewed Judge Molzen for this report by telephone on September 21, 2015.

4250. Interview with Judge Karen B. Molzen, Sept. 21, 2015.

4251. Minutes, *Bd. of Cty. Comm'rs*, No. 1:14-cv-844 (D.N.M. Sept. 17, 2014), D.E. 9.

4252. Consent Decree, United States v. New Mexico, No. 1:10-cv-968 (D.N.M. Oct. 14, 2010), D.E. 7, *also filed as* Ex. A, *Bd. of Cty. Comm'rs* Injunction Motion, *supra* note 4244; *see* Complaint, *Bd. of Cty. Comm'rs*, No. 1:14-cv-844 (D.N.M. Oct. 12, 2010), D.E. 1.

Voting Act of 1986,[4253] as amended by the Military and Overseas Voter Empowerment Act of 2009.[4254] A supplemental consent decree covered the 2012 election cycle.[4255]

On the day after Bernalillo filed its action with New Mexico's supreme court, Santa Fe County filed a similar mandamus action,[4256] which the supreme court set for hearing on September 19, 2014.[4257] New Mexico's secretary of state removed this action on September 17,[4258] and Santa Fe County moved for a remand on September 18.[4259] Assured that the parties in the second case also consented to magistrate-judge jurisdiction, Judge Molzen consolidated the Bernalillo action and the Santa Fe action.[4260] She held a second hearing on September 18.[4261]

Finding that the federal court lacked subject-matter jurisdiction over the cases, following the well-pleaded complaint rule, Judge Molzen remanded the two cases on the day of the second hearing.[4262]

4253. Pub. L. No. 99-410, 100 Stat. 924, *as amended*, 52 U.S.C. §§ 20301–20311. *See generally* Robert Timothy Reagan, Overseas Voting: The Uniformed and Overseas Citizens Absentee Voting Act (Federal Judicial Center 2016).

4254. National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, 123 Stat. 2190, 2318–35.

4255. Supplemental Consent Decree, *United States v. New Mexico*, No. 1:10-cv-968 (D.N.M. Aug. 1, 2011), D.E. 12.

4256. Mandamus Petition, New Mexico *ex rel.* Salazar v. Duran, No. 34,893 (N.M. Sept. 16, 2014), *also filed as* Ex. A, Notice of Removal, New Mexico *ex rel.* Salazar v. Duran, No. 1:14-cv-848 (D.N.M. Sept. 17, 2014), D.E. 1 [hereinafter Santa Fe County Notice of Removal]; *see* Boyd, *supra* note 4245 ("Earlier this month, the Santa Fe commission voted to include a question on the ballot asking voters whether the commission should support city, county and statewide efforts to decriminalize possession of one ounce or less of marijuana.").

4257. Order, *Salazar*, No. 34,893 (N.M. Sept. 17, 2014), *also filed as* Ex. B, Santa Fe County Notice of Removal, *supra* note 4256.

4258. Santa Fe County Notice of Removal, *supra* note 4256.

4259. Remand Motion, *Salazar*, No. 1:14-cv-848 (D.N.M. Sept. 18, 2014), D.E. 4.

4260. Order, Bd. of Cty. Comm'rs v. Duran, No. 1:14-cv-844 (D.N.M. Sept. 18, 2014), D.E. 13; Docket Sheet, *Salazar*, No. 1:14-cv-848 (D.N.M. Sept. 17, 2014) (D.E. 5 to 7); Interview with Judge Karen B. Molzen, Sept. 21, 2015; *see* Joint Motion to Consolidate, *Salazar*, No. 1:14-cv-848 (D.N.M. Sept. 18, 2014), D.E. 9.

4261. Minutes, *Bd. of Cty. Comm'rs*, No. 1:14-cv-844 (D.N.M. Sept. 18, 2014), D.E. 14.

4262. Order, *id.* (Sept. 18, 2014), D.E. 15; Interview with Judge Karen B. Molzen, Sept. 21, 2015; *see* Scott Sandlin, *Ballot Issue Back in State Court*, Albuquerque J., Sept. 19, 2014, at C1 ("A case may be removed by the defendant only if it could have been filed in federal court in the first place, she said.").

On September 19, New Mexico's supreme court ruled in favor of non-binding questions on the counties' ballots.[4263] Judge Molzen was pleased that the state court was able to resolve the cases promptly.[4264]

Electronic Bingo and Voting Rights

Johnson v. Riley (Sharon Lovelace Blackburn, N.D. Ala. 7:10-cv-2067)

> Voters filed a federal complaint challenging police actions against electronic bingo operations as a violation of the voting rights of the voters who approved the operations. The complaint included a claim that executive orders and police actions violated the Voting Rights Act because they had not received section 5 preclearance. The district judge denied as moot a motion for a temporary restraining order preserving a state-court injunction, because the state court had denied a motion to dissolve its order. The following year, the court accepted a voluntary dismissal.
>
> *Topics:* Section 5 preclearance; matters for state courts; ballot measure.

On Thursday, July 29, 2010, thirty-one voters filed a federal complaint in the Northern District of Alabama, challenging Alabama's police actions against electronic bingo operations in Greene and Macon Counties as a violation of the voting rights of the voters who approved the operations.[4265] The complaint included a claim that executive orders and police actions violated the Voting Rights Act because they had not received section 5 preclearance.[4266]

4263. Order, Bd. of Cty. Comm'rs v. Duran, No. 34,890 (N.M. Sept. 19, 2014); *see* Thomas J. Cole, *Ballot Fight Comes Down to "Other Questions,"* Albuquerque J., Sept. 29, 2014, at A1; Dan McKay, *Court Puts Pot Questions Back on Ballot*, Albuquerque J., Sept. 20, 2014, at A1.

4264. Interview with Judge Karen B. Molzen, Sept. 21, 2015.

4265. Complaint, Johnson v. Riley, No. 7:10-cv-2067 (N.D. Ala. July 29, 2010), D.E. 1 [hereinafter *Johnson* Complaint]; *see* Charles J. Dean, *Electronic Bingo Advocates File Suit in Federal Court*, Birmingham News, July 30, 2010, at 5.

4266. *Johnson* Complaint, *supra* note 4265, at 15–17; *see* Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (2017) (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination and requiring that preclearance disputes be heard by a three-judge district court).

On June 25, 2013, the Supreme Court declined to hold section 5 unconstitutional, but the Court did hold unconstitutional the criteria for which jurisdictions require section 5 preclearance. Shelby County v. Holder, 570 U.S. 529 (2013).

The plaintiffs filed a motion for a preliminary injunction on Monday[4267] and a motion for a temporary restraining order on Wednesday.[4268]

On the case's second Friday, Judge Sharon Lovelace Blackburn denied as moot the motion for a temporary restraining order preserving a state-court injunction, because the state court had denied a motion to dissolve its order.[4269] She also asked the circuit's chief judge to empanel a three-judge district court,[4270] and he empaneled one on August 11.[4271]

On February 3, 2011, Judge Blackburn accepted the plaintiffs' voluntary dismissal.[4272]

Certification Deadline for Ballot-Initiative Signatures

Personhood Mississippi v. Hood (Daniel P. Jordan III, S.D. Miss. 3:10-cv-71)

> Supporters of a ballot initiative alleged in a federal complaint that application of a year-long signature period was unconstitutional because county election officials were sometimes taking so long to certify ballot-petition signatures that the initiative supporters could not efficiently determine where to allocate signature-drive resources. The parties appeared in chambers on the day that the complaint was filed, and the state filed a response three days later. Four days after that, the district judge abstained from providing immediate relief because resolution of issues of state law could moot the federal constitutional issues. Later, the court dismissed the action on stipulation.
>
> *Topics:* Ballot measure; getting on the ballot.

On February 2, 2010, supporters of a ballot initiative that would establish conception as the beginning of personhood filed a federal complaint in the Southern District of Mississippi alleging an unconstitutional application of the year-long signature period, which was to conclude on February 13, because county election officials were sometimes taking too long to certify ballot-petition signatures so that the initiative supporters could not efficiently determine where to allocate signature-drive resources.[4273] With

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4267. Preliminary-Injunction Motion, *Johnson*, No. 7:10-cv-2067 (N.D. Ala. Aug. 2, 2010), D.E. 3.

4268. Temporary-Restraining-Order Motion, *id.* (Aug. 4, 2010), D.E. 5.

4269. Order, *id.* (Aug. 6, 2010), D.E. 7, *amended*, Order, *id.* (Aug. 13, 2010), D.E. 11; *see* Kim Chandler, *Judge Won't Allow Raid*, Birmingham News, Aug. 6, 2010, at 1.

4270. Docket Sheet, *Johnson*, No. 7:10-cv-2067 (N.D. July 29, 2010).

4271. Order, *id.* (Aug. 11, 2010), D.E. 9.

4272. Dismissal Order, *id.* (Feb. 3, 2011), D.E. 27.

4273. Complaint, Personhood Miss. v. Hood, No. 3:10-cv-71 (S.D. Miss. Feb. 2, 2010), D.E. 1.

their complaint, the plaintiffs filed a motion for a temporary restraining order or a preliminary injunction.[4274]

> On the day Plaintiffs filed suit, attorneys for the parties appeared in chambers to discuss Plaintiffs' concomitant motion for preliminary injunction. The parties agreed that the issues could be decided without evidentiary hearing and waived argument. The State filed an expedited response Friday, February 5, 2010. Plaintiffs filed their reply the evening of Monday, February 8, raising a new argument that the Voter Initiative Act is unconstitutional for lack of a deadline for circuit clerks to certify the signatures.[4275]

On February 9, pursuant to *Railroad Commission v. Pullman Co.*, Judge Daniel P. Jordan III abstained from providing the plaintiffs with immediate relief "because resolution of the dispute over the interpretation of Mississippi law could moot the federal constitutional issues."[4276]

On April 16, Judge Jordan approved a stipulated dismissal of the action.[4277] The initiative was certified for the November ballot,[4278] and it failed by a vote of 58% to 42%.[4279]

Public Disclosure of Referendum Petition Signatures

Doe v. Reed (Benjamin H. Settle, W.D. Wash. 3:09-cv-5456)

> Persons who signed a referendum petition filed a federal complaint seeking to enjoin the state's releasing the identities of the over 138,500 signatories. The district court held a proceeding that afternoon and a hearing on the following day, which the state defendants chose not to attend. The court issued a temporary restraining order and held a preliminary-injunction hearing a little more than a month later. The district court granted a preliminary injunction, but the court of appeals reversed it. At the

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4274. Motion, *id.* (Feb. 2, 2010), D.E. 3.

4275. Opinion at 2, *id.* (Feb. 9, 2010), D.E. 11 [hereinafter *Personhood Miss.* Opinion], 2010 WL 538302.

4276. *Id.* at 5–10; *see* R.R. Comm'n v. Pullman Co., 312 U.S. 496 (1941) (holding that if resolution of an uncertain state-law matter might moot a federal constitutional question, "In the absence of any showing that . . . methods for securing a definitive ruling in the state courts cannot be pursued with full protection of the constitutional claim, the district court should exercise its wise discretion by staying its hands.").

Judge Jordan also determined that Mississippi had Eleventh Amendment immunity from a federal court's interpretation of Mississippi law. *Personhood Miss.* Opinion, *supra* note 4275, at 4–5.

4277. Order, *Personhood Miss.*, No. 3:10-cv-71 (S.D. Miss. Apr. 16, 2010), D.E. 13.

4278. *See Abortion Issue on 2011 Ballot*, Jackson Clarion-Ledger, Apr. 2, 2010, at A1.

4279. *See Defeat May Not End "Personhood" Efforts in Miss.*, Delta Democrat Times, Nov. 12, 2011.

> beginning of its term, the Supreme Court stayed the reversal, reinstating the injunction, but the Supreme Court affirmed the court of appeals' reversal at the end of the Supreme Court term. On remand, the district court denied the plaintiffs' as-applied challenge and lifted the injunction. After the petitions were released on the internet, the court of appeals determined that the case was moot.
>
> *Topics:* Ballot measure; intervention.

Protect Marriage Washington and two anonymous persons filed a federal complaint in the Western District of Washington's Tacoma courthouse, which serves the state's capital, for declaratory and injunctive relief on July 28, 2009, seeking to protect the identities of over 138,500 Washington residents who signed a referendum petition.[4280] Referendum 71, planned for the November 2009 election, sought to overturn legislation granting domestic partners rights and responsibilities more similar to those of married partners.[4281] With their complaint, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction.[4282]

The court assigned the case to Judge Benjamin H. Settle, who held a courtroom proceeding at 4:20 p.m. on the day that the case was filed, instructed the plaintiffs to serve the defendants, and set a hearing on a temporary restraining order for the following afternoon.[4283] The defendants, Washington's secretary of state and his public-records officer, did not appear at the July 29 hearing.[4284] Several members of the news media were at the proceeding, but not so many as to cause any difficulties.[4285]

Finding "a colorable First Amendment claim," Judge Settle temporarily enjoined the defendants "from releasing the names, addresses, or other contact information of those individuals who signed the Referendum 71 petition."[4286] Judge Settle set a preliminary-injunction hearing for September 3.[4287]

4280. Complaint, Doe v. Reed, No. 3:09-cv-5456 (W.D. Wash. July 28, 2009), D.E. 2; Doe v. Reed, 561 U.S. 186, 193 (2010); Doe v. Reed, 586 F.3d 671, 675–76 (9th Cir. 2009); Doe v. Reed, 823 F. Supp. 2d 1195, 1196 (W.D. Wash. 2011); *see* W.D. Wash. L. Civ. R. 5(e)(1) (assigning cases in Thurston County to the Tacoma courthouse).

4281. *Doe*, 561 U.S. at 191; *Doe*, 586 F.3d at 673, 674–75; *Doe*, 823 F. Supp. 2d at 1197.

4282. Motion, *Doe*, No. 3:09-cv-5456 (W.D. Wash. July 28, 2009), D.E. 3.

4283. Docket Sheet, *id.* (July 28, 2009) [hereinafter *Doe* Docket Sheet] (D.E. 1).

Tim Reagan interviewed Judge Settle for this report by telephone on October 30, 2012.

4284. Temporary Restraining Order, *Doe*, No. 3:09-cv-5456 (W.D. Wash. July 29, 2009), D.E. 9 [hereinafter *Doe* Temporary Restraining Order].

4285. Interview with Judge Benjamin H. Settle, Oct. 30, 2012.

4286. *Doe* Temporary Restraining Order, *supra* note 4284; *Doe*, 586 F.3d at 676; *see*

On August 6, the secretary moved to join as defendants entities that had requested disclosure of the signatories.[4288] Judge Settle determined that the entities could seek intervention if they wished.[4289] On August 27[4290] and September 1,[4291] two of the entities moved to intervene.

On August 28, Washington Families Standing Together (WAFST) moved to intervene because the temporary restraining order was impairing its state-court challenge to the secretary's certification of the referendum for the November ballot.[4292] On September 3, Judge Settle modified the temporary restraining order to permit WAFST access to signature information for purposes of challenging the referendum so long as WAFST did not publicly disclose the signatories' identities.[4293]

At the September 3 hearing, Judge Settle denied without prejudice one motion to intervene because it was defectively filed and granted the others.[4294] On September 16, he again denied intervention to the pro se defective filer because the filer's interests were adequately represented by other parties.[4295]

On September 10, applying strict scrutiny to Washington's Public Records Act (PRA), Judge Settle granted the plaintiffs a preliminary injunction.[4296]

Lornet Turnbull, *Judge Bars Release of Names on Petitions*, Seattle Times, July 30, 2009, at B1.

4287. *Doe* Temporary Restraining Order, *supra* note 4284.

4288. Joinder Motion, *Doe*, No. 3:09-cv-5456 (W.D. Wash. Aug. 6, 2009), D.E. 23.

4289. Order, *id.* (Aug. 24, 2009), D.E. 33.

4290. Intervention Motion, *id.* (Aug. 27, 2009), D.E. 36.

4291. Intervention Motion, *id.* (Sept. 1, 2009), D.E. 58.

4292. Intervention Motion, *id.* (Aug. 28, 2009), D.E. 43; *see* Janet I. Tu, *Foes Sue to Block Referendum 71*, Seattle Times, Aug. 28, 2009, at B1 (reporting on the state court case).

4293. Order, *Doe*, No. 3:09-cv-5456 (W.D. Wash. Sept. 3, 2009), D.E. 59; *see Names on R-71 Petitions Stay Hidden as Judge Studies Case*, Seattle Times, Sept. 4, 2009, at B1.

4294. *Doe* Docket Sheet, *supra* note 4283 (D.E. 62); Preliminary Injunction at 2, *Doe*, No. 3:09-cv-5456 (W.D. Wash. Sept. 10, 2009), D.E. 63 [hereinafter *Doe* Preliminary Injunction].

4295. Order, *Doe*, No. 3:09-cv-5456 (W.D. Wash. Sept. 16, 2009), D.E. 73, *summarily aff'd*, Order, Doe v. Reed, No. 09-35832 (9th Cir. Nov. 1, 2010).

4296. *Doe* Preliminary Injunction, *supra* note 4294; Doe v. Reed, 561 U.S. 186, 193 (2010); Doe v. Reed, 697 F.3d 1235, 1237 (9th Cir. 2012); Doe v. Reed, 586 F.3d 671, 676 (9th Cir. 2009); Doe v. Reed, 823 F. Supp. 2d 1195, 1196 (W.D. Wash. 2011); *see* Janet I. Tu, *R-71 Signatures Kept Private*, Seattle Times, Sept. 11, 2009, at A1.

An appeal was heard on October 14,[4297] and the court of appeals reversed the injunction on October 15.[4298] A week later, the court issued its opinion:

> The district court's analysis was based on the faulty premise that the PRA regulates anonymous political speech. . . .
>
> To the extent the district court did not rely exclusively on anonymous speech cases, the district court nonetheless erred in applying strict scrutiny. . . .
>
> . . . .
>
> We conclude that each of the State's asserted interests is sufficiently important to justify the PRA's incidental limitations on referendum petition signers' First Amendment freedoms.[4299]

On October 20, the Supreme Court stayed the court of appeals' ruling and reinstated Judge Settle's injunction.[4300]

On June 24, 2010, however, the Supreme Court affirmed the court of appeals' decision, concluding that disclosure of referendum petitions in general does not violate the First Amendment.[4301] "We leave it to the lower courts to consider in the first instance the signers' more focused claim concerning disclosure of the information on this particular petition, which is pending before the District Court."[4302]

On October 17, 2011, Judge Settle denied the plaintiffs' as-applied challenge and lifted the injunction.[4303] On October 23, 2012, the court of appeals denied an appeal as moot: "The petitions are now available in original and in searchable form on the internet."[4304]

4297. *Doe*, 586 F.3d at 676; *see Both Sides Make Case on R-71 Signatures*, Seattle Times, Oct. 15, 2009, at B3.

4298. Order, Doe v. Reed, Nos. 09-3518, 09-35826, and 09-35863 (9th Cir. Oct. 15, 2009); *Doe*, 697 F.3d at 1237; *see* Lornet Turnbull, *Release Signatures, Court Says, But Appeal Planned*, Seattle Times, Oct. 16, 2009, at B1.

4299. *Doe*, 586 F.3d at 677, 680 (applying intermediate scrutiny); *see Doe*, 561 U.S. at 193.

4300. Doe v. Reed, 558 U.S. 967 (2009); *see* Lornet Turnbull, *All Petition Signatures a Secret—For Now*, Seattle Times, Oct. 21, 2009, at A1; William Yardley, *Justices Uphold Ban on Releasing Names on a Petition*, N.Y. Times, Oct. 21, 2009, at A22.

4301. *Doe*, 561 U.S. at 191; *Doe*, 697 F.3d at 1238; *see* Adam Liptak, *Secrecy Rejected on Ballot Petitions*, N.Y. Times, June 25, 2010, at A22; Janet I. Tu & Kyung Song, *High Court Ruling Won't End Fight Over Ref. 71*, Seattle Times, June 25, 2010, at A1.

4302. *Doe*, 561 U.S. at 191.

4303. Doe v. Reed, 823 F. Supp. 2d 1195 (W.D. Wash. 2011); *Doe*, 697 F.3d at 1238; *see* Lornet Turnbull, *Ruling Leads to Release of Ref. 71 Signers' Names*, Seattle Times, Oct. 18, 2011, at B1.

4304. *Doe*, 697 F.3d at 1238.

On November 3, 2009, the voters preserved expanded rights and responsibilities for domestic partners.[4305]

Preclearance of an Election to Incorporate a City

Sabel v. Pinal County (James A. Teilborg, D. Ariz. 2:07-cv-2000)

> A suit to enjoin an election on the incorporation of a city for lack of preclearance was filed three weeks before the election. A three-judge district court determined that incorporation elections did not require preclearance.
>
> *Topics:* Section 5 preclearance; enjoining elections; three-judge court; case assignment.

A Pinal County voter filed a federal complaint in the District of Arizona on October 16, 2007, to enjoin a scheduled November 6 election on the incorporation of Arizona City within Pima County for lack of preclearance pursuant to section 5 of the Voting Rights Act.[4306] With his complaint, the voter filed a motion for an order to show cause.[4307]

The court assigned the case to Magistrate Judge Michelle H. Burns.[4308] Because of a request for reassignment to a district judge, the court assigned the case to Judge James A. Teilborg on October 22.[4309] That day, Judge Teilborg ordered that the case be assigned to a three-judge district court to review the section 5 claim.[4310] Chief Circuit Judge Mary M. Schroeder ap-

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4305. *See* Janet I. Tu, *Ref. 71 Certified for Ballot, but Legal Battle Not Over Yet*, Seattle Times, Sept. 3, 2009, at B1; Janet I. Tu, *State Voters Expand the Rights of Same-Sex Couples*, Seattle Times, Nov. 6, 2009, at A1; Lornet Turnbull, *Domestic Partner Measure Kicks In*, Seattle Times, Dec. 3, 2009, at A1.

4306. Complaint, Sabel v. Pinal County, No. 2:07-cv-2000 (D. Ariz. Oct. 16, 2007), D.E. 1; *see* Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination and requiring that preclearance disputes be heard by a three-judge district court).

On June 25, 2013, the Supreme Court declined to hold section 5 unconstitutional, but the Court did hold unconstitutional the criteria for which jurisdictions require section 5 preclearance. Shelby County v. Holder, 570 U.S. 529 (2013).

4307. Motion, *Sabel*, No. 2:07-cv-2000 (D. Ariz. Oct. 16, 2007), D.E. 2.

4308. Docket Sheet, *id.* (Oct. 16, 2007).

Judge Burns retired on February 22, 2023. Appointment of New Magistrate Judge, www.azd.uscourts.gov/sites/default/files/announcements/US%20District%20Court%20%5BBURNS%5D%200922F.pdf, *archived at* web.archive.org/web/20230504181134/www.azd.uscourts.gov/sites/default/files/announcements/US%20District%20Court%20[BURNS]%200922F.pdf.

4309. Minute Order, *Sabel*, No. 2:07-cv-2000 (D. Ariz. Oct. 22, 2007), D.E. 8.

4310. Order, *id.* (Oct. 22, 2007), D.E. 11.

pointed Circuit Judge Pamela A. Rymer and District Judge Susan R. Bolton to join Judge Teilborg as the three-judge court.[4311]

On November 2, the court determined on the briefs that an election to incorporate a city is not a covered change under section 5.[4312] Judge Teilborg dismissed the case as moot after defeat of the incorporation measure in the election.[4313]

Grievance About a Change in Mayoral Power

Winstead v. Stodola (William R. Wilson, Jr., E.D. Ark. 4:07-cv-682)

> Five days before a special election, a federal complaint challenged a ballot measure that would convert the position of Little Rock mayor from part time to full time. Following two recusals, the district judge then assigned the case denied immediate relief on the day before the election.
>
> *Topics:* Ballot measure; case assignment; recusal; class action.

Five days before an August 14, 2007, special election to convert the position of Little Rock mayor from a part-time position to a full-time position with expanded powers, five citizens filed a federal complaint in the Eastern District of Arkansas challenging the propriety of the scheme.[4314] The plaintiffs named as defendants the City of Little Rock, the State of Arkansas, the governor, Little Rock's mayor and city attorney, six of Little Rock's ten city directors, three county election commissioners, and the commission's director.[4315] With their complaint, the plaintiffs filed a motion for an immediate injunction.[4316]

The court assigned the case to Judge Susan Webber Wright, but she recused herself because she was on vacation, so the court reassigned the case to Judge J. Leon Holmes.[4317] Judge Holmes set the case for hearing on Monday, August 13.[4318] One of the plaintiffs, who unlike the other plain-

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4311. Order, *id.* (Oct. 23, 2007), D.E. 15.

Judge Rymer died on September 21, 2011. Federal Judicial Center Biographical Directory of Article III Federal Judges, www. fjc.gov/history/judges.

4312. Order, *Sabel*, No. 2:07-cv-2000 (D. Ariz. Nov. 2, 2007), D.E. 28.

4313. Order, *id.* (Dec. 14, 2007), D.E. 31.

4314. Complaint, Winstead v. Stodola, No. 4:07-cv-682 (E.D. Ark. Aug. 9, 2007), D.E. 1 [hereinafter *Winstead* Complaint].

4315. *Id.*

4316. Motion, *id.* (Aug. 9, 2007), D.E. 3.

4317. Transfer Order, *id.* (Aug. 10, 2007), D.E. 4.

Judge Holmes retired on February 5, 2020. Federal Judicial Center Biographical Directory of Article III Federal Judges, www. fjc.gov/history/judges.

4318. Order, *Winstead*, No. 4:07-cv-682 (E.D. Ark. Aug. 10, 2007), D.E. 6.

tiffs was appearing pro se,[4319] moved for Judge Holmes's recusal[4320] because the judge "has previously been the subject of a judicial complaint filed by the undersigned,"[4321] and Judge Holmes granted the motion.[4322] The court reassigned the case to Judge William R. Wilson, Jr., who is now known as Judge Billy Roy Wilson.[4323]

Receiving the case at 2:40 p.m. on Friday, August 10, Judge Wilson informed the plaintiffs that he could proceed with the Monday hearing so long as he received timely confirmation that the defendants received notice.[4324] At the Monday morning hearing, Judge Wilson denied the plaintiffs immediate relief and set the case for another hearing on September 26.[4325]

Because the plaintiffs did not file a brief by their August 27 deadline, Judge Wilson dismissed the case on August 30 without prejudice.[4326] On the following day, the plaintiffs filed an amended complaint, styled as a class action.[4327]

After additional briefing, Judge Wilson dismissed the case on September 13 as a general grievance.[4328] The court of appeals agreed that the plaintiffs lacked standing.[4329]

Constitutionality of a Ballot Measure

Ajax Gaming Ventures v. Brown (William E. Smith, D.R.I. 1:06-cv-336)

> The suit challenged the constitutionality of a ballot measure in an upcoming election. The court denied immediate relief, because constitutionality could be assessed after the election. The measure did not pass.
>
> *Topics:* Ballot measure; intervention.

The deadline for printing ballots and other election materials in Rhode Island for the 2006 general election was August 9.[4330] On Friday, July 21, a

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4319. *Winstead* Complaint, *supra* note 4314, at 8.

4320. Recusal Motion, *Winstead*, No. 4:07-cv-682 (E.D. Ark. Aug. 10, 2007), D.E. 8.

4321. Recusal Motion Brief, *id.* (Aug. 10, 2007), D.E. 9.

4322. Order, *id.* (Aug. 10, 2007), D.E. 10.

4323. Transfer Order, *id.* (Aug. 10, 2007), D.E. 12.

4324. Letter, *id.* (Aug. 10, 2007), D.E. 14.

4325. Minutes, *id.* (Aug. 13, 2007), D.E. 23; Notice, *id.* (Aug. 13, 2007), D.E. 24.

4326. Order, *id.* (Aug. 30, 2007), D.E. 31.

4327. Amended Complaint, *id.* (Aug. 31, 2007), D.E. 41.

4328. Opinion, *id.* (Sept. 13, 2007), D.E. 65, 2007 WL 2710096.

4329. Anthony v. Stodola, 329 F. App'x 693 (8th Cir. July 7, 2009).

4330. Opinion, Ajax Gaming Ventures, LLC v. Brown, No. 1:06-cv-336 (D.R.I. Aug. 8, 2006), D.E. 17 [hereinafter *Ajax Gaming Ventures, LLC* Opinion]; Agreed Statement of

casino developer associated with Donald Trump and its municipal partner, the Town of Johnston, filed a federal action to enjoin inclusion on the ballot of a constitutional amendment that would have permitted Harrah's and its municipal partner, the Town of West Warwick, to establish a casino with the Narragansett Indian Tribe.[4331] The plaintiffs alleged that the proposed amendment violated equal protection and the First Amendment because it would bestow discriminatory commercial and political benefits on the ethnic tribe and its business partners.[4332] With their complaint, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction.[4333]

Rhode Island's supreme court had declined to issue an advisory opinion on the matter.[4334]

On Monday, the tribe and its partner developer moved to intervene,[4335] a motion that was granted by stipulation on August 9.[4336] Judge William E. Smith allowed Rhode Island's attorney general to participate in the case as an amicus curiae.[4337]

Judge Smith held a status conference on Tuesday, July 25.[4338] It was his practice in emergency cases to quickly assemble the parties for a confer-

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Facts, *id.* (July 28, 2006), D.E. 9 [hereinafter *Ajax Gaming Ventures, LLC* Agreed Statement of Facts]; *see Eleventh-Hour Ruling Likely on West Warwick Casino Vote*, Providence J. Bull., July 26, 2006, at B1 ("If the ballot is not set by Aug. 9, the state faces $1 million in extra preparation and printing costs, said Peter Kerwin, spokesman for Secretary of State Matt Brown.").

4331. Complaint, *Ajax Gaming Ventures, LLC*, No. 1:06-cv-336 (D.R.I. July 21, 2006), D.E. 1 [hereinafter *Ajax Gaming Ventures, LLC* Complaint]; *see Johnston Files Suit to Block Casino Vote*, Providence J. Bull., July 22, 2006, at A1.

4332. *Ajax Gaming Ventures, LLC* Complaint, *supra* note 4331; *Ajax Gaming Ventures, LLC* Opinion, *supra* note 4330, at 1–3.

4333. Motion, *Ajax Gaming Ventures, LLC*, No. 1:06-cv-336 (D.R.I. July 21, 2006), D.E. 2.

4334. *In re* Advisory Opinion to the Governor, 904 A.2d 67 (R.I. 2006); *see Ajax Gaming Ventures, LLC* Agreed Statement of Facts, *supra* note 4330, at 3; *see also Court Refuses to Consider Casino Vote*, Providence J. Bull., July 14, 2006, at A1.

4335. Intervention Motion, *Ajax Gaming Ventures, LLC*, No. 1:06-cv-336 (D.R.I. July 24, 2006), D.E. 5.

4336. Stipulation, *id.* (Aug. 9, 2006), D.E. 18.

4337. *Ajax Gaming Ventures, LLC* Opinion, *supra* note 4330, at 3 n.2; *see* Transcript at 37, *Ajax Gaming Ventures, LLC*, No. 1:06-cv-336 (D.R.I. Aug. 7, 2006, filed Oct. 2, 2006), D.E. 30 [hereinafter *Ajax Gaming Ventures, LLC* Transcript].

Tim Reagan interviewed Judge Smith for this report by telephone on May 23, 2012.

4338. Docket Sheet, *Ajax Gaming Ventures, LLC*, No. 1:06-cv-336 (D.R.I. July 21, 2006) [hereinafter *Ajax Gaming Ventures, LLC* Docket Sheet].

ence and work toward stipulated facts.[4339] Three days later, the parties filed an agreed statement of facts.[4340] On August 7, a little more than two weeks after the case began, Judge Smith held a hearing,[4341] and on the following day he denied the plaintiffs preliminary injunctive relief.[4342] "While it is probably true that Plaintiffs have demonstrated a likelihood of success on the merits for at least one claim—perhaps even a substantial likelihood of success—this Court is not persuaded of the potential for irreparable harm to Plaintiffs if the referendum question appears on the ballot."[4343] The constitutionality of the amendment could be tested after the election, and it might not even pass.[4344]

In fact, the amendment failed.[4345] On November 13, the parties stipulated dismissal of the case.[4346]

Signature Requirements for a Ballot Question

Protect Marriage Illinois v. Orr (Elaine E. Bucklo, N.D. Ill. 1:06-cv-3835)

> On July 14, 2006, proponents of an advisory question for the 2006 general election in Illinois filed a constitutional challenge to the petition requirements for getting their question on the ballot. The plaintiffs claimed that the number of signatures required was too onerous, as was the requirement that the signatures and the signers' addresses match voter-registration cards. On August 2, the district judge granted the defendants' motion to dismiss the case. The court of appeals affirmed the dismissal.
>
> *Topics:* Getting on the ballot; ballot measure; intervention.

On July 14, 2006, proponents of an advisory question for the 2006 general election in Illinois filed a constitutional challenge to the petition require-

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4339. Interview with Judge William E. Smith, May 23, 2012.

4340. *Ajax Gaming Ventures, LLC* Agreed Statement of Facts, *supra* note 4330, at 3; *Ajax Gaming Ventures, LLC* Transcript, *supra* note 4337, at 83 ("I want to thank all counsel for . . . working together to develop a stipulation of facts that allows this case to be decided on an expedited basis").

4341. *Ajax Gaming Ventures, LLC* Docket Sheet, *supra* note 4338; *Ajax Gaming Ventures, LLC* Transcript, *supra* note 4337.

4342. *Ajax Gaming Ventures, LLC* Opinion, *supra* note 4330; *see U.S. Court Keeps Casino Question on Nov. Ballot*, Providence J. Bull., Aug. 9, 2006, at A1.

4343. *Ajax Gaming Ventures, LLC* Opinion, *supra* note 4330, at 7.

4344. *Id.* at 8–9.

4345. *See* Scott Mayerowitz, *No Question, Casino Rejected*, Providence J. Bull., Nov. 8, 2006 (reporting that the vote against the amendment was approximately 63%).

4346. Stipulation, Ajax Gaming Ventures, LLC v. Brown, No. 1:06-cv-336 (D.R.I. Aug. 8, 2006), D.E. 31.

ments for getting their question on the ballot.[4347] The plaintiffs claimed that the number of signatures required was too onerous, as was the requirement that the signatures and the signers' addresses match voter-registration cards.[4348] With their complaint, the plaintiffs filed a motion for expedited hearing, seeking relief before an August 4 evaluation of their ballot petition's validity.[4349] On July 18, the plaintiffs filed an amended complaint and another motion to expedite consideration.[4350]

Judge Elaine E. Bucklo held a conference with the parties on July 20 to determine whether matters of controversy were factual or just legal; although the plaintiffs were reluctant to waive an evidentiary hearing, the case appeared to be substantially a legal one.[4351] She granted expedition and ordered briefing on a preliminary injunction to be completed by July 31.[4352] On August 2, Judge Bucklo granted the defendants' motion to dismiss the case.[4353] She denied as moot a motion by voters to intervene in opposition to the complaint.[4354]

On September 6, the court of appeals affirmed the dismissal.[4355] Ballots are primarily a vehicle for candidates, not ballot questions.[4356] "The ballot is not a traditional public forum for the expression of ideas and opinions,

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4347. Amended Complaint, Protect Marriage Ill. v. Orr, No. 1:06-cv-3835 (N.D. Ill. July 18, 2006), D.E. 7 [hereinafter *Protect Marriage Ill.* Amended Complaint]; Complaint, *id.* (July 14, 2006), D.E. 1 [hereinafter *Protect Marriage Ill.* Complaint]; Protect Marriage Ill. v. Orr, 463 F.3d 604, 605–06 (7th Cir. 2006); Protect Marriage Ill. v. Orr, 458 F. Supp. 2d 562, 567 (N.D. Ill. 2006); *see* Second Amended Complaint, *Protect Marriage Ill.*, No. 1:06-cv-3835 (N.D. Ill. July 21, 2006), D.E. 15.

4348. *Protect Marriage Ill.* Amended Complaint, *supra* note 4347; *Protect Marriage Ill.* Complaint, *supra* note 4347; *Protect Marriage Ill.*, 463 F.3d at 606, 608.

4349. Expedition Motion, *Protect Marriage Ill.*, No. 1:06-cv-3835 (N.D. Ill. July 18, 2006), D.E. 4.

4350. Expedition Motion, *id.* (July 18, 2006), D.E. 8; *Protect Marriage Ill.* Amended Complaint, *supra* note 4347.

4351. Transcript, *Protect Marriage Ill.*, No. 1:06-cv-3835 (N.D. Ill. July 20, 2006, filed Oct. 17, 2006), D.E. 84.

4352. Minute Entry, *id.* (July 20, 2006), D.E. 10; *see* Minute Entry, *id.* (July 27, 2006), D.E. 32 (granting permission for briefs up to thirty pages in length).

4353. Protect Marriage Ill. v. Orr, 458 F. Supp. 2d 562 (N.D. Ill. 2006); Minute Entry, *Protect Marriage Ill.*, No. 1:06-cv-3835 (N.D. Ill. Aug. 2, 2006), D.E. 71.

4354. *Protect Marriage Ill.*, 458 F. Supp. 2d at 564, 575; *see* Motion to Intervene, *Protect Marriage Ill.*, No. 1:06-cv-3835 (N.D. Ill. July 27, 2006), D.E. 38.

4355. Protect Marriage Ill. v. Orr, 463 F.3d 604 (7th Cir. 2006), *cert denied*, 549 U.S. 1208 (2007).

4356. *Id.* at 608.

like streets or parks, to which reasonable access must be given to people who want to engage in political and other protected expression."[4357]

Discrepancies Between Ballot Petitions and Ballot Text

Martinez v. Monterey County (Jeremy Fogel, N.D. Cal. 5:05-cv-2950)

> A federal complaint challenged a ballot initiative as different in wording from the text circulated for ballot-access signatures and challenged the change in wording as a change in election procedures requiring preclearance pursuant to section 5 of the Voting Rights Act. In parallel litigation, the state's supreme court provisionally ruled that the electorate should not be denied an opportunity to vote on the initiative unless the text discrepancies were sufficiently misleading. A three-judge federal district court declined to interfere with state proceedings because the state court also had jurisdiction over the federal question. The initiative failed, and the state's supreme court subsequently ruled that the text discrepancies were not so great as to merit an injunction against including the initiative on the ballot.
>
> *Topics:* Ballot language; ballot measure; section 5 preclearance; matters for state courts; three-judge court; case assignment.

Two Monterey County voters filed a federal complaint in the Northern District of California's San Jose courthouse on July 20, 2005, to enjoin a November 8 ballot initiative as different in wording from the text circulated for ballot-access signatures, claiming the change in text to be a change in voting practices requiring preclearance pursuant to section 5 of the Voting Rights Act, because Monterey County was subject to section 5 preclearance requirements.[4358] According to the complaint,

> Proposition 77, a purported good government initiative, seeks to change the time and manner in which congressional, state legislative, and board of equalization districts in California are drawn in disregard of the California Constitution and the state elections code provisions designed to ensure the integrity of the initiative process and provide accurate information to the California electorate.[4359]

4357. *Id.* at 606.

4358. Complaint, Martinez v. Monterey County, No. 5:05-cv-2950 (N.D. Cal. July 20, 2005), D.E. 1 [hereinafter *Martinez* Complaint]; *see* Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination).

4359. *Martinez* Complaint, *supra* note 4358, at 1.

The November election was a special election set by Governor Schwarzenegger for initiatives, including several favored by the governor.[4360]

With their complaint, the plaintiffs filed an ex parte application for a temporary restraining order[4361] and a request for a three-judge district court.[4362] The plaintiffs declined assignment of the case to a magistrate judge,[4363] and the court assigned the case to District Judge Jeremy Fogel.[4364] The plaintiffs amended their complaint on July 28.[4365]

On August 1, the plaintiffs filed a request for a temporary-restraining-order hearing, attaching a decision by the superior court for the County of Sacramento enjoining the placement of Proposition 77 on the November ballot, finding that the differences in text were substantive.[4366] Noting that the state-court injunction was stayed pending an appeal to be heard on August 5, Judge Fogel denied the plaintiffs a temporary restraining order on August 4, but Judge Fogel did agree to seek appointment of a three-judge court to be ready to hear the case at an appropriate time.[4367]

On August 9, California's court of appeal declined to reverse the superior court by writ of mandate, noting that the text discrepancies resulted

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4360. *See* Robert Salladay & Nancy Vogel, *Initiative Is Under Review*, L.A. Times, July 6, 2005, at 1.

4361. Temporary-Restraining-Order Application, *Martinez*, No. 5:05-cv-2950 (N.D. Cal. July 20, 2005), D.E. 2.

4362. Three-Judge-Court Request, *id.* (July 20, 2005), D.E. 5; *see* § 10304 (requiring that preclearance disputes be heard by a three-judge district court).

4363. Declination, *Martinez*, No. 5:05-cv-2950 (N.D. Cal. July 20, 2005), D.E. 7.

4364. Reassignment Order, *id.* (July 20, 2005), D.E. 9.

Judge Fogel was the Federal Judicial Center's director from October 3, 2011, through his retirement on September 14, 2018. Federal Judicial Center Biographical Directory of Article III Federal Judges, www. fjc.gov/history/judges; *see* Supreme Court Press Release, July 25, 2018, www.fjc.gov/sites/default/files/07.25.18-Press%20Release-FJCAnnouncement.pdf (announcing General John Cooke as Judge Fogel's successor).

4365. Amended Complaint, *Martinez*, No. 5:05-cv-2950 (N.D. Cal. July 28, 2005), D.E. 11.

4366. Hearing Request, *id.* (Aug. 1, 2005), D.E. 12 (including a July 21, 2005, injunction by Superior Court Judge Gail Ohanesian in *Lockyer v. McPherson*, No. 05CS00998); *see* Dean E. Murphy, *Setback for Schwarzenegger on a Redistricting Measure*, N.Y. Times, July 22, 2005, at A16; Jim Sanders, *Election Measure Rejected by Court*, Sacramento Bee, July 22, 2005, at A1; Nancy Vogel, *Gov.'s Remap Bid Ruled Invalid*, L.A. Times, July 22, 2005, at 1; John Wildermuth, *Redistricting Plan Thrown Off State Ballot*, S.F. Chron., July 22, 2005, at A1.

4367. Opinion, *Martinez*, No. 5:05-cv-2950 (N.D. Cal. Aug. 4, 2005), D.E. 25; *see* Three-Judge-Court Request, *id.* (Aug. 4, 2005), D.E. 26.

from the initiative proponents' negligence.[4368] On August 12, California's supreme court granted review, staying the superior court's injunction, and stated that denying the electorate an opportunity to vote on the initiative depended on whether the text discrepancies were likely to have misled the petition signers.[4369]

As the election approached, the decision of California's supreme court was that the proposition should be on the ballot pending a final decision on the merits, which the supreme court came to issue in February 2006.[4370] On October 12, 2005, the federal three-judge district court denied the plaintiffs' motion to lift the federal-court stay.[4371]

> [The California Supreme Court's] ultimate determination of this issue may well moot the instant action; at the very least, its explication of California law will inform this Court's analysis of whether the discrepancies constitute a change in California's voting procedures sufficient to trigger Section 5.
>
> While it is true, as Plaintiffs argue, that the question of whether the proponents of Proposition 77 have complied substantially with state election law is distinct from the *federal* question of whether there has been a change in voting procedures within the meaning of Section 5, *amicus curiae* notes correctly that the California Supreme Court itself has jurisdiction to decide, as a collateral matter, whether the asserted change in California's voting procedures requires Section 5 preclearance.[4372]

On October 17, the plaintiffs filed a notice of appeal to the U.S. Supreme Court.[4373] On November 8, the initiative failed.[4374] On February 16,

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4368. Costa v. Superior Court (Lockyer), 131 Cal. App. 4th 1105, 32 Cal. Rptr. 562 (2005); *see* Christian Berthelsen, *Redistricting Measure Loses in Appeals Court*, S.F. Chron., Aug. 10, 2005, at B2; Peter Hecht, *Appellate Ruling Halts Prop. 77*, Sacramento Bee, Aug. 10, 2005, at A3; Nancy Vogel, *Justices Bar Redistricting Effort*, L.A. Times, Aug. 10, 2005, at 1.

4369. Costa v. Superior Court (Lockyer), 128 P.3d 149, 39 Cal. Rptr. 3d 168 (Cal. 2005); *see* Bob Egelko & Christian Berthelsen, *California Supreme Court Overturns Appellate Ruling in Big Win for Governor*, S.F. Chron., Aug. 13, 2005, at A1; Dean E. Murphy, *Redistricting Referendum Resurrected in California*, N.Y. Times, Aug. 13, 2005, at A8; Jim Sanders, *Redistricting on Ballot to Stay*, Sacramento Bee, Aug. 13, 2005, at A1; Nancy Vogel, *Redistricting Back on Ballot*, L.A. Times, Aug. 13, 2005, at 1.

4370. Costa v. Superior Court (Lockyer), 37 Cal. 4th 986, 128 P.3d 675, 39 Cal. Rptr. 3d 470 (2006).

4371. Opinion, *Martinez*, No. 5:05-cv-2950 (N.D. Cal. Oct. 12, 2005), D.E. 81, 2005 WL 2562629 (decision by Circuit Judge Richard Tallman and District Judges Fogel and Susan Illston).

4372. *Id.* at 7–8.

4373. Docket Sheet, *Martinez*, No. 5:05-cv-2950 (N.D. Cal. July 20, 2005).

2006, California's supreme court concluded that "the error committed by the proponents of Proposition 77 did not justify the action of the lower courts in withholding Proposition 77 from the election ballot."[4375] The federal case was dismissed by stipulation on March 1.[4376]

Preclearance of an Election to Create a Hospital District

Hernandez v. Kirkham (Marcia A. Crone, E.D. Tex. 1:05-cv-134)

> Eleven days after an election to create a hospital district, five residents filed a federal complaint charging that the election and earlier precinct changes had not received preclearance pursuant to section 5 of the Voting Rights Act. At a district-court hearing two days later, the parties agreed to a temporary restraining order that enjoined the conveyance of any property to the hospital district until the end of April. The Justice Department granted preclearance in April, so the district-court action was dismissed.
>
> *Topics:* Section 5 preclearance; three-judge court.

On February 16, 2005, five Texas residents filed a federal complaint in the Eastern District of Texas's Beaumont courthouse alleging that a February 5 election to create a hospital district had not been precleared pursuant to section 5 of the Voting Rights Act[4377] and precinct changes dating back to 2001 also had not been precleared.[4378] With their complaint, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction.[4379]

4374. *Costa*, 37 Cal. 4th at 994, 128 P.3d at 676, 39 Cal. Rptr. 3d at 472; *see* Michael Finnegan & Robert Salladay, *Voters Reject Schwarzenegger's Bid to Remake State Government*, L.A. Times, Nov. 9, 2005, at 1; John Wildermuth, *Voters Reject Attempt to Take Boundary-Drawing from the Hands of State Legislators*, S.F. Chron., Nov. 9, 2005, at A14.

4375. *Costa*, 37 Cal. 4th at 1030, 128 P.3d at 702, 39 Cal. Rptr. 3d at 502–03; *see* Jim Sanders, *Ruling Settles Ballot Dispute*, Sacramento Bee, Feb. 17, 2006, at A3.

4376. Stipulated Dismissal, *Martinez*, No. 5:05-cv-2950 (N.D. Cal. Mar. 1, 2006), D.E. 112.

4377. *See* Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination and requiring that preclearance disputes be heard by a three-judge district court).

On June 25, 2013, the Supreme Court declined to hold section 5 unconstitutional, but the Court did hold unconstitutional the criteria for which jurisdictions require section 5 preclearance. Shelby County v. Holder, 570 U.S. 529 (2013).

4378. Complaint, Hernandez v. Kirkham, No. 1:05-cv-134 (E.D. Tex. Feb. 16, 2005), D.E. 1.

4379. Motion, *id.* (Feb. 16, 2005), D.E. 2.

The next day, the court set a hearing on the motion for February 18 before District Judge Marcia A. Crone.[4380] The circuit's chief judge designated a three-judge district court to hear the section 5 claims: Circuit Judge Jerry E. Smith, District Judge Thad Heartfield, and Judge Crone.[4381] At the hearing before Judge Crone, the parties agreed to a temporary restraining order that enjoined conveying any property to the hospital district until the end of April, subject to further court order and Justice Department preclearance of the February 5 election.[4382] A hearing on the plaintiffs' motion for a preliminary injunction was set for May 17.[4383] Later, the hearing date was moved up to May 5, two days before a planned election to select hospital-district directors.[4384]

The three-judge court conferred by telephone, but the judges determined that a court proceeding was unnecessary.[4385] The Justice Department precleared both the February 5 and the May 7 elections in April.[4386] So Judge Crone declined to enjoin the May 7 election.[4387] She dismissed the action on May 16.[4388]

Initiative to Reallocate Electoral Votes

Napolitano v. Davidson (Lewis T. Babcock, D. Colo. 1:04-cv-2114)

> A pro se plaintiff challenged a ballot initiative that would change the allocation of the state's Electoral College votes in the same election, alleging uncertainty in the strategic value of presidential votes. After expedited hearing, the court dismissed the complaint as too speculative.
>
> *Topics:* Ballot measure; pro se party; intervention; recusal.

On the 2004 general-election ballot in Colorado was proposed amendment 36 to Colorado's constitution; this amendment would allocate Colorado's nine electoral votes in the 2004 selection of President and Vice President

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4380. Notice, *id.* (Feb. 17, 2005), D.E. 4.

Tim Reagan interviewed Judge Crone for this report by telephone on September 7, 2012. Judge Heartfield died on December 27, 2022. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

4381. Order, *Hernandez*, No. 1:05-cv-134 (E.D. Tex. Feb. 17, 2005), D.E. 13.

4382. Temporary Restraining Order, *id.* (Feb. 22, 2005), D.E. 14 [hereinafter *Hernandez* Temporary Restraining Order]; Minutes, *id.* (Feb. 18, 2005), D.E. 15.

4383. *Hernandez* Temporary Restraining Order, *supra* note 4382.

4384. Notice, *Hernandez*, No. 1:05-cv-134 (E.D. Tex. Apr. 29, 2005), D.E. 26; Order, *id.* (May 6, 2005), D.E. 36 [hereinafter May 6, 2005, *Hernandez* Order].

4385. Interview with Judge Marcia A. Crone, Sept. 7, 2012.

4386. May 6, 2005, *Hernandez* Order, *supra* note 4384.

4387. *Id.*

4388. Order, *Hernandez*, No. 1:05-cv-134 (E.D. Tex. May 20, 2005), D.E. 39.

proportionally to the popular vote in Colorado rather than more traditionally awarding all to the winner in Colorado.[4389] On October 13, a voter filed a pro se federal constitutional challenge to the amendment.[4390] The plaintiff's chief complaint was the uncertainty that the proposed amendment created with respect to the effect of a presidential vote in the same election that the amendment was up for consideration.[4391] With his complaint, he filed motions for a temporary restraining order[4392] and a preliminary injunction.[4393]

The court assigned the case to Judge Robert E. Blackburn, but he recused himself because of his close acquaintance with the defendant secretary of state.[4394] Judge Lewis T. Babcock got the case instead.[4395] On the case's second day, Judge Babcock held a hearing on the motion for the temporary restraining order.[4396] He deferred ruling on injunctive relief until after briefing on motions to intervene by two parties—a Republican elector and a Democratic elector.[4397] Judge Babcock granted intervention.[4398]

4389. *See* Karen Abbott, *Amendment 36 Lawsuit*, Rocky Mountain News, Oct. 14, 2004, at 12A.

4390. Complaint, Napolitano v. Davidson, No. 1:04-cv-2114 (D. Colo. Oct. 13, 2004), D.E. 1 [hereinafter *Napolitano* Complaint], Ohio State University Mortiz College of Law, Election Law @ Moritz [hereinafter ELM], moritzlaw.osu.edu/electionlaw/litigation/documents/amend36complaint.pdf, *archived at* web.archive.org/web/20161217141819/moritzlaw.osu.edu/electionlaw/litigation/documents/amend36complaint.pdf; *see* Abbott, *supra* note 4389. *See generally* Richard L. Hasen, *When "Legislature" May Mean More than "Legislature": Initiated Electoral College Reform and the Ghost of* Bush v. Gore, 35 Hastings Const. L.Q. 599, 600–05 (2008).

4391. *Napolitano* Complaint, *supra* note 4390; *see* Karen Abbott, *Amendment 36 Suit Brings Out Lawyers*, Rocky Mountain News, Oct. 15, 2004, at 28A.

4392. Docket Sheet, *Napolitano*, No. 1:04-cv-2114 (D. Colo. Oct. 13, 2004) [hereinafter *Napolitano* Docket Sheet] (D.E. 4).

4393. Preliminary-Injunction Motion, *id.* (Oct. 13, 2004), D.E. 5, ELM, *supra* note 4390, moritzlaw.osu.edu/electionlaw/litigation/documents/amend36preliminjunction.pdf, *archived at* web.archive.org/web/20161217141817/moritzlaw.osu.edu/electionlaw/litigation/documents/amend36preliminjunction.pdf.

4394. *Napolitano* Docket Sheet, *supra* note 4392; Interview with Judge Lewis T. Babcock, July 25, 2012.

Tim Reagan interviewed Judge Babcock for this report by telephone.

4395. *Napolitano* Docket Sheet, *supra* note 4392.

4396. *Id.*

4397. *Id.*; *see* Abbott, *supra* note 4391; Alicia Caldwell, *Groups Target Electoral-Vote Case*, Denver Post, Oct. 15, 2004, at B2.

4398. *Napolitano* Docket Sheet, *supra* note 4392.

After a second hearing on October 26, Judge Babcock granted Colorado's motion to dismiss the case.[4399] The judge determined that the plaintiff's concerns were too speculative.[4400] The plaintiff decided not to pursue the case further.[4401] Judge Babcock recalled the pro se plaintiff as articulate and respectful.[4402]

The amendment did not pass.[4403]

Challenge to a Ballot-Initiative Financial Impact Estimate

Oregonians for Accountability v. Bradbury (Garr M. King, D. Or. 3:04-cv-1170)

> The district judge dismissed a complaint alleging that a financial impact estimate accompanying a ballot initiative was misleading, because the measure text, summary, and explanatory text would make clear to the voters what the measure would do.
>
> *Topics:* Ballot language; ballot measure; laches.

Supporters of a ballot initiative filed a federal complaint in the District of Oregon on August 23, 2004, challenging as misleading the financial impact estimate to accompany the ballot question in the November 2 election.[4404] With their complaint, the plaintiffs filed a motion for a preliminary injunction.[4405]

On August 24, Judge Garr M. King scheduled a telephone conference for August 25.[4406] On the day after the September 1 oral argument,[4407] Judge King dismissed the complaint.[4408]

4399. *Id.*; *see* Karen Abbott, *Judge Tosses Ballot Lawsuit*, Rocky Mountain News, Oct. 27, 2004, at 26A.

4400. *See* Abbott, *supra* note 4399.

4401. *See id.*

4402. Interview with Judge Lewis T. Babcock, July 25, 2012.

4403. *See* Jim Tankersley & Ann Carnahan, *Electoral Votes Remain in Single Bloc*, Rocky Mountain News, Nov. 3, 2004, at 14A.

4404. Complaint, Oregonians for Accountability v. Bradbury, No. 3:04-cv-1170 (D. Or. Aug. 23, 2004), D.E. 1.

4405. Docket Sheet, *id.* (Aug. 23, 2004) [hereinafter D. Or. *Oregonians for Accountability* Docket Sheet] (D.E. 3).

4406. *Id.* (D.E. 4, 5).

Judge King died on February 5, 2019. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

4407. D. Or. *Oregonians for Accountability* Docket Sheet, *supra* note 4405 (D.E. 21).

4408. Opinion, *Oregonians for Accountability*, No. 3:04-cv-1170 (D. Or. Sept. 2, 2004), D.E. 25 [hereinafter *Oregonians for Accountability* Opinion], 2004 WL 1969405 (noting that the opinion was issued on the due date for delivery of the financial impact statement to county clerks); *see* Dan Hortsch, *Ruling Leaves Financial Impacts in SAIF Ballot Title*,

He acknowledged a strong argument for laches.[4409] The federal complaint followed a state-court action filed on August 9 and voluntarily dismissed on August 23.[4410]

> The only practical relief available to the court at this point would be to strike the Estimate from the ballot and voters' pamphlet and, accordingly, deprive voters of any financial impact estimate and create a void that would render already-submitted voters' pamphlet arguments (that refer to the Estimate) nonsensical.[4411]

Judge King dismissed the complaint on the merits.[4412] "The summary of the measure and the explanatory statement (not to mention the full text of the measure), which accompany the Estimate, make abundantly clear what [the measure] will do."[4413]

The court of appeals denied the plaintiffs an injunction pending appeal and denied them expedited briefing.[4414] On October 27, the parties stipulated dismissal of the appeal.[4415]

Minimum County Requirements for Ballot Petitions

Committee to Regulate and Control Marijuana v. Heller (James C. Mahan, D. Nev. 2:04-cv-1035)

> Supporters of an initiative to regulate marijuana filed a federal complaint claiming that Nevada had improperly disqualified signatures on their ballot petition. Three days later, the district judge enjoined the state from taking any action that would prevent the court from providing the plaintiffs with further injunctive relief. One month after that, the judge invalidated a state provision requiring a minimum number of signatures from a supermajority of counties for a ballot measure, because the provision favored voters in small counties. Because the judge left in place a provision that resulted in the disqualification of signa-

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Oregonian, Sept. 3, 2004, at D9; Michael Rose, *SAIF Foes Suffer a Setback*, Salem Statesman J., Sept. 3, 2004, at 1B.

4409. *Oregonians for Accountability* Opinion, *supra* note 4408, at 6–7.

4410. *Id.* at 6 (noting that the case should have been brought in Oregon's supreme court instead of a county circuit court and that Oregon's supreme court did not have jurisdiction to review the amount of the estimate).

4411. *Id.* at 7.

4412. *Id.* at 7–10.

4413. *Id.* at 9.

4414. Docket Sheet, Oregonians for Accountability v. Bradbury, No. 04-35780 (9th Cir. Sept. 9, 2004) (D.E. 5).

4415. Order, *id.* (Oct. 27, 2004), D.E. 6, *filed as* Order, Oregonians for Accountability v. Bradbury, No. 3:04-cv-1170 (D. Or. Oct. 27, 2004), D.E. 28.

> tures by voters who may not have registered before signing the ballot petition, the initiative failed to qualify for the election. The court of appeals affirmed the district judge's decisions.
>
> *Topics:* Ballot measure; getting on the ballot; equal protection; registration procedures.

Supporters of an initiative to regulate marijuana in Nevada filed a federal complaint on July 27, 2004, claiming that Nevada had improperly disqualified signatures on their ballot petition.[4416] With their complaint, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction.[4417] On the following day, Judge James C. Mahan set the matter for a hearing on August 13.[4418]

On July 30, Judge Mahan issued a temporary restraining order: "defendants are restrained from nullifying, processing, and/or verifying the petitions and petition signatures submitted in support of the Regulation of Marijuana Initiative."[4419] In addition, Judge Mahan ordered "that defendants shall not take any action that would in any manner affect the ability of the court to grant plaintiffs' request for preliminary injunction" and ordered the plaintiffs to post a nominal $100 bond.[4420]

On August 20, Judge Mahan declared unconstitutional two provisions of Nevada's initiative law.[4421] First, he declared it unconstitutional for Nevada to require a minimum number of petition signatures from each of at least 75% of Nevada's counties.[4422] Second, he declared unconstitutional "the requirement that each document in a petition submitted in support of an Initiative must contain an affidavit of Document Signer that is executed

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4416. Complaint, Comm. to Regulate & Control Marijuana v. Heller, No. 2:04-cv-1035 (D. Nev. July 27, 2004), D.E. 1; ACLU v. Lomax, 471 F.3d 1010, 1014 (9th Cir. 2006); *see* Carri Geer Thevenot, *ACLU Sues, Tries to Save Initiative*, Las Vegas Rev.-J., July 28, 2004, at 1B.

4417. Motion, *Comm. to Regulate & Control Marijuana*, No. 2:04-cv-1035 (D. Nev. July 27, 2004), D.E. 4–5; *ACLU*, 471 F.3d at 1014.

4418. Order, *Comm. to Regulate & Control Marijuana*, No. 2:04-cv-1035 (D. Nev. July 28, 2004), D.E. 6; *ACLU*, 471 F.3d at 1014.

4419. Temporary Restraining Order, *Comm. to Regulate & Control Marijuana*, No. 2:04-cv-1035 (D. Nev. Aug. 2, 2004), D.E. 8.

4420. *Id.*

4421. Injunction, *id.* (Aug. 20, 2004), D.E. 21; *ACLU*, 471 F.3d at 1015 [hereinafter *Comm. to Regulate & Control Marijuana* Injunction]; *see* Carri Geer Thevenot, *Rules on Initiative Process Unconstitutional*, Las Vegas Rev.-J., Aug. 14, 2004, at 1A.

4422. *Comm. to Regulate & Control Marijuana* Injunction, *supra* note 4421; *ACLU*, 471 F.3d at 1015.

by a person who signed the petition as a supporter of the Initiative."[4423] Judge Mahan denied the plaintiffs' request to nullify a rule disqualifying petition signatures by voters who may have registered after signing the petition.[4424] As a result of this last holding, the initiative failed to qualify for the 2004 general-election ballot.[4425]

On immediate appeal by the plaintiffs, the court of appeals affirmed on September 8, by a vote of two to one, Judge Mahan's ruling against the plaintiffs.[4426] Nine days later, Nevada filed its notice of appeal, challenging Judge Mahan's 75% holding.[4427] The court of appeals affirmed that holding on December 8, 2006.[4428]

Both the district court's and the court of appeals' holdings were dictated by the court of appeals' previously declaring unconstitutional Idaho's requirement that ballot initiatives be promoted by 6% of the voters in at least half of the counties: "this geographic distribution requirement favors residents of sparsely populated areas over residents of more densely populated areas in their respective efforts to participate in the process of qualifying initiatives for the ballot."[4429] The Idaho case, in turn, applied a 1969 holding by the Supreme Court in *Moore v. Ogilvie* declaring unconstitutional as a violation of equal protection an Illinois requirement that presidential nominating petitions include a minimum number of signatures from at least fifty of Illinois's 102 counties, noting that "93.4% of the State's registered voters reside in the forty-nine most populous counties, and only 6.6% are resident in the remaining fifty-three counties."[4430]

On August 1, 2007, Judge Mahan awarded the plaintiffs $107,511.99 in attorney fees and costs.[4431]

4423. *Id.*

4424. *Id.*

4425. Dissenting Opinion at 1–2, Comm. to Regulate & Control Marijuana v. Lomax, No. 04-16626 (9th Cir. Sept. 8, 2004), *filed as* Judgment, *Comm. to Regulate & Control Marijuana*, No. 2:04-cv-1035 (D. Nev. Oct. 25, 2004), D.E. 34 [hereinafter *Comm. to Regulate & Control Marijuana* Judgment]; *see ACLU*, 471 F.3d at 1013; *see also* Ed Vogel, *Petitions Fall Short in Support*, Las Vegas Rev.-J., Sept. 2, 2004, at 1B.

4426. Opinion, *Comm. to Regulate & Control Marijuana*, No. 04-16626 (9th Cir. Sept. 8, 2004), *filed as Comm. to Regulate & Control Marijuana* Judgment, *supra* note 4425; *see ACLU*, 471 F.3d at 1015; *see also* Ed Vogel, *Ruling Sounds Petitions' Death Knell*, Las Vegas Rev.-J., Sept. 9, 2004, at 1A.

4427. Notice of Appeal, *Comm. to Regulate & Control Marijuana*, No. 2:04-cv-1035 (D. Nev. Sept. 17, 2004), D.E. 30; *ACLU*, 471 F.3d at 1015.

4428. *ACLU*, 471 F.3d 1010.

4429. Idaho Coal. United for Bears v. Cenarrussa, 342 F.3d 1073, 1074 (9th Cir. 2003).

4430. 394 U.S. 814, 816 (1969).

4431. Order, *Comm. to Regulate & Control Marijuana*, No. 2:04-cv-1035 (D. Nev.

Required Ballot Notice for a Levy Initiative

Horton v. Multnomah County (Ancer L. Haggerty, D. Or. 3:03-cv-1257)

> The district judge enjoined application of a statute requiring a possibly misleading notice on ballot initiatives for new levies stating that property taxes could increase by more than three percent if the initiative passed, leaving unstated that an increase that high would only arise from the maximum increase in assessments permitted by law. The court of appeals vacated the injunction pending appeal and reversed the injunction two years later.
>
> *Topics:* Ballot language; ballot measure; matters for state courts; interlocutory appeal; intervention; attorney fees.

The U.S. Court of Appeals for the Ninth Circuit determined that a required ballot notice for a levy initiative that might appear misleading in isolation was not misleading in the context of the state's property-assessment regulations.

Supporters of a special-levy ballot initiative in Multnomah County filed a federal complaint in the District of Oregon on September 12, 2003, claiming that a ballot statement certified on September 4 was inaccurate.[4432] The complaint also challenged the constitutionality of the statute requiring the ballot statement.[4433] Judge Ancer L. Haggerty set the case for hearing on September 18 and invited Oregon's attorney general to intervene because of the challenge to the constitutionality of a statute.[4434] Judge Haggerty also granted a party's intervention in support of the statute.[4435]

The ballot statement was required by Oregon law:

> (a) Except as provided in paragraph (b) of this subsection, the ballot title for a measure authorizing the imposition of local option taxes shall contain the following additional statement:
>
> > This measure may cause property taxes to increase more than three percent.
>
> (b) The ballot title for a measure authorizing the renewal of current local option taxes shall contain the following additional statement:

Aug. 2, 2007), D.E. 70.

4432. Complaint, Horton v. Multnomah County, No. 3:03-cv-1257 (D. Or. Sept. 12, 2003), D.E. 1.

4433. *Id.*

4434. Order, *id.* (Sept. 18, 2003), D.E. 14 [hereinafter Sept. 18, 2003, *Horton* Order]; *see* Docket Sheet, *id.* (Sept. 12, 2003) [hereinafter D. Or. *Horton* Docket Sheet] (granting Oregon's motion to intervene, D.E. 30); Intervention Motion, *id.* (Sept. 26, 2003), D.E. 23.

4435. Sept. 18, 2003, *Horton* Order, *supra* note 4434; *see* D. Or. *Horton* Docket Sheet, *supra* note 4434 (motion to intervene, D.E. 11).

This measure renews current local option taxes.[4436]

On September 19, Judge Haggerty concluded, "Plaintiffs correctly contend that the three percent warning is grossly inaccurate."[4437] A one-year special levy of $0.003 per $1,000 assessed value is much less than a three percent increase in taxes, which averaged $21 per $1,000 assessed value.[4438]

Judge Haggerty determined, however, that the federal court was without jurisdiction to hear the challenge to the ballot language, because the ballot language was certified by a state judge; among federal courts, only the Supreme Court has jurisdiction to review state-court decisions.[4439] Judge Haggerty could, however, review the constitutionality of the statute relied on by the state-court judge.[4440]

Following the September 19 decision, the plaintiffs presented Judge Haggerty with a transcript of the state judge's proceeding, which contradicted defense counsel's representation that the state judge had considered the constitutionality of the statute.[4441] Judge Haggerty concluded on October 3 that he had jurisdiction over the application of the statute to the ballot language after all.[4442]

At an October 15 hearing, the defendants informed Judge Haggerty that the ballots need not be mailed out until October 21.[4443] On the morning of an October 17 hearing, however, "defendants mailed 345,000 ballots to Multnomah County voters. This number constitutes over ninety-nine percent of the ballots for the election."[4444] On October 17, Judge Haggerty issued an injunction against Oregon's mandatory three-percent statement on all initiatives for a local option tax and ordered the defendants to pub-

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4436. O.R.S. § 280.070(4).

4437. Opinion at 4, *Horton*, No. 3:03-cv-1257 (D. Or. Sept. 19, 2003), D.E. 17 [hereinafter Sept. 19, 2003, *Horton* Opinion].

4438. *Id.* at 3–4.

"Conceivably, defendants argue, Multnomah County could raise the assessed valuation of homes by exactly three percent, as permitted by the Oregon Constitution, and the small tax increase authorized by Measure 26-52 would then 'raise property taxes more than three percent.' This interpretation of the three percent warning is rejected." Opinion at 7, *id.* (Oct. 17, 2003), D.E. 45 [hereinafter *Horton* Injunction Opinion].

4439. Sept. 19, 2003, *Horton* Opinion, *supra* note 4437, at 6–8; *see* D.C. Ct. of Appeals v. Feldman, 460 U.S. 462 (1983).

4440. Sept. 19, 2003, *Horton* Opinion, *supra* note 4437, at 8–10.

4441. Opinion, *Horton*, No. 3:03-cv-1257 (D. Or. Oct. 3, 2003), D.E. 31.

4442. *Id.*

4443. *Horton* Injunction Opinion, *supra* note 4438, at 13.

4444. *Id.*

lish widely corrections to the incorrect ballot statement.[4445] The court of appeals, however, stayed the injunction pending appeal.[4446] On December 15, 2003, the court of appeals dismissed the appeals as moot and vacated the injunction as it applied to the 2003 election, but left in effect the injunction as it applied to future elections.[4447]

Judge Haggerty applied his reasoning in the Multnomah County case to a January 14, 2004, ruling in pending litigation over a Yamhill County initiative scheduled for a March 9 election.[4448] On May 27, Judge Haggerty awarded the Yamhill County plaintiffs $14,000 in attorney fees and costs;[4449] on December 6, he awarded the Multnomah County plaintiffs $30,475 in attorney fees and costs.[4450]

Reviewing the Yamhill County case, the court of appeals determined on September 6, 2005, that the Oregon statute was constitutional.[4451] The court of appeals evaluated the statute in the context of an underlying three-percent limit on annual assessments so that voter-approved levies, no matter how small, could increase taxes by more than three percent if assessments were increased at the maximum allowed rate.[4452] The court of appeals determined that the First Amendment burden imposed by the statute was justified by the state's interest in informing voters, observing that strict scrutiny is not generally applied to election laws' First Amendment intrusions.[4453]

Judge Haggerty vacated his injunction and awards of attorney fees.[4454]

4445. *Id.* at 14–15; *see* Dave Hogan & Harry Esteve, *Ballot Tax Warning Is Ruled Misleading*, Oregonian, Oct. 18, 2003, at A1.

4446. Docket Sheet, Horton v. Multnomah County, No. 03-35841 (9th Cir. Oct. 21, 2003) (D.E. 7) (state's appeal); Docket Sheet, Horton v. Multnomah County, No. 03-35837 (9th Cir. Oct. 20, 2003) (D.E. 4) (intervenor's appeal); Docket Sheet, Horton v. Multnomah County, No. 03-35836 (9th Cir. Oct. 20, 2003) (D.E. 10) (county's appeal); *see* Dave Hogan, *Appeals Court Blocks PUD Ads*, Oregonian, Oct. 22, 2003, at B1.

4447. Order, *Horton*, Nos. 03-35836, 05-35837, and 03-35841 (9th Cir. Dec. 15, 2003), D.E. 34, 32, 33, *filed as* Order, *Horton*, No. 3:03-cv-1257 (D. Or. Jan. 13, 2004), D.E. 72.

4448. Opinion, Caruso v. Yamhill County, No. 3:03-cv-1731 (D. Or. Jan. 14, 2004), D.E. 15, 2004 WL 2005626; *see* Docket Sheet, *id.* (Dec. 12, 2003).

4449. Order, *id.* (May 27, 2004), D.E. 33.

4450. Opinion, *Horton*, No. 3:03-cv-1257 (D. Or. Dec. 6, 2004), D.E. 102; Judgment, *id.* (Dec. 17, 2004), D.E. 103 (dismissing the case).

4451. Caruso v. Yamhill County, 422 F.3d 848 (9th Cir. 2005), *cert. denied*, 547 U.S. 1071 (2006); *see* Horton v. Multnomah County, 197 F. App'x 635 (9th Cir. 2006) (applying the Yamhill County decision to the Multnomah County case).

4452. *See Caruso*, 422 F.3d at 854.

4453. *Id.* at 855–62.

4454. Order, *Caruso*, No. 3:03-cv-1731 (D. Or. Oct. 16, 2006), D.E. 43; Order, *Horton*,

Preclearance for a Zoning Election

Watson v. Fuhrmeister (Karon O. Bowdre, N.D. Ala. 2:03-cv-1960)

> One week before a special election, voters filed a federal complaint alleging that the special election was in violation of section 5 of the Voting Rights Act because the election's question, whether a county precinct would be subject to zoning by a county planning commission, pertained to zoning laws that had not been precleared. Defendants acknowledged that the laws in question had not been precleared, so the court enjoined the election. The action was dismissed on notice of preclearance.
>
> *Topics:* Enjoining elections; section 5 preclearance; ballot measure.

One week before an August 5, 2003, special election, three voters filed a federal complaint in the Northern District of Alabama against the three members of Shelby County's election-canvassing board, alleging that the special election was in violation of section 5 of the Voting Rights Act[4455] because the election's question, whether a county precinct would be subject to zoning by a county planning commission, pertained to zoning laws that had not been precleared.[4456] Among other relief, the complaint sought a preliminary injunction.[4457] The court assigned the case to Judge Karon O. Bowdre, who requested appointment of a three-judge district court.[4458]

On Thursday, July 31, the parties filed stipulations that included a stipulation that the laws in question had not been precleared.[4459] That day, Judge Bowdre issued a temporary restraining order against the holding of the election.[4460]

No. 3:03-cv-1257 (D. Or. Oct. 13, 2006), D.E. 113.

4455. Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination and requiring that preclearance disputes be heard by a three-judge district court).

On June 25, 2013, the Supreme Court declined to hold section 5 unconstitutional, but the Court did hold unconstitutional the criteria for which jurisdictions require section 5 preclearance. Shelby County v. Holder, 570 U.S. 529 (2013).

4456. Complaint, Watson v. Fuhrmeister, No. 2:03-cv-1960 (N.D. Ala. July 29, 2003), D.E. 1 [hereinafter *Watson* Complaint]; *see* Nancy Wilstach, *County Attorney Suggests Election Dilemma Solutions*, Birmingham News, Sept. 10, 2003, at 2.

4457. *Watson* Complaint, *supra* note 4456, at 5.

4458. *See* Order, *Watson*, No. 2:03-cv-1960 (N.D. Ala. July 31, 2003), D.E. 2.

4459. Stipulation, *id.* (July 31, 2003), D.E. 4.

4460. Temporary Restraining Order, *id.* (July 31, 2003), D.E. 6; Opinion, *id.* (July 31, 2003), D.E. 5.

The canvassing board decided to seek preclearance, and it consented to a sixty-day extension of the restraining order.[4461] The extension was expanded to October 28 to accommodate the Justice Department's expected response to the preclearance request.[4462] On notice of October 9 preclearance,[4463] Judge Bowdre dismissed the action on October 29.[4464]

Enjoining Nonbinding Voting That Allots One Vote Per House or Apartment Building

Andrade v. Pulido (Cormac J. Carney, C.D. Cal. 8:03-cv-1157)

> A federal complaint, which was filed two days before a nonbinding mail-in election was to end, challenged as discriminatory the election on retaining traffic barriers, because one vote was assigned to each house or apartment building. The district judge issued a temporary restraining order on the following day and ultimately ruled against a related election held three years previously using the same vote allocation.
>
> *Topics:* Enjoining elections; ballot measure; equal protection; attorney fees.

A July 23, 2003, federal complaint filed in the Santa Ana courthouse of the Central District of California challenged a nonbinding mail-in election on retaining traffic barriers as discriminating against apartment dwellers in favor of house dwellers, because only one vote was assigned to each apartment building or house.[4465] With their complaint, which was filed two days before voting was to end, the plaintiffs filed an application for a temporary restraining order.[4466]

According to the *Los Angeles Times*,

> The lawsuit alleges that the election favors French Park, a community of single-family homes on one side of the barriers, over French Court, made up mostly of Latino apartment dwellers on the other.
>
> . . .

4461. Consent, *id.* (Aug. 8, 2003), D.E. 8.

4462. Order, *id.* (Aug. 29, 2003), D.E. 10.

4463. Motion, *id.* (Oct. 16, 2003), D.E. 13.

4464. Dismissal, *id.* (Oct. 29, 2003), D.E. 15.

4465. Docket Sheet, Andrade v. Pulido, No. 8:03-cv-1157 (C.D. Cal. July 23, 2003) [hereinafter *Andrade* Docket Sheet]; *see* Jennifer Mena, *Voting-Rights Suit Aims to Halt Santa Ana's "Poll" on Barriers*, L.A. Times, July 24, 2003, Cal. Metro, at 1.

4466. *Andrade* Docket Sheet, *supra* note 4465; *see* Mena, *supra* note 4465.

> French Park residents say the barriers reduce north-south commuter traffic, but the apartment dwellers in adjacent French Court say they limit police access and make it difficult to leave the neighborhood.[4467]

On the day after the complaint was filed, Judge Cormac J. Carney issued a temporary restraining order and an order to show cause by Friday, August 1, why counting of the votes should not be enjoined.[4468] On Monday, Judge Carney issued a preliminary injunction against counting the ballots.[4469] Santa Ana's city council voted the same day to suspend the barrier election.[4470]

Reviewing an amended complaint, Judge Carney ruled on December 16, 2004, that the barriers must be removed, because they were erected following a 2000 vote with the same flaws as the 2003 vote.[4471]

On April 4, 2005, the parties agreed to a payment of $65,000 in attorney fees, in addition to the $1,339.45 bill of costs.[4472]

Failure to Preclear a Change in the Percentage of Votes Needed to Avoid a Runoff Election

Luper v. Anchorage (James K. Singleton, Jr., Richard Tallman, and James A. von der Heydt, D. Alaska 3:03-cv-79)

> A federal complaint challenged the forgoing of a runoff election because the leading candidate received more than 45% of the vote and in the same election voters approved a change in law allowing that, claiming that the new rule was invalid because it had not been precleared pursuant to section 5 of the Voting Rights Act. Because the change was precleared after the election, a three-judge district court denied the plaintiffs a remedy, reasoning that failure to preclear the change was an innocent oversight.
>
> *Topics:* Section 5 preclearance; three-judge court; ballot measure; matters for state courts; intervention.

4467. Mena, *supra* note 4465.

4468. Order, *Andrade*, No. 8:03-cv-1157 (C.D. Cal. July 24, 2003), D.E. 9; *see* Jennifer Mena, *Judge Stops Count of Votes on Barricades*, L.A. Times, July 25, 2003, Cal. Metro, at 3.

4469. Preliminary Injunction, *Andrade*, No. 8:03-cv-1157 (C.D. Cal. Aug. 4, 2003), D.E. 10.

4470. *See* Jennifer Mena & David Haldane, *Santa Ana Suspends Vote Tactic*, L.A. Times, Cal. Metro, Aug. 5, 2003, at 3.

4471. Opinion, *Andrade*, No. 8:03-cv-1157 (C.D. Cal. Dec. 16, 2004), D.E. 55; Judgment, *id.* (Dec. 17, 2004), D.E. 56.

4472. Order, *id.* (Apr. 7, 2005), D.E. 60; Bill of Costs, *id.* (Jan. 21, 2005), D.E. 57.

An April 10, 2003, federal complaint filed in the District of Alaska sought to invalidate the April 1 election of Anchorage's mayor on the ground that forgoing a runoff election when the leader has more than 45% of the vote had not been precleared pursuant to section 5 of the Voting Rights Act.[4473] In the April 1 election, voters approved an initiative that enacted the plurality change for mayor as of that election.[4474] Anchorage initiated preclearance procedures on April 11.[4475]

The two Alaska Native plaintiffs filed an amended complaint on April 14 and a motion for injunctive relief on April 15.[4476] Defendants filed a motion on April 21 for a three-judge district court to hear the section 5 claim.[4477] On April 29, Chief Circuit Judge Mary M. Schroeder appointed Circuit Judge Richard Tallman and District Judge James A. von der Heydt to join District Judge James K. Singleton, Jr., as a three-judge court.[4478]

Because the preclearance process was underway, and because the court expected preclearance to be granted, the court decided to await the outcome of that process before resolving the case, so on May 1 it denied the

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4473. Docket Sheet, Luper v. Anchorage, No. 3:03-cv-79 (D. Alaska Apr. 10, 2003) [hereinafter *Luper* Docket Sheet] (D.E. 1); Luper v. Anchorage, 268 F. Supp. 2d 1110, 1111–12 (D. Alaska 2003); *see* Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination and requiring that preclearance disputes be heard by a three-judge district court); *see also* Ben Spiess, *Runoff Law Prop. 2 Draws Suit*, Anchorage Daily News, Apr. 11, 2003, at B1.

On June 25, 2013, the Supreme Court declined to hold section 5 unconstitutional, but the Court did hold unconstitutional the criteria for which jurisdictions require section 5 preclearance. Shelby County v. Holder, 570 U.S. 529 (2013).

4474. *Luper*, 268 F. Supp. 2d at 1111.

The leading candidate received 45.03% of the vote, seventeen votes more than necessary to avoid a runoff election under the new rule. *See* Ben Spiess, *Begich Triumphs After Recount*, Anchorage Daily News, Apr. 24, 2003, at A1.

4475. *Luper*, 268 F. Supp. 2d at 1112.

4476. *Luper* Docket Sheet, *supra* note 4473 (D.E. 13, 14); *Luper*, 268 F. Supp. 2d at 1112; *see* Ben Spiess, *Racist History Put State on Fed's List*, Anchorage Daily News, May 1, 2003, at B1.

4477. *Luper* Docket Sheet, *supra* note 4473 (D.E. 34); *Luper*, 268 F. Supp. 2d at 1112.

4478. *Luper* Docket Sheet, *supra* note 4473 (D.E. 46); *Luper*, 268 F. Supp. 2d at 1111 n.*, 1112.

Judge von der Heydt died on December 1, 2013. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

plaintiffs a preliminary injunction.[4479] Because of parallel state-court proceedings, the plaintiffs dismissed all but their section 5 claim.[4480]

The Justice Department precleared the election change on May 15.[4481] While an objection to that decision remained pending, the court heard the case on June 9.[4482] On June 20, eleven days before the scheduled swearing in of the mayor, the court dismissed the complaint.[4483]

> Exercising our equitable discretion, we do not think any further remedy is appropriate in the case before us. . . . The failure to obtain preclearance was, by all accounts, an oversight. We also think it significant that Plaintiffs did not notify the City of its failure to obtain preclearance until *after* the election was held and the incumbent mayor lost.[4484]

Defective Suit to Stop an Annexation Election

Kleisner v. City of White Sulphur Springs (David A. Faber, S.D. W. Va. 5:03-cv-101)

> A motion for a temporary restraining order against a municipal annexation election omitted an affidavit of immediate injury, verification of the complaint, and reference to defendant notice, so the district judge denied the motion. In addition, a state court had already stayed the election.
>
> *Topics:* Enjoining elections; absentee ballots; ballot measure; matters for state courts; class action.

A resident and two owners of land in a part of Greenbrier County that the City of White Sulphur Springs sought to annex filed a class-action federal complaint in the Southern District of West Virginia on February 6, 2003, claiming that an annexation election scheduled on January 15 for February 14 was not allowing adequate time and procedures for absentee voting.[4485] With their complaint, the plaintiffs filed a motion for a temporary restraining order.[4486]

4479. *Luper* Docket Sheet, *supra* note 4473 (D.E. 48); *Luper*, 268 F. Supp. 2d at 1112; *see* Ben Spiess, *Order Barring Begich Denied*, Anchorage Daily News, May 3, 2003, at B1.

4480. *Luper*, 268 F. Supp. 2d at 1112.

4481. *Id.* at 1113; *see* Katie Pesznecker, *Prop. 2 Gets Justice's OK*, Anchorage Daily News, May 20, 2003, at B1.

4482. *Luper*, 268 F. Supp. 2d at 1113; *see* Nicole Tsong, *Judges Urged to Order Runoff for Mayor*, Anchorage Daily News, June 10, 2003, at B3.

4483. *Luper*, 268 F. Supp. 2d at 1114.

4484. *Id.*

4485. Complaint, Kleisner v. City of White Sulphur Springs, No. 5:03-cv-101 (S.D. W. Va. Feb. 6, 2003), D.E. 1; *see* CSX Hotels, Inc. v. City of White Sulphur Springs, 217 W. Va. 238, 239, 617 S.E.2d 785, 786 (2005).

4486. Temporary-Restraining-Order Motion, *Kleisner*, No. 5:03-cv-101 (S.D. W. Va.

The annexation of resort properties was intended to expand the city's tax base in light of use by the resort properties and by planned resort developments of city services, including sewer services.[4487] State law required annexation elections to be scheduled within thirty days, but state law also required absentee ballots to be available forty-two days in advance of the election.[4488]

On the day after the complaint was filed, Judge David A. Faber denied the plaintiffs' motion because of many procedural defects.[4489]

> The plaintiffs have not filed an *affidavit* setting forth any indication of immediate and irreparable injury, loss, or damage that will occur should the temporary restraining order not be granted. The plaintiffs' complaint is *not verified*. None of the four attorneys entering an appearance for the plaintiffs has certified to the court in writing the efforts, if any, which have been made to give *notice* and the reasons supporting the claim that notice should not be required. In fact, the question of notice to the parties to be restrained makes no appearance in the documents filed with the court, whether by certification of efforts, certificate of service, or otherwise.[4490]

Moreover, a state court had already stayed the election pending further state court action.[4491]

Propriety of an Advisory Question on the Ballot in Washington

Lamar Company v. Spokane County Board of County Commissioners (Fred Van Sickle, E.D. Wash. 2:02-cv-326)

> The district court ruled that it was not improper for a county to put on the general-election ballot an advisory question on curtailing roadside billboards.
>
> *Topics:* Ballot measure; getting on the ballot; enjoining elections; laches; ballot language.

Feb. 6, 2003), D.E. 2.

4487. *See* Pam Ramsey, *Tax District Expected to Revitalize White Sulphur Springs*, Charleston Gazette, Mar. 9, 2004, at 2A; *Town Votes to Annex Greenbrier Resort*, Charleston Daily Mail, Jan. 16, 2003, at 9A.

4488. *See* Melanie Jarvis, *Annexation and Voting Conflicts Are Putting The Greenbrier and White Sulphur Springs in a Tug-of-War*, Charleston Daily Mail, Jan. 31, 2003, at 1A.

4489. Opinion, *Kleisner*, No. 5:03-cv-101 (S.D. W. Va. Feb. 7, 2003), D.E. 5.

4490. *Id.* at 1–2 (emphasis added).

4491. *Id.* at 2; *see Judge Puts Temporary Halt on Resort Annexation Vote*, Charleston Daily Mail, Feb. 6, 2003, at 9A.

On September 26, 2002, a billboard company filed a federal complaint in the Eastern District of Washington challenging a planned advisory measure for Spokane County voters in the November 5 general election on curtailing billboards along county roads.[4492] The complaint challenged both the propriety of an advisory election and existing content regulations for billboards.[4493] On October 1, the plaintiff filed a motion for a preliminary injunction.[4494] On the next day, Judge Fred Van Sickle granted expedited hearing.[4495]

At the October 11 hearing, Judge Van Sickle denied the plaintiff preliminary relief.[4496] His October 15 opinion explained that the county had implied authority to put an advisory question to voters: "This power is implied from the County Commissioners' constitutional and statutory powers to enact zoning ordinances and other regulations not in conflict with state law."[4497] Moreover, because the complaint was not filed within ten days of the August 15 filing of the ballot question, the complaint was untimely under state law.[4498]

The plaintiff dismissed its complaint voluntarily on January 24, 2003.[4499]

Overturning State-Court Blocking of a Ballot Initiative

Anderson v. Gale (Richard G. Kopf, D. Neb. 4:02-cv-3257)

> Supporters of a ballot initiative filed a federal complaint seeking relief from a state-court invalidation of the initiative as concerning more than one subject. On the day that the complaint was filed, the federal judge held a conference call with the parties and scheduled a hearing for two days later. The judge denied immediate relief so as to not interfere unduly with the coming election and because he found no constitutional problem with the one-subject rule.
>
> *Topics:* Ballot measure; getting on the ballot; intervention; matters for state courts.

4492. Complaint, Lamar Co. v. Spokane Cty. Bd. of Cty. Comm'rs, No. 2:02-cv-326 (E.D. Wash. Sept. 26, 2002), D.E. 1.

4493. *Id.* (noting that the advisory question was adopted on August 6, 2002).

4494. Preliminary-Injunction Motion, *id.* (Oct. 1, 2002), D.E. 2, 3.

4495. Order, *id.* (Oct. 2, 2002), D.E. 10.

Judge Van Sickle died on September 2, 2021. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

4496. Minutes, *Lamar Co.*, No. 2:02-cv-326 (E.D. Wash. Oct. 11, 2002), D.E. 21.

4497. Opinion at 5, *id.* (Oct. 15, 2002), D.E. 24.

4498. *Id.* at 7–8.

4499. Voluntary Dismissal, *id.* (Jan. 24, 2003), D.E. 26.

On September 23, 2002, supporters of a proposed gaming initiative filed a federal complaint in the District of Nebraska against Nebraska's secretary of state, seeking relief from a state court invalidation of the initiative as concerning more than one subject.[4500]

The petition sought to accomplish the following:

(1) Revise the Nebraska Constitution to allow electronic gaming devices under local control;

(2) Provide limitations on the manner income from the gaming could be spent;

(3) Limit the ability of the Legislature to tax the gaming; and

(4) Require the creation of a gaming commission.[4501]

With their complaint, the plaintiffs filed a motion for a temporary restraining order.[4502] On the day that the action was filed, Judge Richard G. Kopf held a conference call with the parties and then scheduled a hearing for two days later.[4503] When Judge Kopf received a motion for a temporary restraining order, it was his practice to have chambers contact plaintiffs' counsel immediately to obtain contact information for defense counsel, if possible.[4504]

On September 24, the director of Gambling With the Good Life, which opposed expansion of gambling in Nebraska and which obtained the state-court order blocking the initiative's inclusion on the general-election ballot, sought to intervene as a defendant.[4505]

On September 25, Judge Kopf granted intervention and denied immediate injunctive relief.[4506] He was reluctant to interfere with the impending election: "Properly run elections are not like faucets. They cannot be

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4500. Complaint, Anderson v. Gale, No. 4:02-cv-3257 (D. Neb. Sept. 23, 2002), D.E. 1; *see* Butch Mabin, *Gambling Supporters File Federal Lawsuit*, Lincoln J. Star, Sept. 24, 2002, at A1.

4501. Loontjer v. Robinson, 266 Neb. 902, 903, 670 N.W.2d 301, 303 (2003).

4502. Docket Sheet, *Anderson*, No. 4:02-cv-3257 (D. Neb. Sept. 23, 2002).

4503. Order, *id.* (Sept. 23, 2002), D.E. 4.

Tim Reagan interviewed Judge Kopf for this report by telephone on September 10, 2013.

4504. Interview with Judge Richard G. Kopf, Sept. 10, 2013.

4505. Intervention Motion, *Anderson*, No. 4:02-cv-3257 (D. Neb. Sept. 24, 2002), D.E. 5; *see* Leslie Reed, *Gambling Foes Seek to Intervene in Suit*, Omaha World-Herald, Sept. 25, 2002, at 2B.

4506. Opinion, *Anderson*, No. 4:02-cv-3257 (D. Neb. Sept. 25, 2002), D.E. 12 [hereinafter *Anderson* Opinion]; Minutes, *id.* (Sept. 25, 2002), D.E. 11; *see* Butch Mabin, *Judge Denies Gaming Petition*, Lincoln J. Star, Sept. 26, 2002, at A1; Leslie Reed, *Ruling Ends Slot Fans' 2002 Effort*, Omaha World-Herald, Sept. 26, 2002, at 1A.

turned on and off at will."[4507] Also, Nebraska's supreme court had yet to rule on the case's merits, but it had indicated that if the lower-court judge's ruling was in error then the initiative could be placed on a subsequent ballot.[4508] Perhaps most importantly, Judge Kopf found no constitutional violation in restricting ballot initiatives to one subject.[4509]

On November 8, Judge Kopf granted the plaintiffs' October 16 motion to dismiss their complaint without prejudice.[4510]

Nebraska's supreme court determined on October 24, 2003, that "the petition was legally insufficient because the sponsors failed to include a sworn statement of their names and street addresses."[4511] Three of the court's seven justices also opined that the initiative violated the single-subject rule.[4512]

Enjoining a Water-District Annexation for Want of Section 5 Preclearance

Thelma Area Neighborhood Corporation v. Evergreen Underground Water Conservation District (Edward C. Prado, W.D. Tex. 5:01-cv-1191)

> A district judge enjoined an election to annex territory to a water-conservation district, because the election had not been precleared pursuant to section 5 of the Voting Rights Act. The election was canceled and held three months later than originally scheduled, and annexation failed.
>
> *Topics:* Section 5 preclearance; enjoining elections; ballot measure.

An organization filed a federal complaint against a water district on December 28, 2001, in the Western District of Texas to challenge a February 2, 2002, election to annex the southern part of Bexar County, claiming that the election had not yet received preclearance pursuant to section 5 of the

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4507. *Anderson* Opinion, *supra* note 4506, at 2.

4508. *Id.* at 1–2.

4509. *Id.* at 2–3.

4510. Judgment, *Anderson*, No. 4:02-cv-3257 (D. Neb. Nov. 8, 2002), D.E. 17; *see* Motion, *id.* (Oct. 16, 2002), D.E. 16.

4511. Loontjer v. Robinson, 266 Neb. 902, 903, 670 N.W.2d 301, 303 (2003); *see* Leslie Reed, *High Court Keeps Slots Off Ballot*, Omaha World-Herald, Oct. 24, 2003, at 1A.

4512. *Loontjer*, 266 Neb. at 912–20, 670 N.W.2d at 309–14 (Chief Justice John V. Hendry, concurring in the result); *id.* at 920–27, 670 N.W.2d at 314–19 (Justices John F. Wright and John Gerrard, concurring); *see* Robynn Tysver, *Court Kills Gambling Petition*, Omaha World-Herald, Oct. 25, 2003, at 1A.

Voting Rights Act.[4513] With its complaint, the plaintiff filed a motion for a temporary restraining order.[4514]

Judge Edward C. Prado set the case for hearing on January 3, 2002.[4515] Following the hearing, Judge Prado agreed to stay the case until January 14, two days before early voting was to begin, to see if preclearance would be granted.[4516] Because preclearance had not been granted by January 14, Judge Prado enjoined the election.[4517] Following the cancelation of the election, Judge Prado dismissed the case on January 25.[4518]

Annexation failed in a May 4 election.[4519]

Unconstitutionality of a Referendum

Nogueras Cartagena v. María Calderón (Hector M. Laffitte, D.P.R. 3:01-cv-1789)

> A Puerto Rico voter filed a pro se federal complaint on June 13, 2001, challenging the constitutionality of a local referendum and a later federal referendum on the U.S. military's continued use of the island of Vieques for explosives exercises. Respecting the imminent local referendum, the court ruled that the plaintiff did not have standing to pursue a general grievance in court. Later,

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4513. Docket Sheet, Thelma Area Neighborhood Corp. v. Evergreen Underground Water Conservation Dist., No. 5:01-cv-1191 (W.D. Tex. Dec. 28, 2001) [hereinafter *Thelma Area Neighborhood Corp.* Docket Sheet] (D.E. 1); Temporary Restraining Order, *id.* (Jan. 14, 2002), D.E. 8 [hereinafter *Thelma Area Neighborhood Corp.* Temporary Restraining Order]; *see* Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination).

On June 25, 2013, the Supreme Court declined to hold section 5 unconstitutional, but the Court did hold unconstitutional the criteria for which jurisdictions require section 5 preclearance. Shelby County v. Holder, 570 U.S. 529 (2013).

4514. *Thelma Area Neighborhood Corp.* Docket Sheet, *supra* note 4513 (D.E. 2).

4515. Order, *Thelma Area Neighborhood Corp.*, No. 5:01-cv-1191 (W.D. Tex. Dec. 28, 2001), D.E. 3.

Judge Prado was elevated to the court of appeals on May 5, 2003, and he retired on April 2, 2018. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

4516. Order, *Thelma Area Neighborhood Corp.*, No. 5:01-cv-1191 (W.D. Tex. Jan. 3, 2002), D.E. 6.

4517. *Thelma Area Neighborhood Corp.* Temporary Restraining Order, *supra* note 4513.

4518. Order, *Thelma Area Neighborhood Corp.*, No. 5:01-cv-1191 (W.D. Tex. Jan. 25, 2002), D.E. 13; *see* Jerry Needham, *Water District Delays Annexation Election*, San Antonio Express-News, Jan. 23, 2002, at 8B.

4519. *See* Jerry Needham, *Water Management at Issue in 2 Votes*, San Antonio Express-News, May 5, 2002, at 8B

> the court issued an order to show cause why claims concerning the federal referendum should not be dismissed, and then the court dismissed those claims.
>
> *Topics:* Ballot measure; enjoining elections; pro se party.

A Puerto Rico voter filed a pro se federal complaint in the District of Puerto Rico on June 13, 2001, challenging the constitutionality of two scheduled referenda on the U.S. military's continued use of the island of Vieques for explosives exercises.[4520] A local referendum was scheduled for July 29 and a federal referendum was scheduled for November 6.[4521]

The National Defense Authorization for Fiscal Year 2001 provided for a "referendum by the Vieques electorate whether the people of Vieques approve or disapprove of the continuation of the conduct of live-fire training, and any other types of training, by the Armed Forces at the Navy's training sites on the island."[4522] The federal law specified that "no proposition or option may be presented as an alternative to the propositions of approval and of disapproval of the continuation of the conduct of [the] training."[4523]

On June 13, Puerto Rico's legislature provided for an earlier Vieques referendum "to ascertain the sense of the residents of Vieques regarding the military exercises and bombings of the Navy of the United States of America on said island-municipality."[4524] The purpose of the local referendum was to provide the voters of Vieques with ballot alternatives different from those provided by the federal legislation.[4525]

On June 18, Judge Hector M. Laffitte ordered the defendants to show cause at a June 25 hearing why a preliminary injunction should not be granted.[4526] On June 28, Judge Laffitte, accepting the parties' agreement to consolidation of his consideration of both a preliminary and a permanent injunction, ruled against the plaintiff with respect to the upcoming local

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4520. Nogueras Cartagena v. María Calderón, 150 F. Supp. 2d 338, 341 (D.P.R. 2001); Docket Sheet, Nogueras Cartagena v. María Calderón, No. 3:01-cv-1789 (D.P.R. June 13, 2001).

4521. *Nogueras Cartagena*, 150 F. Supp. 2d at 341.

4522. Pub. L. No. 106-398 § 1503(a)(1), 114 Stat. 1654, 1654A-352 (2000).

4523. *Id.* § 1503(b).

4524. 2001 P.R. Law No. 34 (June 13, 2001).

4525. *Id.*

4526. Order, Nogueras Cartagena v. María Calderón, No. 3:01-cv-1789 (D.P.R. June 18, 2001), D.E. 5.

Judge Laffitte retired on February 16, 2007. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

referendum.[4527] The plaintiff did not have standing to sue on general grievances against the holdings of the referendum, and his claim that he was improperly denied the right to vote because he was not a resident of Vieques was without merit.[4528]

In the local referendum, which drew a turnout of 81%, departure of the Navy received 68% of the vote.[4529]

On August 20, Judge Laffitte ordered the plaintiff to show cause why his claims concerning the federal referendum should not be dismissed.[4530] On September 14, Judge Laffitte dismissed the federal referendum claims.[4531]

The federal referendum was canceled in light of a decision to phase out use of Vieques for war games.[4532] On December 26, the plaintiff dismissed his appeal.[4533]

Enjoining a Referendum on a Property Transfer

Petitioners Alliance v. City Council (Sharon Lovelace Blackburn, N.D. Ala. 2:01-cv-497)

> On the day before a special election, five voters filed a federal complaint seeking to enjoin transfer of assets in frustration of a ballot question, which was a referendum on the city's transfer of assets to a water-and-sewer board. The judge denied immediate injunctive relief and, in time, granted the defendants a dismissal because the plaintiffs had not alleged infringement of the right to vote.
>
> *Topic:* Ballot measure.

On the day before a February 27, 2001, special election in Birmingham, Alabama, following unsuccessful litigation in state courts, five voters filed a federal complaint in the Northern District of Alabama seeking to enjoin

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4527. Nogueras Cartagena v. María Calderón, 150 F. Supp. 2d 338 (D.P.R. 2001); Partial Judgment, *Nogueras Cartagena*, No. 3:01-cv-1789 (D.P.R. June 21, 2001), D.E. 21.

4528. *Nogueras Cartagena*, 150 F. Supp. 2d 338.

4529. *See 68% in Vieques Want Navy Out Now*, Miami Herald, July 30, 2001, at 1A; David Gonzalez, *Vieques Voters Want the Navy to Leave Now*, N.Y. Times, July 30, 2001, at A1.

4530. Opinion, *Nogueras Cartagena*, No. 3:01-cv-1789 (D.P.R. Aug. 20, 2001), D.E. 27.

4531. Opinion, *id.* (Sept. 14, 2001), D.E. 30; Judgment, *id.* (Sept. 14, 2001), D.E. 31.

4532. National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107 § 1049, 115 Stat. 1012, 1230 (Dec. 28, 2001); *see Bombing Tests Set for Vieques*, Miami Herald, Mar. 16, 2002, at 17A; *Court Clears Way for Vote on Vieques*, N.Y. Times, Oct. 19, 2001, at A17.

4533. Docket Sheet, Nogueras Cartagena v. María Calderón, No. 01-2470 (1st Cir. Oct. 17, 2001).

transfer of assets in frustration of a ballot question, which was a referendum on the city's transfer of assets to a water-and-sewer board.[4534] (The board had transferred the assets to the city in 1998.[4535]) With their complaint, the voters filed a motion for a temporary restraining order.[4536]

Judge Sharon Lovelace Blackburn denied the plaintiffs immediate injunctive relief that same day.[4537] On the following day, citizens voted to overturn the transfer.[4538]

On March 15, 2002, Judge Blackburn granted the defendants a dismissal because the plaintiffs had not alleged infringement of the right to vote.[4539]

Unsuccessful Pro Se Challenge to a Fluoride Ballot Initiative

Espronceda v. Krier (H.F. Garcia, William Wayne Justice, and Pamela A. Mathy, W.D. Tex. 5:00-cv-1259)

> One week after the election, a pro se federal complaint challenged the passage of a referendum to add fluoride to a city's drinking water. A little over a year later, a three-judge district court granted the defendants summary judgment.
>
> *Topics:* Ballot measure; enjoining certification; pro se party; section 5 preclearance; three-judge court; case assignment; recusal.

A pro se federal complaint filed in the Western District of Texas on November 14, 2000, sought invalidation of November 7 election results in San Antonio, which is located in Bexar County, because of opposition to a municipal referendum to add fluoride to the city's drinking water.[4540] With

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4534. Complaint, Petitioners Alliance v. City Council, No. 2:01-cv-497 (N.D. Ala. Feb. 26, 2001), D.E. 1.

4535. Opinion at 2, *id.* (Mar. 15, 2002), D.E. 8 [hereinafter *Petitioners Alliance* Opinion]; *see* Chris Scribner, *Underlying Referendum Issue: Kincaid vs. Council*, Birmingham News, Jan. 16, 2001, at 1.

4536. Temporary-Restraining-Order Motion, *Petitioners Alliance*, No. 2:01-cv-497 (N.D. Ala. Feb. 26, 2001), D.E. 2.

4537. Order, *id.* (Feb. 26, 2001), D.E. 3; *see* Chris Scribner, *Election On, Doesn't Count "Irrelevant" Vote*, Birmingham News, Feb. 27, 2001, at 1.

4538. *Petitioners Alliance* Opinion, *supra* note 4535, at 4; *see* Chris Scribner & Benjamin Niolet, *Vote Goes Big for Referendum*, Birmingham News, Feb. 28, 2001, at 1 (reporting a vote of 13,923 to 3,340).

4539. *Petitioners Alliance* Opinion, *supra* note 4535.

4540. Docket Sheet, Espronceda v. Krier, No. 5:00-cv-1259 (W.D. Tex. Nov. 14, 2000) [hereinafter *Espronceda* Docket Sheet] (D.E. 1); Opinion, *id.* (Jan. 8, 2002), D.E. 173 [hereinafter *Espronceda* Summary-Judgment Opinion]; Report and Recommendation at 2, *id.* (Dec. 28, 2000), D.E. 70 [hereinafter *Espronceda* Report and Recommendation].

their complaint, the plaintiffs filed a motion for a temporary restraining order.[4541]

That same day, District Judge H.F. Garcia denied the plaintiffs a temporary restraining order for failure to comply with the notice provisions of Federal Rule of Civil Procedure 65.[4542] On November 28, Judge Garcia denied additional motions for temporary restraining orders and referred motions for preliminary injunctions to Magistrate Judge Pamela A. Mathy,[4543] who denied motions that she recuse herself.[4544]

Reviewing an amended complaint filed on November 21, Judge Mathy recommended, on December 28, (1) denial of the plaintiffs' motion for a preliminary injunction and (2) direction that further filings from the plaintiffs not be accepted without proper certificates of service.[4545]

Judge Garcia transferred the case to District Judge William Wayne Justice on May 22, 2001.[4546] Judge Garcia died on January 16, 2002.[4547] Judge Justice determined that a pending claim pursuant to section 5 of the Voting Rights Act required appointment of a three-judge district court, so on July 16, 2001, Circuit Judge Emilio M. Garza and Western District of Texas Judge Edward C. Prado were named to join Judge Justice on a three-judge court.[4548] Circuit Judge Fortunato P. Benavides replaced Judge Garza, who recused himself.[4549]

4541. *Espronceda* Docket Sheet, *supra* note 4540 (D.E. 2); *Espronceda* Report and Recommendation, *supra* note 4540, at 2.

4542. Order, *Espronceda*, No. 5:00-cv-1259 (W.D. Tex. Nov. 14, 2000), D.E. 3; *Espronceda* Report and Recommendation, *supra* note 4540, at 2–3.

4543. Order, *Espronceda*, No. 5:00-cv-1259 (W.D. Tex. Nov. 28, 2000), D.E. 13; *Espronceda* Docket Sheet, *supra* note 4540; *Espronceda* Report and Recommendation, *supra* note 4540, at 4–5.

Judge Mathy retired on January 14, 2017. Judicial Milestones, www.uscourts.gov/judicial-milestones/pamela-ann-mathy.

4544. Order and Advisory at 9, *Espronceda*, No. 5:00-cv-1259 (W.D. Tex. Dec. 19, 2000), D.E. 48; Order and Advisory, *id.* (Dec. 4, 2000), D.E. 16.

4545. *Espronceda* Report and Recommendation, *supra* note 4540; *see Espronceda* Docket Sheet, *supra* note 4540 (amended complaint, D.E. 5); *see also* Order, *Espronceda*, No. 5:00-cv-1259 (W.D. Tex. Dec. 28, 2000), D.E. 71 (returning the case to the district judge); Matt Flores, *Fluoridation Foes Lose Round in Court*, San Antonio Express-News, Dec. 30, 2000, at 1B.

4546. Order, *Espronceda*, No. 5:00-cv-1259 (W.D. Tex. May 22, 2001), D.E. 124.

Judge Justice died on October 13, 2009. Federal Judicial Center Biographical Directory of Article III Federal Judges [hereinafter FJC Biographical Directory], www.fjc.gov/history/judges.

4547. FJC Biographical Directory, *supra* note 4546.

4548. Order, *Espronceda*, No. 5:00-cv-1259 (W.D. Tex. July 16, 2001), D.E. 125; *see*

On August 30, 2001, Judge Justice issued nine orders denying pending plaintiff motions.[4550] Judge Justice issued an additional fifteen orders against the plaintiffs over the course of four weeks.[4551] He also issued six orders not adverse to the plaintiffs[4552] and an additional order denying a motion for sanctions against the plaintiffs.[4553]

On January 8, 2002, the three-judge court granted summary judgment to the defendants.[4554] "[W]ith all due respect to the plaintiffs' anti-fluoride jeremiad, this court is not the proper forum for resolution of the health issues plaintiff advances. Plaintiffs have still produced no solid evidence that the defendants violated federal election law or otherwise infringed upon plaintiffs' civil rights."[4555]

The court of appeals dismissed an appeal as having been filed with the wrong court; the appeal from the three-judge decision should have been filed with the Supreme Court.[4556]

Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination and requiring that preclearance disputes be heard by a three-judge district court).

On June 25, 2013, the Supreme Court declined to hold section 5 unconstitutional, but the Court did hold unconstitutional the criteria for which jurisdictions require section 5 preclearance. Shelby County v. Holder, 570 U.S. 529 (2013).

Judge Garza retired on January 5, 2015; Judge Prado was elevated to the court of appeals on May 5, 2003, and he retired on April 2, 2018. FJC Biographical Directory, *supra* note 4546.

4549. Order, *Espronceda*, No. 5:00-cv-1259 (W.D. Tex. July 23, 2001), D.E. 126.

Judge Benavides died on May 5, 2023. FJC Biographical Directory, *supra* note 4546.

4550. Orders, *Espronceda*, No. 5:00-cv-1259 (W.D. Tex. Aug. 31, 2001), D.E. 127 to 135.

4551. Orders, *id.* (Aug. 31, 2001), D.E. 136 to 140, 142 to 148, 152, 154, 155.

4552. Orders, *id.* (Sept. 28 to Oct. 24, 2001), D.E. 149 to 151, 153, 159, 160.

4553. Order, *id.* (Sept. 28, 2001), D.E. 141.

4554. *Espronceda* Summary-Judgment Opinion, *supra* note 4540.

4555. *Id.* at 2.

4556. Espronceda v. Krier, 61 F. App'x 121 (5th Cir. 2003).

9. Campaign Activities

Litigation over campaign activities is often under time pressure, because the campaign is underway and the election is approaching.

For example, a minor candidate for office might file a legal challenge against the candidate's exclusion from a debate, but holders of debates or other candidate forums are not required to include minor candidates.[4557]

More legally challenging are cases involving where campaign activities can be conducted. A county apparently proscribed campaign activity on county-owned property, which included public spaces suitable for campaigning.[4558] Still, a courthouse parking lot could be designated as primarily for courthouse parking, and reasonable restrictions on campaign facilities there, such as tents or barbeques, could be permitted.[4559] Resolution followed oral scrutiny by the court of back-and-forth amendments to county policy and the plaintiffs' complaint.

Door-to-door campaigning presents a special problem.[4560] For example, although campaigning is protected political speech, there are legitimate concerns about free access to public-housing spaces.[4561] There are stricter limits on a municipality's application of door-to-door restrictions on campaign activities.[4562] For one municipality, limits were agreed to in negotiation following the filing of a federal lawsuit.[4563]

An interesting case arose in Florida in 2014, where a candidate in one municipality sued a neighboring municipality, because the neighbor's em-

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4557. *See, e.g.*, "Refusal to Accept a Minor Candidate's Campaign Ads," *infra* page 618; "Debate Participation," *infra* page 635; "Last-Minute Challenge to a Debate Exclusion," *infra* page 643.

4558. *See* "Electioneering on County Property," *infra* page 612.

4559. Gonzalez Garza v. Starr County, 309 F. Supp. 3d 454, 458 (S.D. Tex. 2018).

4560. Case studies illustrating this problem have "door-to-door canvassing" among their case-study topics.

4561. De la O v. Housing Auth. of El Paso, 417 F.3d 495, 507–08 (5th Cir. 2005), *as reported in* "The Right to Campaign in Housing Projects," *infra* page 661; Opinion, Mendenhall v. Akron Metro. Hous. Auth., No. 5:09-cv-742 (N.D. Ohio Apr. 3, 2009), D.E. 10, *as reported in* "Ballot-Petition Signatures in Public Housing," *infra* page 639.

4562. Service Employees Int'l Union v. Municipality of Mt. Lebanon, 446 F.3d 419 (3d Cir. 2006).

4563. *See* "Get-Out-the-Vote Canvassing," *infra* page 648.

ployee removed the candidate's campaign signs.[4564] The district judge denied relief to the candidate on a finding that the removal was the employee's error, and the error was corrected when it was brought to the neighbor's attention.[4565]

The extent to which a political advertisement endorses an issue or a candidate can be the subject of litigation.[4566] In one case, a judge stood in the way of possible forum shopping and declined to hear a case brought before his court merely because the advertisement would air there,[4567] and the case—ultimately unsuccessful on the merits—was brought in the plaintiff's home district.[4568]

Whether a state can punish false statements in political advertisements generated complex litigation in Ohio in 2010.[4569] Courts agreed that the state's proscriptions were not sufficiently narrowly tailored.[4570] The court of appeals also decided that a defamation claim arising in the case was without merit because the statements were not completely false and they were not said with actual malice.[4571]

In Nevada, in 2020, the district court held that although statutory proscriptions on using the word "reelect" to refer to someone who was not the incumbent were not unconstitutional, they were unconstitutionally applied to a candidate who had previously held the office.[4572]

In a case that same year in New York with allegations that false statements about voting by mail in robocalls constituted voter suppression, the court required curative calls.[4573]

4564. *See* "Municipal Campaign Signs in a Neighboring Municipality," *infra* page 622.

4565. Opinion, O'Boyle v. City of Delray Beach, No. 9:14-cv-80270 (S.D. Fla. Oct. 20, 2014), D.E. 44.

4566. *E.g.*, "Issue Ads During Election Season," *infra* page 645.

4567. Opinion, Hispanic Leadership Fund v. Fed. Election Comm'n, No. 4:12-cv-339 (S.D. Iowa Aug. 9, 2012), D.E. 26.

4568. Hispanic Leadership Fund, Inc. v. Fed. Election Comm'n, 897 F. Supp. 2d 407 (E.D. Va. 2012), *as reported in* "Electioneering Communications," *infra* page 626.

4569. *See* "Constitutionality of Proscriptions on False Statements About Candidates," *infra* page 628.

4570. Susan B. Anthony List v. Driehaus, 814 F.3d 466 (6th Cir. 2016), *aff'g* Susan B. Anthony List v. Driehaus, 45 F. Supp. 3d 765 (S.D. Ohio 2014).

4571. Susan B. Anthony List v. Driehaus, 779 F.3d 628 (6th Cir. 2015).

4572. Make Liberty Win v. Cegavske, 499 F. Supp. 3d 794 (D. Nev. 2020), *as reported in* "Prohibited Use of 'Reelection' for a Previous Office Holder Who Is Not the Incumbent," *infra* page 607.

4573. Nat'l Coal. on Black Civic Participation v. Wohl, 498 F. Supp. 3d 457 (S.D.N.Y. 2020), *as reported in* "Enjoining False Robocalls About Voting by Mail," *infra* page 609.

Whether campaign activities—such as ballot-security initiatives that ostensibly target voter fraud—amount to voter suppression was the subject of a consent decree binding both national parties in litigation that began in 1981.[4574] Emergency enforcement actions were brought in 2008 and 2016.[4575] The decree was terminated in 2018.[4576] In 2020, a judge declined to consider remedies for what he determined to be a speculative voter-suppression action brought thirteen days before the general election, three to five months after the alleged improper activities.[4577]

Money is an important component of campaign activity. Public matching funds triggered by an opponent's spending have received close scrutiny.[4578] In one case, however, because a campaign was already underway and it was too late to unspend money, a district judge in Arizona declined to enjoin enforcement of a campaign-finance law that she believed was probably unconstitutional and that the Supreme Court ultimately decided was unconstitutional.[4579] In a case that a court of appeals determined was brought soon enough to provide effective relief, the appellate court ordered the district judge to provide the plaintiff with relief.[4580]

Reporting requirements for campaign spending are less problematic constitutionally than spending limits.[4581] One court declined to give a candidate relief from campaign-contribution reporting requirements for small

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4574. Docket Sheet, Democratic Nat'l Comm. v. Republican Nat'l Comm., No. 2:81-cv-3876 (D.N.J. Dec. 14, 1981).

4575. *See* "Voter Interference," *infra* page 652.

4576. Consent-Decree Termination Order, *Democratic Nat'l Comm.*, No. 2:81-cv-3876 (D.N.J. Jan. 8, 2018), D.E. 213, *aff'd*, Opinion, No. 18-1215 (3d Cir. Jan. 7, 2019), 2019 WL 117555.

4577. Transcript at 32–33, Mi Familia Voter Educ. Fund v. Trump, No. 1:20-cv-3030 (D.D.C. Oct. 29, 2020, filed Nov. 17, 2020), D.E. 25, *as reported in* "No Relief for a Last-Minute Speculative Complaint of Voter Suppression by the President," *infra* page 606.

4578. *E.g.*, Scott v. Roberts, 612 F.3d 1279 (11th Cir. 2010), *as reported in* "Public Campaign Funds Triggered by an Opponent's Expenditures," *infra* page 633.

4579. Findings of Fact and Conclusions of Law, McComish v. Brewer, No. 2:08-cv-1550 (D. Ariz. Oct. 17, 2008), D.E. 185, 2008 WL 4629337 (denying a preliminary injunction), *as reported in* "Campaign-Finance Regulations for Candidates Opposing Self-Funded Candidates," *infra* page 640; Order, *id.* (Aug. 29, 2008), D.E. 30 (denying a temporary restraining order); *see* Ariz. Free Enterprise Club's Freedom Club PAC v. Bennett, 564 U.S. 721 (2011).

4580. N.Y. Progress & Protection PAC v. Walsh, 733 F.3d 483 (2d Cir. 2013), *on remand*, N.Y. Progress & Protection PAC v. Walsh, 17 F. Supp. 3d 319 (S.D.N.Y. 2014), *as reported in* "Nullifying Campaign Limits Shortly Before an Election," *infra* page 624.

4581. Nat'l Org. for Marriage v. McKee, 666 F. Supp. 2d 193 (D. Me. 2009), *as reported in* "Constitutionality of a Campaign Expenditure Reporting Statute," *infra* page 637.

contributions.[4582] Another court found no equal-protection violation for different financial filing requirements for incumbents and non-incumbents.[4583]

Emergency federal litigation has also been about anonymous campaigning[4584] and deadlines for forming campaign committees.[4585] A federal judge in Kentucky declined to order election officials to provide a candidate with temporary mailing addresses for absentee voters.[4586]

An action was filed in Arkansas complaining about the exclusion of school-board-election challengers from a school-district staff meeting that the incumbents could attend; although the challengers lost in court, they won on election day.[4587]

No Relief for a Last-Minute Speculative Complaint of Voter Suppression by the President

Mi Familia Vota Education Fund v. Trump (Richard J. Leon, D.D.C. 1:20-cv-3030)

> A federal complaint filed thirteen days before the 2020 general election alleged voter suppression by the President over the previous few months. The district judge denied immediate relief, finding the last-minute allegations to be speculative.
>
> *Topic:* Laches.

An organization and two voters filed a federal complaint in the district court for the District of Columbia on October 21, 2020, against President Trump, the attorney general, and the secretary of homeland security, alleging schemes to discourage, inconvenience, and intimidate voters.[4588] With their complaint, the plaintiffs filed a motion for a temporary restraining

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4582. Herschaft v. N.Y. City Campaign Fin. Bd., 10 F. App'x 21 (2d Cir. 2001), *aff'g* 127 F. Supp. 2d 164, 166–67 (E.D.N.Y. 2000), *cert. denied*, 534 U.S. 888 (2001), *as reported in* "A Disabled Candidate's Challenge to Signature-and-Contribution Statutes," *supra* page 389.

4583. Smith v. S.C. Election Comm'n, 874 F. Supp. 2d 483, 497 (D.S.C. 2012), *as reported in* "Strict Application of Campaign Filing Requirements," *supra* page 332.

4584. *See, e.g.*, "Anonymous Campaign Literature and Keeping a Candidate Off the Ballot," *infra* page 615.

4585. *See, e.g.*, "Unconstitutional Proscription on Forming a Campaign Committee Shortly Before an Election," *infra* page 619.

4586. Sheldon v. Grimes, 18 F. Supp. 3d 854 (E.D. Ky. 2014), *as reported in* "Direct-Mail Campaigning to Absentee Voters," *infra* page 621.

4587. *See* "Improper Support for School-Board Incumbents," *infra* page 643.

4588. Complaint, Mi Familia Voter Educ. Fund v. Trump, No. 1:20-cv-3030 (D.D.C. Oct. 21, 2020), D.E. 1.

order, a preliminary injunction, and a speedy declaratory judgment.[4589] Five days later, the parties jointly moved for briefing on the other motion to conclude by October 28 with a hearing scheduled for the following day.[4590] Judge Richard J. Leon agreed to set a telephonic hearing for the afternoon of October 29.[4591]

Judge Leon began the hearing by pointing out that with the election to be held in five days, three to five months after the actions complained of, there was no time for an effective preliminary injunction, so the relief in question would be a temporary restraining order (TRO).[4592] Judge Leon concluded,

> Well, as is the practice of this Court and all the other judges on our court, in the case of TROs, we announce our [decision] on the spot; we don't issue a written opinion.
>
> This case has more holes than a piece of Swiss cheese, and it's no surprise, as a result, that it's being at the 11th hour and 58th minute in the electoral season of our country this year.
>
> As far as this Court can discern, the Court lacks jurisdiction. The plaintiffs have not demonstrated [sufficient] standing; it's way too speculative. . . .
>
> . . .
>
> So for all those reasons, the Court will deny the TRO. The case will be moot as of Tuesday.[4593]

The plaintiffs dismissed their case voluntarily the next day.[4594]

Prohibited Use of "Reelection" for a Previous Office Holder Who Is Not the Incumbent

Make Liberty Win v. Cegavske (Robert C. Jones, D. Nev. 3:20-cv-592)

> Election statutes forbade campaign materials from referring to the election of a previous office holder who was not the incumbent as reelection. The district judge agreed that application of the statutes to a specific campaign was unconstitutional but did not agree that the statutes were facially unconstitutional.
>
> *Topics:* Campaign materials; door-to-door canvassing; Covid-19.

4589. Motion, *id.* (Oct. 21, 2020), D.E. 2.
4590. Joint Motion, *id.* (Oct. 26, 2020), D.E. 16.
4591. Docket Sheet, *id.* (Oct. 21, 2020).
4592. Transcript at 6–7, *id.* (Oct. 29, 2020, filed Nov. 17, 2020), D.E. 25.
4593. *Id.* at 32–33.
4594. Dismissal Notice, *id.* (Oct. 30, 2020), D.E. 24.

A political action committee filed a federal complaint in the District of Nevada on October 19, 2020, objecting to a determination by Nevada's secretary of state that the committee could not advocate for the "reelection" of a former legislator who was not an incumbent.[4595] With its complaint, the committee filed a motion for a preliminary injunction and a motion to expedite briefing, waiving oral argument.[4596]

Nevada's revised statutes on elections included chapter 294A on campaign practices. Among the provisions on required and prohibited practices were section 294A.330 on use of the term "reelect" and section 294A.340 on creating an implication that a candidate was an incumbent, both of which forbade referring to the election of someone who was not the incumbent but who previously held the office as reelection.[4597]

Judge Robert C. Jones agreed on October 21 that an opposition brief would be due seven days after service of the complaint and a reply would be due three days after service of the opposition.[4598] On October 23, he set the case for an October 29 videoconference hearing, posting on the public docket sheet telephone access for the public and a reminder that recording of the proceeding would not be permitted.[4599] The hearing was held at a time of widespread social distancing made necessary by the global Covid-19 infectious pandemic.

At the hearing, Judge Jones informed the parties how he would rule, and he ordered submission of a proposed order.[4600] On November 2, the day before the election, Judge Jones issued a preliminary injunction providing relief to the plaintiff committee.[4601] An opinion followed four days later, concluding that although application of the statute to the plain-

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4595. Complaint, Make Liberty Win v. Cegavske, No. 3:20-cv-592 (D. Nev. Oct. 19, 2020), D.E. 1; *see* Make Liberty Win v. Cegavske, 499 F. Supp. 3d 794, 797–99 (D. Nev. 2020).

4596. Briefing Motion, *Make Liberty Win*, No. 3:20-cv-592 (D. Nev. Oct. 19, 2020), D.E. 3 (requesting that the opposition be due within seven days and a reply due three days after that); Preliminary-Injunction Motion, *id.* (Oct. 19, 2020), D.E. 2.

4597. *Make Liberty Win*, 499 F. Supp. 3d at 798–99.

4598. Order, *Make Liberty Win*, No. 3:20-cv-592 (D. Nev. Oct. 21, 2020), D.E. 8.

4599. Docket Sheet, *id.* (Oct. 19, 2020) (minute order, D.E. 10).

4600. *Id.* (minutes, D.E. 18); *see* Proposed Order, *id.* (Oct. 31, 2020), D.E. 19; *see Make Liberty Win*, 499 F. Supp. 3d at 799.

4601. Preliminary Injunction, *Make Liberty Win*, No. 3:20-cv-592 (D. Nev. Nov. 2, 2020), D.E. 20; *Make Liberty Win*, 499 F. Supp. 3d at 799; Make Liberty Win v. Cegavske, 570 F. Supp. 3d 936, 939–40 (D. Nev. 2021).

tiff's specific campaign materials was unconstitutional, the statute was not otherwise unconstitutional.[4602]

The former legislator won the election.[4603]

On November 8, 2021, Judge Jones resolved the case by resolving summary-judgment motions.[4604] Applying the statutory restrictions to former incumbents was unconstitutional because "Defendant fails to provide a compelling government interest in preventing people from truthfully using the term 'reelect' when they were previously elected to the office even if they are not the current incumbent."[4605] But a facial challenge was wanting because "the statute can properly be enforced against a candidate falsely claiming to be an incumbent."[4606]

Enjoining False Robocalls About Voting by Mail

National Coalition on Black Civic Participation v. Wohl (Victor Marrero, S.D.N.Y. 1:20-cv-8668)

> A district judge required private parties who had made robocalls threatening voters with false statements about voting by mail to make curative robocalls.
>
> *Topics:* Campaign materials; early voting; absentee ballots; corporate electioneering; intervention; matters for state courts; pro se party; interlocutory appeal; Covid-19.

An October 16, 2020, federal complaint filed in the Southern District of New York accused defendants of intimidating voters during the global Covid-19 infectious pandemic with robocalls warning voters not to vote by mail: "Voters deceived by these messages face a harmful choice: expose yourself and your family to increased risk of contracting COVID-19 by voting in person, or do not vote."[4607] The plaintiffs were an organization and eight voters in New York, Pennsylvania, and Ohio.[4608] The defendants

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4602. *Make Liberty Win*, 499 F. Supp. 3d 794.

4603. *Make Liberty Win*, 570 F. Supp. 3d at 940; *see* Current Assembly Legislators, www.leg.state.nv.us/App/Legislator/A/Assembly/Current (Jill Dickman, district 31).

4604. *Make Liberty Win*, 570 F. Supp. 3d 936.

4605. *Id.* at 943.

4606. *Id.* at 945.

4607. Complaint at 1, Nat'l Coal. on Black Civic Participation v. Wohl, No. 1:20-cv-8668 (S.D.N.Y. Oct. 19, 2020), D.E. 11 [hereinafter *Nat'l Coal. on Black Civic Participation* Complaint] (correcting a Friday, October 16, 2020, filing error); Nat'l Coal. on Black Civic Participation v. Wohl, ___ F. Supp. 3d ___, ___, 2023 WL 2403012 (S.D.N.Y. 2023) (pp.1, 14 of opinion filed at S.D.N.Y. No. 1:20-cv-8668, D.E. 256); *see* Nat'l Coal. on Black Civic Participation v. Wohl, 512 F. Supp. 3d 500, 504–05 (S.D.N.Y. 2021); Nat'l Coal. on Black Civic Participation v. Wohl, 498 F. Supp. 3d 457, 463 (S.D.N.Y. 2020).

4608. *Nat'l Coal. on Black Civic Participation* Complaint, *supra* note 4607, at 3–4.

were two persons, two of their businesses, and ten Does.[4609] The plaintiffs filed a proposed temporary restraining order on October 22.[4610]

Judge Victor Marrero ordered a written response to the request for a temporary restraining order by October 23 and set the case for a telephonic hearing on Monday, October 26, posting contact information in the public record.[4611] The individual defendants, who were also facing criminal prosecution, appeared at the hearing pro se.[4612] An attorney filed a brief on their behalf on the following day.[4613]

Judge Marrero granted the plaintiffs a temporary restraining order on Wednesday.[4614] Referring to the defendants' actions as electoral terror, "this Court finds that the information Defendants' calls convey is manifestly false and meant to intimidate citizens from exercising voting

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4609. *Id.* at 4–5.

4610. Proposed Order, *Nat'l Coal. on Black Civic Participation*, No. 1:20-cv-8668 (S.D.N.Y. Oct. 22, 2020), D.E. 12; *Nat'l Coal. on Black Civic Participation*, ___ F. Supp. 3d at ___, 2023 WL 2403012 (p.14 of opinion filed at S.D.N.Y. No. 1:20-cv-8668, D.E. 256); *see Nat'l Coal. on Black Civic Participation*, 512 F. Supp. 3d at 507.

4611. Order, *Nat'l Coal. on Black Civic Participation*, No. 1:20-cv-8668 (S.D.N.Y. Oct. 22, 2020), D.E. 27; *see* Docket Sheet, *id.* (Oct. 16, 2020) [hereinafter *Nat'l Coal. on Black Civic Participation* Docket Sheet] (minutes, Oct. 26, 2020); *Nat'l Coal. on Black Civic Participation*, ___ F. Supp. 3d at ___, 2023 WL 2403012 (p.14 of opinion filed at S.D.N.Y. No. 1:20-cv-8668, D.E. 256); *Nat'l Coal. on Black Civic Participation*, 498 F. Supp. 3d at 465–66.

4612. *Nat'l Coal. on Black Civic Participation*, 498 F. Supp. 3d at 466, 468, 474–75; Opinion at 3–4, *Nat'l Coal. on Black Civic Participation*, No. 1:20-cv-8668 (S.D.N.Y. Feb. 22, 2021), D.E. 77, 2021 WL 694557 (denying a renewed defense motion to stay the case pending criminal proceedings in state court), *appeal dismissed for lack of a final order*, Order, No. 21-495 (2d Cir. June 22, 2021), D.E. 92, 2021 WL 3852252; *see also* Oralandar Brand-Williams, *2 Conservative Activists to Be Tried in Robocall Plot*, Detroit News, Oct. 30, 2020, at A5; Beth LeBlanc, *Two Appear in Voter Intimidation Case*, Detroit News, Oct. 9, 2020, at A4; Darrel Rowland, *Ohio Considering Charges in Voter Intimidation*, Cincinnati Enquirer, Oct. 18, 2020, at A15.

One defendant said at the hearing, "We rushed as fast as we could to get a lawyer, and we have secured him as of yesterday, and he will be available on the case literally within 24 hours or so." Transcript at 3, *Nat'l Coal. on Black Civic Participation*, No. 1:20-cv-8668 (S.D.N.Y. Oct. 26, 2020, filed Nov. 2, 2020), D.E. 53.

4613. Defendants' Brief, *Nat'l Coal. on Black Civic Participation*, No. 1:20-cv-8668 (S.D.N.Y. Oct. 27, 2020), D.E. 36; *Nat'l Coal. on Black Civic Participation*, 498 F. Supp. 3d at 469.

4614. *Nat'l Coal. on Black Civic Participation*, 498 F. Supp. 3d 457; *Nat'l Coal. on Black Civic Participation*, ___ F. Supp. 3d at ___, 2023 WL 2403012 (p.14 of opinion filed at S.D.N.Y. No. 1:20-cv-8668, D.E. 256); *Nat'l Coal. on Black Civic Participation*, 512 F. Supp. 3d at 507; *see* Opinion, *Nat'l Coal. on Black Civic Participation*, No. 1:20-cv-8668 (S.D.N.Y. Oct. 29, 2020), D.E. 41, 2020 WL 6365336 (denying reconsideration).

rights."[4615] The robocalls asserted that voting by mail would subject voters to enhanced private and government surveillance.[4616] Judge Marrero ordered the defendants to make curative robocalls to all recipients of the false robocalls informing them of the court's findings.[4617]

Judge Marrero ordered evidence of compliance submitted by 5:00 p.m. on October 29.[4618] Instead, the defendants' attorney submitted a letter outlining difficulties in complying with the court's order arising from pending criminal prosecutions.[4619] Following negotiations among the parties and two teleconference hearings on October 30, Judge Marrero determined that information submitted by the defendants remained insufficient to assess compliance with his order.[4620] An interlocutory appeal from the temporary restraining order was withdrawn.[4621]

In January 2021, Judge Marrero denied the defendants' motion to dismiss the case.[4622] In February, Judge Marrero denied defendants a stay pending resolution of their criminal prosecutions in Michigan and Ohio.[4623] In May, Judge Marrero permitted New York's attorney general to intervene as a plaintiff, adding a California robocall business as a defendant.[4624] Judge Marrero denied intervention to someone who "has not iden-

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4615. *Nat'l Coal. on Black Civic Participation*, 498 F. Supp. 3d at 464.

4616. *Id.* at 466.

4617. *Id.* at 490 (scripting the message).

4618. *Id.*

4619. Letter, *Nat'l Coal. on Black Civic Participation*, No. 1:20-cv-8668 (S.D.N.Y. Oct. 29, 2020), D.E. 43.

4620. Opinion, *id.* (Oct. 30, 2020), D.E. 49; *see* Letters, *id.* (Oct. 3, 2020), D.E. 46 to 48; *Nat'l Coal. on Black Civic Participation* Docket Sheet, *supra* note 4611 (minutes, Oct. 30, 2020); *see also* Oralandar Brand-Williams, *Judge Criticizes Activists' Remedy for Robocalls*, Detroit News, Oct. 31, 2020, at A6.

4621. Order, Nat'l Coal. on Black Civic Participation v. Wohl, No. 20-3724 (2d Cir. Nov. 9, 2020), D.E. 11.

4622. Nat'l Coal. on Black Civic Participation v. Wohl, 512 F. Supp. 3d 500 (S.D.N.Y. 2021).

4623. Opinion, *Nat'l Coal. on Black Civic Participation*, No. 1:20-cv-8668 (S.D.N.Y. Feb. 22, 2021), D.E. 77, 2021 WL 694557; *see* Order, Nat'l Coal. on Black Civic Participation v. Wohl, No. 21-232 (2d Cir. June 22, 2021), D.E. 113, 2021 WL 3852252 (dismissing an interlocutory appeal).

4624. Opinion, *Nat'l Coal. on Black Civic Participation*, No. 1:20-cv-8668 (S.D.N.Y. May 19, 2021), D.E. 101; *see* Nat'l Coal. on Black Civic Participation v. Wohl, ___ F. Supp. 3d ___, ___, 2023 WL 2403012 (S.D.N.Y. 2023) (pp.1–2, 16 of opinion filed at S.D.N.Y. No. 1:20-cv-8668, D.E. 256); Intervention Complaint, *Nat'l Coal. on Black Civic Participation*, No. 1:20-cv-8668 (S.D.N.Y. May 19, 2021), D.E. 102; N.Y. Att'y Gen. Letter, *id.* (May 6, 2021), D.E. 92; *see also* Opinion, *id.* (Sept. 17, 2021), D.E. 140, 2021 WL 4254802 (denying a motion to dismiss new defendants).

tified any claim or defense he wishes to assert that shares a common question of law or fact with the main action"; the prospective intervenor sought to challenge the attorney general's "selective enforcement of voting rights laws and alleged misconduct in connection with the 2017 New York City government elections."[4625] On September 17, Judge Marrero denied a motion to dismiss the attorney general's complaint in intervention.[4626]

The original and intervening plaintiffs filed an amended complaint on November 12, 2021.[4627] On June 2, 2022, Judge Marrero issued a consent decree governing the California business's robocalls.[4628] The individual defendants pleaded guilty in the Ohio prosecution in October.[4629] Judge Marrero granted the plaintiffs summary judgment on March 8, 2023.[4630] He concluded, "Defendants set into motion a full-scale voter suppression operation during the summer of 2020 to discourage eligible voters from voting by targeting mail-in voting in the 2020 Election."[4631] A jury trial on remedies is set to begin on January 29, 2024.[4632]

Electioneering on County Property

Gonzalez Garza v. Starr County (Randy Crane, S.D. Tex. 7:18-cv-46)

> A federal district judge declared unconstitutionally vague an apparent proscription against electioneering on county-owned property adjacent to voting locations, finding that the apparent order was expressed merely as a desire. Litigation continued for three years during several amendments to the policy, several

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4625. Opinion at 2–3, *Nat'l Coal. on Black Civic Participation*, No. 1:20-cv-8668 (S.D.N.Y. May 28, 2021), D.E. 115, 2021 WL 2183090.

4626. Opinion, *id.* (Sept. 17, 2021), D.E. 140, 2021 WL 4254802; *Nat'l Coal. on Black Civic Participation*, ___ F. Supp. 3d at ___, 2023 WL 2403012 (p.16 of opinion filed at S.D.N.Y. No. 1:20-cv-8668, D.E. 256).

4627. Amended Complaint, *Nat'l Coal. on Black Civic Participation*, No. 1:20-cv-8668 (S.D.N.Y. Nov. 12, 2021), D.E. 149.

4628. Consent Decree, *id.* (June 2, 2022), D.E. 196; *Nat'l Coal. on Black Civic Participation*, ___ F. Supp. 3d at ___, 2023 WL 2403012 (p.16 of opinion filed at S.D.N.Y. No. 1:20-cv-8668, D.E. 256).

4629. Letter, *Nat'l Coal. on Black Civic Participation*, No. 1:20-cv-8668 (S.D.N.Y. Jan. 9, 2023), D.E. 252 (attaching a plea transcript); *Nat'l Coal. on Black Civic Participation*, ___ F. Supp. 3d at ___, 2023 WL 2403012 (p.15 of opinion filed at S.D.N.Y. No. 1:20-cv-8668, D.E. 256); *see* Christine Hauser, *2 Plead Guilty Over Robocalls Meant to Curb Voting by Mail*, N.Y. Times, Oct. 26, 2022, at A11.

4630. *Nat'l Coal. on Black Civic Participation*, ___ F. Supp. 3d ___, 2023 WL 2403012 (opinion filed at S.D.N.Y. No. 1:20-cv-8668, D.E. 256).

4631. *Id.* at ___ (p.5 of filed opinion).

4632. Order, *Nat'l Coal. on Black Civic Participation*, No. 1:20-cv-8668 (S.D.N.Y. Aug. 31, 2023), D.E. 318.

amendments to the complaint, and additional rulings by the judge. A final settlement brought the action to an end.

Topics: Campaign materials; early voting.

Two voters, one active in the Democratic Party and one active in the Republican Party, filed a federal complaint in the Southern District of Texas's McAllen courthouse on Wednesday, February 21, 2018, against Starr County and its election officials to challenge a proscription against electioneering on county-owned property—including property adjacent to early-voting locations—during the March 6 primary election and the November 6 general election.[4633] The voters filed an application for a temporary restraining order on February 22.[4634] That day, Judge Randy Crane set the case for hearing on Monday.[4635] Although one of the defendants asked on Saturday for a continuance because of the tight time frame,[4636] Judge Crane conducted the hearing as originally scheduled.[4637]

The order that triggered the case stated, "the Commissioners Court of Starr County finds that it desires to regulate the time, place and manner of electioneering by prohibiting electioneering during any 'voting period' . . . in or on property owned or under the care, custody and control of the County of Starr."[4638] At the hearing, Judge Crane questioned whether a statement of desire was an order.[4639] Following testimony and argument, Judge Crane concluded that "a document that expresses only the desires of the county [which] contains no language actually adopting any order or rule" is unconstitutionally vague as something that could be enforced against an individual.[4640]

4633. Complaint, Gonzalez Garza v. Starr County, No. 7:18-cv-46 (S.D. Tex. Feb. 21, 2018), D.E. 1; *see* Second Amended Complaint, *id.* (May 1, 2018), D.E. 29; First Amended Complaint, *id.* (Apr. 2, 2018), D.E. 24; *see also* Molly Smith, *Lawsuit Challenges Starr County's Electioneering Ban*, McAllen Monitor, Feb. 22, 2018.

4634. First Temporary-Restraining-Order Motion, *Gonzalez Garza*, No. 7:18-cv-46 (S.D. Tex. Feb. 22, 2018), D.E. 4.

4635. Order, *id.* (Feb. 22, 2018), D.E. 5.

Tim Reagan interviewed Judge Crane for this report by telephone on September 17, 2018.

4636. Continuance Motion, *Gonzalez Garza*, No. 7:18-cv-46 (S.D. Tex. Feb. 24, 2018), D.E. 9; Transcript at 5, *id.* (Feb. 26, 2018, filed Mar. 9, 2018), D.E. 19 [hereinafter Feb. 26, 2018, *Gonzalez Garza* Transcript].

4637. Feb. 26, 2018, *Gonzalez Garza* Transcript, *supra* note 4636.

4638. Ex. A, First Temporary-Restraining-Order Brief, *Gonzalez Garza*, No. 7:18-cv-46 (S.D. Tex. Feb. 22, 2018), D.E. 4.

4639. Feb. 26, 2018, *Gonzalez Garza* Transcript, *supra* note 4636, at 6–10.

4640. *Id.* at 103; *see* Berenice Garcia, *Judge Issues Preliminary Order on Starr Election-*

On February 28, Judge Crane enjoined, "until the merits of this case are decided," any proscription on electioneering in county-owned common areas outside a 100-foot buffer around polling places.[4641] Judge Crane did not enjoin "reasonable restrictions in light of the primary purpose served by the fora": proscriptions on setting up electioneering tents and barbeque pits in parking lots.[4642]

As a May 22 runoff primary election approached, and following new statements of electioneering control issued on April 11 and May 9, the plaintiffs sought leave on May 20 to file a third amended complaint,[4643] and they filed a second application for a temporary restraining order on May 21.[4644] Judge Crane scheduled a hearing for June 5.[4645] Following the hearing, Judge Crane gave the county thirty days to refine their electioneering controls, after which the plaintiffs would have thirty days to amend their complaint again.[4646] A fourth amended complaint was filed on July 25,[4647] and a fifth amended complaint was filed on August 23.[4648]

The quality of the lawyering in the case was good, which was a pleasure for Judge Crane.[4649] On one side of the case was one of his former law clerks, and on the other side was a former law clerk of another judge in the courthouse.[4650]

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eering Ban, McAllen Monitor, Feb. 26, 2018.

4641. Gonzalez Garza v. Starr County, 309 F. Supp. 3d 454 (S.D. Tex. 2018); *see* Berenice Garcia, *Judge Blocks Part of Starr County Electioneering Rules*, McAllen Monitor, Feb. 28, 2018.

4642. *Gonzalez Garza*, 309 F. Supp. 3d at 458.

4643. Amended-Complaint Motion, *Gonzalez Garza*, No. 7:18-cv-46 (S.D. Tex. May 20, 2018), D.E. 35; Minutes, *id.* (May 22, 2018), D.E. 38; *see* Transcript, *id.* (May 2, 2018, filed May 14, 2018), D.E. 32 (status conference including a discussion of electioneering-policy revisions).

4644. Second Temporary-Restraining-Order Motion, *id.* (May 21, 2018), D.E. 36.

4645. Order, *id.* (May 22, 2018), D.E. 39.

"There were some scheduling issues, I probably would have set it earlier, but here it is now." Transcript at 3, *id.* (June 5, 2018, filed July 12, 2018), D.E. 54 [hereinafter June 5, 2018, *Gonzalez Garza* Transcript] (remarks by Judge Crane).

4646. Order, *id.* (June 5, 2018), D.E. 53; *see* June 5, 2018, *Gonzalez Garza* Transcript, *supra* note 4645, at 9 (Judge Crane's observing, "the Plaintiffs I feel need to re-plead with greater specificity"); *see also* Berenice Garcia, *Judge Denies Order Blocking Starr County Policies*, McAllen Monitor, June 7, 2018.

4647. Fourth Amended Complaint, *Gonzalez Garza*, No. 7:18-cv-46 (S.D. Tex. July 25, 2018), D.E. 56; *see* Transcript at 2–4, *id.* (Aug. 17, 2018, filed Aug. 28, 2018), D.E. 64 [hereinafter Aug. 17, 2018, *Gonzalez Garza* Transcript].

4648. Fifth Amended Complaint, *id.* (Aug. 23, 2018), D.E. 63.

4649. Interview with Judge Randy Crane, Sept. 17, 2018.

4650. *Id.*; Aug. 17, 2018, *Gonzalez Garza* Transcript, *supra* note 4647, at 24 (Aug. 17,

Changes in county policy to accommodate the plaintiffs' concerns and the court's concerns resulted in frequent amendments to the complaint. Although this presented Judge Crane with a moving target,[4651] it was also a process that moved the situation toward a just result.[4652] Changes in circumstances also tended to give the court a break in time pressure, because the plaintiffs needed time to examine the changes.[4653]

On November 6, 2019, Judge Crane found unconstitutionally vague a proscription on electioneering activities that distract drivers, but otherwise found constitutional the county's latest version of its electioneering policies.[4654]

The parties stipulated dismissal of the action as settled on May 12, 2021.[4655]

Anonymous Campaign Literature and Keeping a Candidate Off the Ballot

Davis v. Johnson (2:16-cv-13545) and Simpson v. Garrett (2:16-cv-13784) (Arthur J. Tarnow, E.D. Mich.)

> A frequent litigant and an incumbent school-board member filed federal actions challenging restrictions on anonymous campaigning and seeking to overturn state-court actions putting another candidate on the ballot. The district judge determined that the challenge to campaign restrictions required further administrative review and the challenge to state-court rulings was barred by judicial immunity and the *Rooker-Feldman* doctrine, which states that among federal courts only the Supreme Court has appellate jurisdiction over state-court proceedings. The court of appeals decided that litigation of this type belongs in state courts.
>
> *Topics:* Matters for state courts; getting on the ballot; campaign materials.

A voter filed a federal complaint in the Eastern District of Michigan on October 3, 2016, seeking a declaration of unconstitutionality for a Michigan statute that would forbid the plaintiff from "print[ing] and distribut[ing] anonymous campaign literature advocating the defeat of cer-

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2018, filed Aug. 28, 2018), D.E. 64 ("Always nice seeing former law clerks in court.").

4651. June 5, 2018, *Gonzalez Garza* Transcript, *supra* note 4645, at 7 (Judge Crane's observing, "we have a little bit of a moving target here").

4652. Interview with Judge Randy Crane, Sept. 17, 2018.

4653. *Id.*

4654. Opinion, Gonzalez Garza v. Starr County, No. 7:18-cv-46 (S.D. Tex. Nov. 6, 2019), D.E. 117.

4655. Stipulation, *id.* (May 12, 2021), D.E. 146.

tain candidates who were running for the Detroit Community School District Board of Education."[4656] Named as defendants were state and county election officials and a circuit judge for Wayne County.[4657] With his counseled complaint, the voter filed an application to proceed in forma pauperis[4658] and a motion for a temporary restraining order or a preliminary injunction.[4659] Judge Arthur J. Tarnow allowed the voter to proceed without fees[4660] and set a telephonic conference for October 6.[4661]

The federal case followed unsuccessful filings by the voter in state court. Following the voter's challenge to the candidacy of Penelope Bailer, the county election commission eliminated Bailer from the November 8 ballot for Detroit's board of education because her affidavit of identity did not include her precinct number.[4662] On September 16, the Wayne County circuit judge who would be named as a defendant in the federal action issued a writ of mandamus putting Bailer back on the ballot.[4663] On September 21, Michigan's court of appeals dismissed an appeal by the voter and his sister, a write-in candidate, because they were not parties to the mandamus action, noting that their interests had been "more than adequately represented."[4664] Michigan's supreme court denied review on September 22.[4665] The voter and the write-in candidate filed their own action in Wayne County's circuit court, which the circuit judge dismissed on September 28.[4666]

4656. Complaint at 6, Davis v. Johnson, No. 2:16-cv-13545 (E.D. Mich. Oct. 3, 2016), D.E. 1 [hereinafter *Davis* Complaint]; *see* Mich. Comp. Laws § 169.247(1).

4657. *Davis* Complaint, *supra* note 4656.

4658. IFP Application, *Davis*, No. 2:16-cv-13545 (E.D. Mich. Oct. 3, 2016), D.E. 2.

4659. Motion, *id.* (Oct. 3, 2016), D.E. 3.

4660. IFP Order, *id.* (Oct. 5, 2016), D.E. 4.

Judge Tarnow died on January 21, 2022. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

4661. Notice, *Davis*, No. 2:16-cv-13545 (E.D. Mich. Oct. 6, 2016), D.E. 8; *see* Docket Sheet, *id.* (Oct. 3, 2016) [hereinafter E.D. Mich. *Davis* Docket Sheet] (minutes).

4662. *See* Shawn D. Lewis, *2 School Board Candidates Off Ballot*, Detroit News, Sept. 15, 2016, at A5.

4663. Writ, Bailer v. Winfrey, No. 16-011797-AW (Mich. Cir. Ct. Wayne Cty. Sept. 16, 2016), *filed as* Ex. F, *Davis* Complaint, *supra* note 4656; *see* Docket Sheet, *id.* (Sept. 14, 2016), cmspublic.3rdcc.org/.

4664. Opinion, Bailer v. Detroit City Clerk, No. 334823 (Mich. Ct. App. Sept. 21, 2016), 2016 WL 5328522.

4665. Bailer v. Detroit City Clerk, 884 N.W.2d 788 (Mich. 2016).

4666. Order, Davis v. Garrett, No. 16-012226-AW (Mich. Cir. Ct. Wayne Cty. Sept. 28, 2016), filed as Ex. H, *Davis* Complaint, *supra* note 4656; *see* Docket Sheet, *id.* (Sept. 23, 2016), cmspublic.3rdcc.org/.

The voter's federal complaint sought relief from his lack of success in state court and from county election officials' "deliberately and intentionally not appealing the clearly erroneous [mandamus] Order."[4667] An October 10 amended complaint added an incumbent candidate as a plaintiff.[4668]

Following a second telephonic conference on October 14,[4669] Judge Tarnow issued an October 19 opinion dismissing the county circuit judge as a defendant because of judicial immunity and the *Rooker-Feldman* doctrine, which states that among federal courts only the Supreme Court has appellate jurisdiction over state-court proceedings.[4670] Judge Tarnow also dismissed the incumbent as a plaintiff, because she was pursuing different claims for relief.[4671] Because the voter had not pursued administrative procedures for his campaign activities, Judge Tarnow otherwise decided to hold federal-court proceedings in abeyance.[4672]

The incumbent candidate filed her separate federal complaint on October 24, challenging the state-court order putting Bailer on the November ballot.[4673] With her complaint, the incumbent filed a motion for a temporary restraining order or a preliminary injunction.[4674] Judge Tarnow set a telephonic conference for October 27.[4675] At the conference, he ordered the defendants to respond to the incumbent's motion by November 7.[4676]

On October 31, the voter asked Judge Tarnow to reopen his case, because he had received preliminary indications from state election officials that his anonymous campaigning would not be permitted.[4677] On the fol-

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4667. *Davis* Complaint, *supra* note 4656, at 2–3.

4668. Amended Complaint, Davis v. Johnson, No. 2:16-cv-13545 (E.D. Mich. Oct. 10, 2016), D.E. 10; *see* Amended Motion, *id.* (Oct. 11, 2016), D.E. 12 (voter's motion for immediate relief); Motion, *id.* (Oct. 11, 2016), D.E. 11 (incumbent's motion for immediate relief).

4669. E.D. Mich. *Davis* Docket Sheet, *supra* note 4661 (minutes).

4670. Amended Opinion at 3–6, *Davis*, No. 2:16-cv-13545 (E.D. Mich. Oct. 20, 2016), D.E. 25 [hereinafter E.D. Mich. *Davis* Abeyance Opinion], *amending* Opinion, *id.* (Oct. 19, 2016), D.E. 22; *see* D.C. Ct. of Appeals v. Feldman, 460 U.S. 462 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923); *see also* Martin A. Schwartz, Section 1983 Litigation 21–24 (Federal Judicial Center 3d ed. 2014).

4671. E.D. Mich. *Davis* Abeyance Opinion, *supra* note 4670, at 2–3, 6.

4672. *Id.* at 3, 6.

4673. Complaint, Simpson v. Garrett, No. 2:16-cv-13784 (E.D. Mich. Oct. 24, 2016), D.E. 1.

4674. Motion, *id.* (Oct. 24, 2016), D.E. 2.

4675. Notice, *id.* (Oct. 27, 2016), D.E. 6.

4676. Docket Sheet, *id.* (Oct. 24, 2016) (minutes).

4677. Motion, Davis v. Johnson, No. 2:16-cv-13545 (E.D. Mich. Oct. 31, 2016), D.E. 28.

lowing day, Judge Tarnow denied the motion, because state administrative review was not yet complete.[4678]

On October 29, three days after the voter's appeal from the dismissal of the state judge as a federal defendant was docketed, the voter filed a motion to expedite the appeal so that it would be decided by election day.[4679] The motion also briefed the merits of the appeal.[4680] On November 4, two circuit judges concluded that "this entire matter should be in state court" and ordered the district-court case dismissed without argument or further briefing.[4681] The third judge would have denied the motion to expedite the appeal and left determination of the courts' jurisdiction for decision after briefing on the issue.[4682] The majority characterized state and federal court filings by the voter and his attorney as "repetitive, vexatious, and frivolous," although the majority also characterized the observation as "not pertinent to the adjudication of this appeal."[4683] The dissenting judge observed that even a vexatious litigant is "entitled to notice and an opportunity to be heard."[4684] Judge Tarnow dismissed the voter's case on November 15.[4685]

On November 8, neither Bailer nor the incumbent candidate was elected to the school board.[4686] Judge Tarnow dismissed the incumbent candidate's federal complaint on December 28.[4687]

Refusal to Accept a Minor Candidate's Campaign Ads

Sloan v. Hearst Media Company (Paul J. Barbadoro, D.N.H. 1:16-cv-52)

> A pro se federal complaint filed on the afternoon of the day of presidential primary elections challenged the plaintiff's exclusion from televised debates and challenged the refusal of a television station to air the plaintiff's paid ads. The district judge denied the

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4678. Opinion, *id.* (Nov. 1, 2016), D.E. 29.

4679. Motion, Davis v. Johnson, No. 16-2499 (6th Cir. Oct. 29, 2016), D.E. 8 [hereinafter 6th Cir. *Davis* Motion]; *see* Docket Sheet, *id.* (Oct. 26, 2016).

4680. 6th Cir. *Davis* Motion, *supra* note 4679, at 3–7.

4681. Davis v. Johnson, 664 F. App'x 446, 450–51 (6th Cir. 2016) (opinion by Circuit Judge Eric L. Clay, joined by Circuit Judge Julia Smith Gibbons).

4682. *Id.* at 451–52 (concurring and dissenting opinion by Circuit Judge Helene N. White).

4683. *Id.* at 450.

4684. *Id.* at 452.

4685. Order, Davis v. Johnson, No. 2:16-cv-13545 (E.D. Mich. Nov. 15, 2016), D.E. 31.

4686. *See* Members of the Detroit Board of Education, detroitk12.org/board/members/, *archived at* web.archive.org/web/20170209102023/detroitk12.org/board/members/; Shawn D. Lewis, *Detroit Picks 7 to Lead New District*, Detroit News, Nov. 10, 2016, at A6.

4687. Opinion, Simpson v. Garrett, No. 2:16-cv-13784 (E.D. Mich. Dec. 28, 2016), D.E. 12, 2016 WL 7453763.

> plaintiff a temporary restraining order on the day that the complaint was filed for failure to comply with Federal Rule of Civil Procedure 65(b)(1)'s notice requirements for a temporary restraining order. A little over two months later, a magistrate judge reviewed the complaint and recommended its dismissal. Reviewing the plaintiff's objections, the district judge adopted the recommendation, and the court of appeals affirmed the dismissal.
>
> *Topics:* Campaign materials; pro se party; primary election.

At 3:48 p.m. on the day of the 2016 presidential primary election in New Hampshire, a candidate filed a pro se federal complaint in the District of New Hampshire against a television station and a national party chair challenging the station's refusal to air the candidate's paid ads and challenging the candidate's exclusion from television debates.[4688] With his complaint, the candidate filed a motion for a temporary restraining order.[4689]

District Judge Paul J. Barbadoro denied the motion that day for failure to comply with Federal Rule of Civil Procedure 65(b)(1)'s notice requirements for a temporary restraining order.[4690]

On April 28, Magistrate Judge Andrea K. Johnstone evaluated the complaint and recommended dismissal of the case.[4691] Considering the candidate's May 26 objections,[4692] Judge Barbadoro approved the recommendation on May 31,[4693] a decision that the court of appeals summarily affirmed on October 28.[4694]

Unconstitutional Proscription on Forming a Campaign Committee Shortly Before an Election

Missourians for Fiscal Accountability v. Klahr (Ortrie D. Smith, W.D. Mo. 2:14-cv-4287)

> A district court's temporary restraining order blocked a proscription on forming a campaign committee fewer than thirty days before an election. After the election, the district judge determined that the case was not moot, but he later determined that it was not ripe. The court of appeals concluded that the case was

4688. Complaint, Sloan v. Hearst Media Co., No. 1:16-cv-52 (D.N.H. Feb. 9, 2016), D.E. 1.

4689. Temporary-Restraining-Order Motion, *id.* (Feb. 9, 2016), D.E. 2.

4690. Order, *id.* (Feb. 9, 2016), D.E. 4.

4691. Report and Recommendation, *id.* (Apr. 28, 2016), D.E. 5, 2016 WL 3063847.

4692. Objections, *id.* (May 26, 2016), D.E. 6.

4693. Order, *id.* (May 31, 2016), D.E. 7, 2016 WL 3077873.

4694. Order, Sloan v. Hearst Television, Inc., No. 16-1885 (1st Cir. Oct. 28, 2016).

> ripe, and the district judge then issued a summary judgment that the proscription was unconstitutional. The court of appeals agreed, and the district judge awarded the plaintiff $158,055.80 in attorney fees and costs.
>
> *Topics:* Campaign finance; attorney fees; recusal; ballot measure.

On the Thursday before the November 4, 2014, general election, an organization established on October 22 to promote a ballot proposition filed a federal complaint in the Western District of Missouri challenging a statute that forbade the formation of a campaign committee fewer than thirty days before an election.[4695] A little after 11:00 on the following morning, the organization filed a motion for preliminary and permanent injunctions and a temporary restraining order.[4696]

On the case's second day, Judge Dean Whipple recused himself,[4697] and the court reassigned the case to Judge Ortrie D. Smith.[4698] Judge Smith held a telephonic hearing at 3:30 p.m. on Friday.[4699] On Sunday, he issued a temporary restraining order against enforcement of the statute as an unconstitutional restriction on speech.[4700] "[T]he blackout period is not a disclosure requirement. It does not require those collecting or expending funds to say anything to anyone, much less to the electorate. To the contrary, the blackout period *forbids* communication by preventing the committee from expending solicited funds."[4701]

Two days after the election, Judge Smith issued an order to show cause why the case should not be dismissed as moot: "Plaintiff can no longer advocate in support of ballot issues from the election, and the Court can no

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4695. Complaint, Missourians for Fiscal Accountability v. Klahr, No. 2:14-cv-4287 (W.D. Mo. Oct. 30, 2014), D.E. 1; Missourians for Fiscal Accountability v. Klahr, 892 F.3d 944, 948 (8th Cir. 2018); Missourians for Fiscal Accountability v. Klahr, 830 F.3d 789, 792 (8th Cir. 2016); *see* Mo. Rev. Stat. § 130.011(8).

4696. Motion, *Missourians for Fiscal Accountability*, No. 2:14-cv-4287 (W.D. Mo. Oct. 31, 2014), D.E. 5; Opinion at 2, *id.* (Nov. 2, 2014), D.E. 9 [hereinafter *Missourians for Fiscal Accountability* Temporary-Restraining-Order Opinion], 2014 WL 5530996.

4697. Recusal Order, *id.* (Oct. 31, 2014), D.E. 4.

4698. Docket Sheet, *id.* (Oct. 30, 2014) (D.E. 6).

4699. Transcript, *id.* (Oct. 31, 2014, filed Nov. 17, 2014), D.E. 12; *Missourians for Fiscal Accountability* Temporary-Restraining-Order Opinion, *supra* note 4696, at 2.

4700. *Missourians for Fiscal Accountability* Temporary-Restraining-Order Opinion, *supra* note 4696; *Missourians for Fiscal Accountability*, 892 F.3d at 948; *Missourians for Fiscal Accountability*, 830 F.3d at 792.

4701. *Missourians for Fiscal Accountability* Temporary-Restraining-Order Opinion, *supra* note 4696, at 4.

longer grant any effective relief."[4702] On January 8, 2015, Judge Smith concluded that the case was not moot, because "Plaintiff must register at least thirty days before any future elections."[4703]

On April 27, however, Judge Smith determined that the organization's claims were not yet ripe.[4704] By a vote of two to one, the court of appeals determined on July 29, 2016, that the case was ripe because the committee formed to support a successful 2014 ballot proposition had engaged in eleven days of self-censorship.[4705] Judge Smith awarded the organization summary judgment on January 5, 2017,[4706] a judgment affirmed by the court of appeals on June 12, 2018.[4707] "[T]he formation deadline prohibits those who do not form a campaign committee 30 days before the election from speaking."[4708] "Due to its burden on speech and its modest effect on preventing circumvention of the disclosure regime, the formation deadline is not narrowly tailored."[4709]

On April 10, 2017, Judge Smith awarded the organization $158,055.80 in attorney fees and costs.[4710]

Direct-Mail Campaigning to Absentee Voters

Sheldon v. Grimes (David L. Bunning, E.D. Ky. 2:14-cv-60)

> A primary-election candidate filed a federal complaint to obtain mailing addresses for persons who had been sent absentee ballots so that she could target her campaign to them. The district judge declined to invalidate the state law that protected the voters' temporary mailing addresses from the candidate.
>
> *Topics:* Campaign materials; absentee ballots; primary election.

4702. Order to Show Cause, *Missourians for Fiscal Accountability*, No. 2:14-cv-4287 (W.D. Mo. Nov. 6, 2014), D.E. 11.

4703. Order at 1, *id.* (Jan. 8, 2015), D.E. 20.

4704. Opinion, *id.* (Apr. 27, 2015), D.E. 25, 2015 WL 1893359; *Missourians for Fiscal Accountability*, 830 F.3d at 792; *Missourians for Fiscal Accountability*, 892 F.3d at 948.

4705. *Missourians for Fiscal Accountability*, 830 F.3d at 794–97; *Missourians for Fiscal Accountability*, 892 F.3d at 948.

4706. Opinion, *Missourians for Fiscal Accountability*, No. 2:14-cv-4287 (W.D. Mo. Jan. 5, 2017), D.E. 44, 2017 WL 58588; *Missourians for Fiscal Accountability*, 892 F.3d at 948.

4707. *Missourians for Fiscal Accountability*, 892 F.3d at 946.

4708. *Id.* at 949.

4709. *Id.* at 952.

4710. Opinion, *Missourians for Fiscal Accountability*, No. 2:14-cv-4287 (W.D. Mo. Apr. 10, 2017), D.E. 62.

A candidate in a May 20, 2014, primary election for state senate filed a federal complaint in the Eastern District of Kentucky on April 3 challenging the constitutionality of local election officials' refusal, pursuant to a new statute, to provide the candidate with mailing addresses for voters who had requested absentee ballots so that the candidate could inform the voters "about her background as a veteran, mother, and lifelong Republican."[4711] With her complaint, the candidate filed a motion for a temporary restraining order.[4712]

On April 4, Judge David L. Bunning set a telephonic status conference for April 7.[4713] At the conference, he ordered briefing, including on legislative history, to be completed on April 16.[4714] At an April 18 teleconference, he set the case for hearing on April 28.[4715]

At the April 28 hearing, he denied the candidate immediate relief,[4716] and he issued an opinion with his reasons on May 1.[4717] "At the heart of this case lies one simple question: Under the First Amendment, does the government have a duty to disclose information to candidates in order to facilitate their campaign efforts? The Court thinks not."[4718]

Following additional briefing, Judge Bunning granted the defendants' motion to dismiss the case on August 26.[4719] An appeal was dismissed as settled on November 13.[4720]

Municipal Campaign Signs in a Neighboring Municipality

O'Boyle v. City of Delray Beach (Donald M. Middlebrooks, S.D. Fla. 9:14-cv-80270)

> A municipal candidate's federal complaint alleged that a neighboring municipality was wrongfully taking down the candidate's campaign signs in the defendant's municipality. The district judge set the case for hearing on a Friday, four days after the complaint was filed, but the defendant city sought time to find outside counsel because an assistant city attorney was named in

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4711. Complaint, Sheldon v. Grimes, No. 2:14-cv-60 (E.D. Ky. Apr. 3, 2014), D.E. 1; *see* Amended Complaint, *id.* (Apr. 11, 2014), D.E. 13.

4712. Temporary-Restraining-Order Motion, *id.* (Apr. 3, 2014), D.E. 5.

4713. Order, *id.* (Apr. 4, 2014), D.E. 7.

4714. Order, *id.* (Apr. 7, 2014), D.E. 8.

4715. Order, *id.* (Apr. 18, 2014), D.E. 23; *see* Order, *id.* (Apr. 16, 2014), D.E. 21 (setting a teleconference for April 18, 2014).

4716. Minutes, *id.* (Apr. 28, 2014), D.E. 25.

4717. Sheldon v. Grimes, 18 F. Supp. 3d 854 (E.D. Ky. 2014).

4718. *Id.* at 856.

4719. Opinion, *Sheldon*, No. 2:14-cv-60 (E.D. Ky. Aug. 26, 2014), D.E. 46.

4720. Order, Sheldon v. Kentucky, No. 14-6192 (6th Cir. Nov. 13, 2014), D.E. 13.

> the complaint. The judge reset the hearing for the following Monday, but he urged the parties to come to a temporary agreement. A stipulated temporary restraining order forbade the defendant city from taking down the plaintiff's signs in locations where campaign signs were permitted. Months later, the judge awarded the defendant city summary judgment because the taking down of the plaintiff's signs resulted from a single city worker's error that subsequently was corrected.
>
> *Topic:* Campaign materials.

A candidate in a March 11, 2014, election for town commissioner in Gulf Stream, Florida, filed a federal complaint in the Southern District of Florida on February 24 against the neighboring City of Delray Beach, alleging that the city's officials were wrongfully removing the candidate's campaign signs from locations within the city, and alleging that other Gulf Stream candidates' signs were not removed.[4721] With his complaint, the candidate—an experienced filer in the court—filed a motion for a temporary restraining order.[4722]

On the following day, Judge Donald M. Middlebrooks set the case for hearing on February 28.[4723] Because an assistant city attorney was named in the complaint, the city informed the court that it would need time to appoint outside counsel.[4724] Judge Middlebrooks reset the hearing for March 3 to accommodate the possible conflict, but he also instructed "the Parties to meet and confer to determine whether an interim agreement can be reached," which "would obviate the need for an emergency hearing."[4725] On March 3, Judge Middlebrooks signed a stipulated temporary restraining order preventing Delray Beach from removing the candidate's signs from locations where other campaign signs are permitted.[4726]

Following additional briefing, Judge Middlebrooks awarded summary judgment to the city on October 20, finding that the removal of the candi-

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4721. Complaint, O'Boyle v. City of Delray Beach, No. 9:14-cv-80270 (S.D. Fla. Feb. 24, 2014), D.E. 1.

4722. Temporary-Restraining-Order Motion, *id.* (Feb. 24, 2014), D.E. 4.

4723. Order, *id.* (Feb. 25, 2014), D.E. 7; Interview with Judge Donald M. Middlebrooks, May 31, 2016.

Tim Reagan interviewed Judge Middlebrooks for this report by telephone.

4724. Notice, *O'Boyle*, No. 9:14-cv-80270 (S.D. Fla. Feb. 27, 2014), D.E. 11.

4725. Order, *id.* (Feb. 27, 2014), D.E. 12.

4726. Temporary Restraining Order, *id.* (Mar. 3, 2014), D.E. 20; *see* Marisa Gottesman, *Candidate Wins Sign Squabble*, F. Lauderdale Sun-Sentinel, Mar. 4, 2014, at 1B.

date's signs was a city worker's error that was subsequently corrected.[4727] The candidate's appeal was voluntarily dismissed.[4728]

For the March 11 election, the plaintiff was the single challenger to five incumbents for five at-large positions, and all of the incumbents prevailed.[4729]

Nullifying Campaign Limits Shortly Before an Election

New York Progress and Protection PAC v. Walsh (Paul A. Crotty, S.D.N.Y. 1:13-cv-6769)

> On September 25, 2013, a political action committee filed a federal complaint challenging campaign contribution limits. On October 17, the district judge denied a preliminary injunction against decades-old limits challenged in an emergency case that could have been brought earlier. On October 24, the court of appeals ordered the district judge to issue a preliminary injunction. Six months later, the district judge awarded the political action committee summary judgment, and the parties later agreed to an attorney-fee award of $360,000.
>
> *Topics:* Campaign finance; interlocutory appeal; laches; attorney fees.

A political action committee filed a federal complaint in the Southern District of New York on September 25, 2013, challenging campaign finance regulations in light of the committee's desire to advocate for the election of a conservative candidate in the November 5 election for mayor of New York.[4730]

On the following day, the committee filed a motion for a preliminary injunction.[4731] The committee also submitted a letter supporting urgency with a report that the prohibition on donations exceeding $150,000 was in conflict with a pending contribution of $200,000 and a desire to influence

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4727. Opinion, *O'Boyle*, No. 9:14-cv-80270 (S.D. Fla. Oct. 20, 2014), D.E. 44.

4728. Order, O'Boyle v. City of Delray Beach, No. 14-15192 (11th Cir. Apr. 28, 2015).

4729. *See* Larry Barszewski, *Municipalities Ready for Voters*, F. Lauderdale Sun-Sentinel, Mar. 11, 2014, at 1B; *Gulf Stream*, Palm Beach Post, Mar. 12, 2014, at 4B.

4730. Complaint, N.Y. Progress & Protection PAC v. Walsh, No. 1:13-cv-6769 (S.D.N.Y. Sept. 25, 2013), D.E. 1; N.Y. Progress & Protection PAC v. Walsh, 733 F.3d 483, 485 (2d Cir. 2013); *see* Rich Calder & Carl Campanile, *Lhota PACs Punch: Big-$$ Donors Suing in Bid to Open Floodgates*, N.Y. Post, Sept. 26, 2013, at 10.

4731. Preliminary-Injunction Motion, *N.Y. Progress & Protection PAC*, No. 1:13-cv-6769 (S.D.N.Y. Sept. 26, 2013), D.E. 3; *N.Y. Progress & Protection PAC*, 733 F.3d at 485.

the mayoral election.[4732] The state replied that the urgency resulted from the plaintiff's delay in bringing the action.[4733]

Judge Paul A. Crotty heard the case on October 8.[4734] On October 16, the committee filed a mandamus petition with the court of appeals seeking an order that Judge Crotty rule.[4735] Circuit Judge Dennis Jacobs granted the committee's motion for expedited consideration,[4736] but Judge Crotty ruled on October 17.[4737] Judge Crotty denied the plaintiff a preliminary injunction, noting the plaintiff's (1) asking the court to rush to dismantle a law, (2) asking the court to disrupt the status quo just days before an election, and (3) creating artificial urgency by challenging a law decades on the books so close to an election.[4738]

The court of appeals agreed to hear an appeal of the injunction denial on October 18, the day originally scheduled for a hearing on the mandamus petition.[4739] On October 24, the court of appeals ordered Judge Crotty to issue a preliminary injunction against the contribution cap.[4740] "Although we express no opinion on the ultimate outcome, the plaintiff here has a substantial likelihood of success on the merits."[4741] The delay in bringing the action was forgivable because it was filed only fifteen days af-

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4732. Plaintiff's Letter, *N.Y. Progress & Protection PAC*, No. 1:13-cv-6769 (S.D.N.Y. Sept. 26, 2013), D.E. 7.

4733. State's Letter, *id.* (Sept. 26, 2013), D.E. 8.

4734. Transcript, *id.* (Oct. 8, 2013, filed Nov. 19, 2013), D.E. 38; Docket Sheet, *id.* (Sept. 25, 2013) (D.E. 12).

4735. Mandamus Petition, *In re* N.Y. Progress & Protection PAC, No. 13-3868 (2d Cir. Oct. 16, 2013), D.E. 1; *N.Y. Progress & Protection PAC*, 733 F.3d at 485.

4736. Order, *In re N.Y. Progress & Protection PAC*, No. 13-3868 (2d Cir. Oct. 16, 2013), D.E. 13.

4737. Opinion, *N.Y. Progress & Protection PAC*, No. 1:13-cv-6769 (S.D.N.Y. Oct. 17, 2013), D.E. 31 [hereinafter October 17, 2013, *N.Y. Progress & Protection PAC* Opinion], 2013 WL 5647168; Mandate, *In re N.Y. Progress & Protection PAC*, No. 13-3868 (2d Cir. Oct. 16, 2013), D.E. 33 (granting withdrawal of the mandamus petition); *N.Y. Progress & Protection PAC*, 733 F.3d at 485–86.

4738. October 17, 2013, *N.Y. Progress & Protection PAC* Opinion, *supra* note 4737, at 9, 12; *see* Rich Calder, *A "Lhota" Cash Off the Table*, N.Y. Post, Oct. 18, 2013, at 16; Thomas Kaplan, *U.S. Judge Denies Bid by Lhota Supporters to Accept Unlimited Donations*, N.Y. Times, Oct. 18, 2013, at A22.

4739. *N.Y. Progress & Protection PAC*, 733 F.3d at 486; Preliminary Injunction, *N.Y. Progress & Protection PAC*, No. 1:13-cv-6769 (S.D.N.Y. Oct. 24, 2013), D.E. 34.

4740. *N.Y. Progress & Protection PAC*, 733 F.3d at 489; *see* Daniel Beekman & Annie Karni, *Pol Pile of Cash: Ruling KOs Limits on PACs in a Windfall for Lhota*, N.Y. Daily News, Oct. 25, 2013, at 18; Thomas Kaplan, *Court Lifts Limit on Contributing to Pro-Lhota PAC*, N.Y. Times, Oct. 25, 2013, at A1.

4741. *N.Y. Progress & Protection PAC*, 733 F.3d at 487.

ter the Republican primary election produced the candidate that the committee wished to support.[4742]

On April 24, 2014, Judge Crotty granted summary judgment to the committee.[4743] On June 25, the parties agreed to an award of $360,000 in attorney fees.[4744]

Electioneering Communications

Hispanic Leadership Fund v. Federal Election Commission (John A. Jarvey, S.D. Iowa 4:12-cv-339) and Hispanic Leadership Fund v. Federal Election Commission (T.S. Ellis III, E.D. Va. 1:12-cv-893)

> A group wishing to run a political advertisement filed a federal complaint against the Federal Election Commission in the Southern District of Iowa because the commission's advisory to another group suggested that the commission might not approve the plaintiff's advertisement. Ten days after the complaint was filed, the district court dismissed the action, determining that it should have been filed in Washington, D.C. Following the filing of a second complaint in the Eastern District of Virginia, the second district court decided on October 4 that three of five draft advertisements were electioneering communications subject to regulation because they referred to the presidential candidate for reelection.
>
> *Topics:* Corporate electioneering; campaign materials; case assignment; campaign finance.

The Hispanic Leadership Fund filed a federal complaint in the Southern District of Iowa on July 30, 2012, to seek the court's blessing of proposed advertisements that the fund wanted to air, including during the presidential election period beginning on August 4, expressing concern that an advisory issued to another group on June 13 suggested that the Federal Election Commission might not approve the fund's advertisements.[4745] With

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4742. *Id.* at 485.

4743. N.Y. Progress & Protection PAC v. Walsh, 17 F. Supp. 3d 319 (S.D.N.Y. 2014); *see* Daniel Beekman, *Court: Nix N.Y. Limit on Elex $*, N.Y. Daily News, Apr. 25, 2014, at 10; Carl Campanile, *Sad Judge Opens NY Pol $pigots*, N.Y. Post, Apr. 25, 2014, at 4; Thomas Kaplan, *Judge Rejects State Limit on Donations to "Super PACs,"* N.Y. Times, Apr. 25, 2014, at A22.

4744. Stipulated Order, *N.Y. Progress & Protection PAC*, No. 1:13-cv-6769 (S.D.N.Y. June 25, 2014), D.E. 79.

4745. Complaint, Hispanic Leadership Fund v. Fed. Election Comm'n, No. 4:12-cv-339 (S.D. Iowa July 30, 2012), D.E. 1; *see* Hispanic Leadership Fund, Inc. v. Fed. Election Comm'n, 897 F. Supp. 2d 407, 415, 418–20 (E.D. Va. 2012).

its complaint, the fund filed a motion for preliminary and permanent injunctions.[4746]

The court originally assigned the case to Senior Judge Harold D. Vietor, but he withdrew from the case, so the court assigned it to Judge John A. Jarvey, who, on August 2, set the case for hearing on August 8.[4747] On August 6, the Commission moved to transfer the case to the district court for the Eastern District of Virginia or the district court for the District of Columbia.[4748]

On the day after the hearing, Judge Jarvey dismissed the complaint for improper venue.[4749]

> All of the Defendant's activities took place in . . . Washington D.C. The Defendant's activities have little or no connection with Iowa. It certainly cannot be said that a "substantial part" of *any* activities giving rise to this cause of action, let alone the Defendants activities, occurred in Iowa. The only connection to Iowa is the Plaintiff's desire to broadcast the advertisements at issue.[4750]

The fund filed a federal complaint in the Eastern District of Virginia, where the fund had a mailing address, on August 10.[4751] The fund also filed a motion for a preliminary injunction.[4752]

Judge T.S. Ellis III heard the parties on August 17[4753] and ordered them to submit by August 24 proposed discovery and trial schedules for a consolidated merits trial and motion hearing.[4754] The parties agreed to waive discovery, and they agreed with the court to hold a proceeding on August

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4746. Motion, *Hispanic Leadership Fund*, No. 4:12-cv-339 (S.D. Iowa July 30, 2012), D.E. 2.

4747. Docket Sheet, *id.* (July 30, 2012); *see* Minutes, *id.* (Aug. 8, 2012), D.E. 24.

Judge Vietor died on July 23, 2016, and Judge Jarvey retired on March 18, 2022. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjcgov/history/judges.

4748. Transfer Motion, *Hispanic Leadership Fund*, No. 4:12-cv-339 (S.D. Iowa Aug. 6, 2012), D.E. 16.

4749. Opinion, *id.* (Aug. 9, 2012), D.E. 26.

4750. *Id.* at 4.

4751. Complaint at 1, 11, Hispanic Leadership Fund, Inc. v. Fed. Election Comm'n, No. 1:12-cv-893 (E.D. Va. Aug. 10, 2012), D.E. 1; Hispanic Leadership Fund, Inc. v. Fed. Election Comm'n, 897 F. Supp. 2d 407, 414–15 (E.D. Va. 2012).

4752. Preliminary-Injunction Motion, *Hispanic Leadership Fund, Inc.*, No. 1:12-cv-893 (E.D. Va. Aug. 10, 2012), D.E. 2.

4753. Minutes, *id.* (Aug. 17, 2012), D.E. 20.

4754. Order, *id.* (Aug. 17, 2012), D.E. 21.

31.[4755] Judge Ellis agreed to let the Campaign Legal Center participate as an amicus curiae.[4756] Another proceeding was held on September 20.[4757]

Judge Ellis ruled on October 4.[4758] He determined that the essence of the case was whether the advertisements referred to a clearly identified candidate, namely the President running for reelection.[4759] Three of five draft advertisements at issue were electioneering communications because they referred to candidate Barack Obama.[4760]

Constitutionality of Proscriptions on False Statements About Candidates

Susan B. Anthony List v. Driehaus (1:10-cv-720) and Coalition Opposed to Additional Spending & Taxes v. Ohio Elections Commission (1:10-cv-754) (Timothy S. Black and Susan J. Dlott, S.D. Ohio)

> Two actions filed in late October 2010 challenged the constitutionality of an Ohio statute proscribing false statements about candidates for office. The judge in the first case stayed the federal case pending state executive and judicial proceedings, pursuant to *Younger v. Harris*. The judge in the second case also denied immediate injunctive relief, and the two cases were consolidated for further proceedings after the election. Dismissals for lack of live controversies were reversed by the Supreme Court. The court of appeals affirmed a holding that the statute was unconstitutional, and it affirmed dismissal of a candidate's defamation counterclaim. The parties agreed to an attorney fee award of $1.3 million.
>
> *Topics:* Campaign materials; matters for state courts; recusal; case assignment; interlocutory appeal; attorney fees.

The Susan B. Anthony List, a public-interest organization dedicated to opposition of abortion and support for the election of women to Congress who share that opposition, filed a federal action in the Southern District of Ohio on October 18, 2010, challenging the constitutionality of an Ohio

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4755. Order, *id.* (Aug. 22, 2012), D.E. 23; Notice, *id.* (Aug. 22, 2012), D.E. 22; *see* Minutes, *id.* (Aug. 31, 2012), D.E. 30.

4756. Order, *id.* (Aug. 29, 2012), D.E. 29; *see* Motion, *id.* (Aug. 29, 2012), D.E. 28.

4757. Minutes, *id.* (Sept. 20, 2012), D.E. 38.

4758. Hispanic Leadership Fund, Inc. v. Fed. Election Comm'n, 897 F. Supp. 2d 407 (E.D. Va. 2012).

4759. *Id.* at 426; *see* 52 U.S.C. § 30104(f)(3)(A)(1)(I), *formerly* 2 U.S.C. § 434(f)(3)(A)(1)(I) (2012).

4760. *Hispanic Leadership Fund, Inc.*, 897 F. Supp. 2d at 415, 429–33; *see* Order, *Hispanic Leadership Fund, Inc.*, No. 1:12-cv-893 (E.D. Va. Dec. 11, 2012), D.E. 55 (denying the commission's motion for reconsideration).

statute proscribing false statements about candidates for office.[4761] With its complaint, the List filed a motion for a temporary restraining order and a preliminary injunction.[4762] The court originally assigned the case to Judge Susan J. Dlott,[4763] but she recused herself because an attorney in the case worked at her husband's law firm,[4764] so the case was transferred on the day that it was filed to Judge Timothy S. Black.[4765]

The controversy began with an intention by the List to publish a billboard in opposition to a candidate for reelection to Congress: "Shame on Steve Driehaus! Driehaus voted FOR taxpayer-funded abortion."[4766] The intended reference was a vote by Driehaus in favor of the 2010 Patient Protection and Affordable Care Act.[4767] On October 4, Driehaus filed a complaint against the List with Ohio's election commission, alleging that the proposed billboard violated Ohio's election false-statement statute.[4768] A commission panel found probable cause for the full commission to hear the complaint, and a hearing was set for October 28.[4769]

4761. Complaint, Susan B. Anthony List v. Driehaus, No. 1:10-cv-720 (S.D. Ohio Oct. 18, 2010), D.E. 1 [hereinafter *Susan B. Anthony List* Complaint]; Susan B. Anthony List v. Driehaus, 573 U.S. 149, 154 (2014); Susan B. Anthony List v. Driehaus, 814 F.3d 466, 470 (6th Cir. 2016); Susan B. Anthony List v. Driehaus, 779 F.3d 628, 631 (6th Cir. 2015); Susan B. Anthony List v. Driehaus, 805 F. Supp. 2d 412, 415 (S.D. Ohio 2011); *see Anti-Abortion Group Seeks to Erect Billboards Critical of Driehaus*, Cincinnati Enquirer, Oct. 19, 2010.

4762. Motion, *Susan B. Anthony List*, No. 1:10-cv-720 (S.D. Ohio Oct. 18, 2010), D.E. 2.

4763. For this report, Tim Reagan interviewed Judge Dlott and her law clerk Sarah Fairweather by telephone on July 30, 2012.

4764. Interview with Judge Timothy S. Black, Aug. 16, 2012; Interview with Judge Susan J. Dlott and her law clerk Sarah Fairweather, July 30, 2012.

Tim Reagan interviewed Judge Black for this report by telephone.

4765. Transfer Order, *Susan B. Anthony List*, No. 1:10-cv-720 (S.D. Ohio Oct. 18, 2010), D.E. 6.

4766. *Susan B. Anthony List* Complaint, *supra* note 4761; *Susan B. Anthony List*, 573 U.S. at 154 (also noting, "The advertising company that owned the billboard space refused to display that message, however, after Driehaus' counsel threatened legal action."); *Susan B. Anthony List*, 805 F. Supp. 2d at 414.

4767. *Susan B. Anthony List* Complaint, *supra* note 4761, at 3; *see* Pub. L. No. 111-148, 124 Stat. 119 (2010); *see also Susan B. Anthony List* Complaint, *supra* note 4761; *Susan B. Anthony List*, 573 U.S. at 153–54.

4768. *Susan B. Anthony List*, 573 U.S. at 154; Susan B. Anthony List v. Driehaus, 779 F.3d 628, 631 (6th Cir. 2015); *Susan B. Anthony List*, 805 F. Supp. 2d at 414.

4769. *Susan B. Anthony List*, 573 U.S. at 154; *Susan B. Anthony List*, 805 F. Supp. 2d at 414; *see Elections Panel Sides with Rep. Steve Driehaus in Abortion Flap*, Cincinnati Enquirer, Oct. 15, 2010.

The clerk's office established procedures for efficiently identifying emergency election cases, and motions for immediate injunctive relief were effectively resolved pursuant to a local rule.[4770] On October 25, Judge Black denied the List a restraining order and stayed the federal action, pursuant to *Younger v. Harris*,[4771] pending state executive and judicial proceedings.[4772] On October 28, the court of appeals denied the List an injunction pending appeal.[4773] In December, the List voluntarily dismissed this appeal.[4774]

The List and Driehaus agreed to postpone commission proceedings until after the election, which Driehaus lost.[4775] Thereafter, Driehaus withdrew his commission complaint.[4776] Judge Black lifted his stay on December 6.[4777]

The List's action became consolidated with a similar action filed on October 27 by the Coalition Opposed to Additional Spending & Taxes (COAST) against Ohio's election commission, its members, and its staff attorney.[4778] This case also was originally assigned to Judge Dlott, who held a telephonic conference with the parties on October 28, at which she de-

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4770. Interview with Judge Timothy S. Black, Aug. 16, 2012; *see* S.D. Ohio L.R. 65.1(a).

4771. 401 U.S. 37 (1971) (determining that the federal courts should not enjoin a criminal prosecution for violation of a statute that may violate the First Amendment absent a showing of bad faith, because the state courts can adjudicate the constitutional claim); *see id.* at 54 ("the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good-faith attempts to enforce it").

4772. Order, Susan B. Anthony List v. Driehaus, No. 1:10-cv-720 (S.D. Ohio Oct. 25, 2010), D.E. 14; *Susan B. Anthony List*, 805 F. Supp. 2d at 415; *Susan B. Anthony List*, 573 U.S. at 154–55; *Susan B. Anthony List*, 779 F.3d at 631; *see Court Stays Out of Driehaus Billboard Spat*, Cincinnati Enquirer, Oct. 26, 2010.

4773. Order, Susan B. Anthony List v. Driehaus, No. 10-4320 (6th Cir. Oct. 28, 2010), D.E. 28; *Susan B. Anthony List*, 573 U.S. at 155; *Susan B. Anthony List*, 805 F. Supp. 2d at 415.

4774. Order, *Susan B. Anthony List*, No. 10-4320 (6th Cir. Dec. 20, 2010), D.E. 33; *Susan B. Anthony List*, 805 F. Supp. 2d at 415.

4775. *Susan B. Anthony List*, 573 U.S. at 155; *Susan B. Anthony List*, 779 F.3d at 631 & n.2; *Susan B. Anthony List*, 805 F. Supp. 2d at 415; *see* Quan Truong, *Chabot Back to Congress*, Cincinnati Enquirer, Nov. 4, 2010.

4776. *Susan B. Anthony List*, 805 F. Supp. 2d at 415.

4777. Order, *Susan B. Anthony List*, No. 1:10-cv-720 (S.D. Ohio Dec. 6, 2010), D.E. 20; *Susan B. Anthony List*, 805 F. Supp. 2d at 415.

4778. Motion, Coal. Opposed to Additional Spending & Taxes v. Ohio Elections Comm'n, No. 1:10-cv-754 (S.D. Ohio Oct. 27, 2010), D.E. 2; Complaint, *id.* (Oct. 27, 2010), D.E. 1; *Susan B. Anthony List*, 573 U.S. at 155; Susan B. Anthony List v. Driehaus, 814 F.3d 466, 470 (6th Cir. 2016).

nied immediate injunctive relief.[4779] The case was consolidated with the List's case on November 19 and transferred to Judge Black as related to the earlier filed case.[4780] COAST filed amended complaints in December.[4781]

Judge Black resolved several motions in the two cases on August 1, 2011. He determined that the List's claims were moot because the commission action was dismissed and unripe because concerns about future actions were speculative.[4782]

COAST's strategies on abortion were similar to the List's, and COAST alleged that the administrative action against the List chilled its speech.[4783] Judge Black also found COAST's claims too speculative for federal-court jurisdiction.[4784]

On May 13, 2013, the court of appeals agreed that actions by the List and COAST were not yet ripe.[4785] Following a lively argument on April 22, 2014,[4786] the Supreme Court ruled unanimously on June 16 that the challenges to the statute were justiciable after all.[4787] On September 11, Judge Black declared the false-statements statute unconstitutional: "Lies have no place in the political arena and serve no purpose other than to undermine the integrity of the democratic process. The problem is that, at times, there

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4779. Docket Sheet, *Coal. Opposed to Additional Spending & Taxes*, No. 1:10-cv-754 (S.D. Ohio Oct. 27, 2010).

4780. Order, *id.* (Nov. 19, 2010), D.E. 9; *Susan B. Anthony List*, 805 F. Supp. 2d at 416; Interview with Judge Timothy S. Black, Aug. 16, 2012.

4781. Second Amended Complaint, *Coal. Opposed to Additional Spending & Taxes*, No. 1:10-cv-754 (S.D. Ohio Dec. 22, 2010), D.E. 12; First Amended Complaint, *id.* (Dec. 2, 2010), D.E. 10.

4782. Order, *Susan B. Anthony List*, No. 1:10-cv-720 (S.D. Ohio Aug. 1, 2011), D.E. 65, 2011 WL 3296174; *Susan B. Anthony List*, 573 U.S. at 156; *see* Dan Horn, *Driehaus Wins Abortion Billboard Battles*, Cincinnati Enquirer, Aug. 2, 2011 [hereinafter *Driehaus Wins*].

4783. *Susan B. Anthony List*, 805 F. Supp. 2d at 415–17.

4784. *Id.* at 417–23; *Susan B. Anthony List*, 573 U.S. at 156.

4785. Susan B. Anthony List v. Driehaus, 525 F. App'x 415 (6th Cir. 2013); *Susan B. Anthony List*, 573 U.S. at 156–57.

4786. Docket Sheet, Susan B. Anthony List v. Driehaus, No. 13-193 (U.S. Aug. 13, 2013); *see* Susan B. Anthony List v. Driehaus, 571 U.S. 1118 (2014) (granting certiorari); *see also* Robert Barnes, *Justices Suspicious of Law Criminalizing False Speech About Candidates*, Wash. Post, Apr. 23, 2014, at A6.

Tim Reagan attended the argument.

4787. *Susan B. Anthony List*, 573 U.S. 149; *see* Adam Liptak, *Justices Permit Challenge to an Ohio Law Banning Lies During Campaigns*, N.Y. Times, June 17, 2014, at A14.

is no clear way to determine whether a political statement is a lie or the truth."[4788]

On February 24, 2016, the court of appeals agreed: "Ohio's political false-statements laws are content-based restrictions targeting core political speech that are not narrowly tailored to serve the state's admittedly compelling interest in conducting fair elections."[4789]

Driehaus's answer to the List's complaint included a counterclaim for defamation, alleging that the List "defamed Mr. Driehaus by impugning his professional reputation as a pro-life Member of Congress and by falsely characterizing his performance and conduct in the office he held."[4790] In 2011, Judge Black denied the List summary judgment on the defamation counterclaim.[4791] In 2013, on reconsideration in light of intervening Supreme Court decisions and observing, "Sometimes even a person with excellent vision does not see the forest for the trees," Judge Black dismissed the counterclaim as inconsistent with the First Amendment: "as a matter of law, associating a political candidate with a mainstream political position, even if false, cannot constitute defamation."[4792]

The court of appeals affirmed Judge Black's defamation judgment, but rejected his reasoning, on March 6, 2015.[4793] "The district court's broad First Amendment proclamation is a misstatement of First Amendment

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4788. Susan B. Anthony List v. Driehaus, 45 F. Supp. 3d 765, 769 (S.D. Ohio 2014); *see* Sabrina Eaton, *Ohio Law on Political Lies Illegal, Judge Rules*, Cleveland Plain Dealer, Sept. 12, 2014, at A1; Kurtis Lee, *Judge Kills Ohio Ban on False Political Speech*, L.A. Times, Sept. 14, 2014, at 8; Dan Sewell & Lisa Cornwell, *Ohio's Curbs on Campaign Speech Voided*, Bos. Globe, Sept. 12, 2014, at A11; Chrissie Thompson, *Law Can't Stop Political Lies, Judge Rules*, Cincinnati Enquirer, Sept. 12, 2014, at A8.

> Based on a long life in the law and in a free society, I recognize the fundamental truth in a democracy, that the response to false speech in politics is counterspeech that is truthful such that there is a robust discussion of the issues in what is the truth or not the truth if, in politics, the truth can even be determined.

Transcript at 52, Susan B. Anthony List v. Driehaus, No. 1:10-cv-720 (S.D. Ohio Sept. 4, 2014, filed Dec. 19, 2014), D.E. 144 (closing remarks by Judge Black).

4789. Susan B. Anthony List v. Driehaus, 814 F.3d 466, 476 (6th Cir. 2016).

4790. Driehaus Answer and Counterclaim at 16, *Susan B. Anthony List*, No. 1:10-cv-720 (S.D. Ohio Dec. 3, 2010), D.E. 18; Susan B. Anthony List v. Driehaus, 805 F. Supp. 2d 423, 426 (S.D. Ohio 2011); *see Driehaus Sues Anti-Abortion Group*, Cincinnati Enquirer, Dec. 4, 2010.

4791. *Susan B. Anthony List*, 805 F. Supp. 2d 423; *see Driehaus Wins*, *supra* note 4782.

4792. Opinion at 1, 6, *Susan B. Anthony List*, No. 1:10-cv-720 (S.D. Ohio Jan. 25, 2013), D.E. 108, 2013 WL 308748; *see Judge Dismisses Driehaus Defamation Suit*, Cincinnati Enquirer, Jan. 30, 2013, at B1.

4793. Susan B. Anthony List v. Driehaus, 779 F.3d 628 (6th Cir. 2015).

defamation law and the grant of summary judgment based on that misstatement is clearly incorrect."[4794] Instead, the candidate lost the case because the advocacy group's statements were not completely devoid of truth and they were not said with actual malice.[4795]

On July 5, Judge Black entered a stipulated attorney fee award of $1.3 million.[4796]

Public Campaign Funds Triggered by an Opponent's Expenditures

Scott v. Roberts (Robert L. Hinkle, N.D. Fla. 4:10-cv-283)

> A self-funded gubernatorial candidate filed a federal complaint challenging public matching campaign funds for an opponent triggered by the plaintiff's spending above a specified threshold. The district court determined that the provision combatted corruption by promoting public campaign financing, but the court of appeals issued a preliminary injunction against the provision because it was not the least restrictive way to combat corruption. After the Supreme Court invalidated a similar provision in another state, the district judge issued a permanent injunction against the provision.
>
> *Topics:* Campaign finance; intervention; primary election.

Rick Scott, a self-funded primary-election candidate for governor, filed a federal complaint in the Northern District of Florida on July 7, 2010, against Florida's secretary of state challenging the Florida Election Campaign Financing Act's provision of matching public funding for an opposing candidate's campaign once a candidate's expenditures reached $2 per registered voter, or $24,901,170, which was also the expenditure limit for a candidate who opted into public campaign subsidies.[4797] With his complaint, the plaintiff filed a motion for a preliminary injunction.[4798]

4794. *Id.* at 632.

4795. *Id.* at 632–34.

4796. Stipulated Judgment, *Susan B. Anthony List*, No. 1:10-cv-720 (S.D. Ohio July 5, 2016), D.E. 150 (awarding $975,000 to Susan B. Anthony List and $325,000 to COAST).

4797. Complaint, Scott v. Roberts, No. 4:10-cv-283 (N.D. Fla. July 7, 2010), D.E. 1; Scott v. Roberts, 612 F.3d 1279, 1281, 1283, 1286 (11th Cir. 2010); Transcript at 86, *Scott*, No. 4:10-cv-283 (N.D. Fla. July 14, 2010, filed July 15, 2010), D.E. 28 [hereinafter *Scott* Hearing Transcript].

4798. Preliminary-Injunction Motion, *Scott*, No. 4:10-cv-283 (N.D. Fla. July 7, 2010), D.E. 3; *Scott*, 612 F.3d at 1287.

On July 9, Judge Robert L. Hinkle set a telephonic status conference for July 12[4799] and ordered service on Florida's attorney general.[4800] On the day of the conference, Judge Hinkle allowed Bill McCollum, the attorney general, to intervene as a defendant on his own behalf, because he was the opposing candidate who benefitted from the challenged statute.[4801] Judge Hinkle set the case for hearing on July 14.[4802]

In its 2008 case *Davis v. FEC*, the Supreme Court invalidated a federal "Millionaire Amendment," which increased contribution limits for candidates opposing candidates who spent large amounts of their own wealth on a campaign.[4803] On July 14, 2010, Judge Hinkle denied Scott a preliminary injunction, concluding, "Promoting participation in public financing, and, thus, decreasing potential corruption at least indirectly through public financing, was not involved in *Davis*."[4804]

On July 30, the court of appeals reversed Judge Hinkle's ruling and issued its own preliminary injunction against the matching funds that would be triggered by Scott's expenditures.[4805] "The parties have not sufficiently explained how the Florida public financing system furthers the anticorruption interest."[4806] The court of appeals concluded that the provision was not the least restrictive way to curtail corruption.[4807]

On December 1, following Scott's November election as governor, Judge Hinkle granted McCollum's motion to withdraw from the case.[4808] Judge Hinkle denied the remaining parties' joint motion for a permanent injunction, noting that the court of appeals had only decided the case on a preliminary-injunction standard and the plaintiff was about to become the defendant's boss.[4809] On June 28, 2011, however, Judge Hinkle did issue a

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4799. Order, *Scott*, No. 4:10-cv-283 (N.D. Fla. July 9, 2010), D.E. 8.

4800. Order, *id.* (July 9, 2010), D.E. 10.

4801. Intervention Order, *id.* (July 12, 2010), D.E. 18; *see* Intervention Motion, *id.* (July 12, 2010), D.E. 13.

4802. Transcript at 9, 16–17, *id.* (July 12, 2010, filed July 16, 2010), D.E. 32; Minutes, *id.* (July 12, 2010), D.E. 14; *see Scott*, 612 F.3d at 1281.

4803. 554 U.S. 724 (2008); *see* Daniel P. Tokaji, Election Law in a Nutshell 308 (2013).

4804. *Scott* Hearing Transcript, *supra* note 4797, at 93; Order, *Scott*, No. 4:10-cv-283 (N.D. Fla. July 14, 2010), D.E. 27; Minutes, *id.* (July 14, 2010), D.E. 25; *Scott*, 612 F.3d at 1289; *see* Mary Ellen Klas, *Bill McCollum Wins Round Over Matching Campaign Funds*, Miami Herald, July 15, 2010, at 1A.

4805. *Scott*, 612 F.3d at 1281–82; *see* Mary Ellen Klas, *Court Deals Blow to Public Money Match for Bill McCollum Campaign*, Miami Herald, July 31, 2010, at 1A.

4806. *Scott*, 612 F.3d at 1292.

4807. *Id.* at 1281, 1290, 1294.

4808. Order, *Scott*, No. 4:10-cv-283 (N.D. Fla. Dec. 1, 2010), D.E. 39.

4809. *Id.*

permanent injunction in the plaintiff's favor in line with the Supreme Court's June 27 decision in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett* invalidating a similar matching-funds program in Arizona.[4810]

Debate Participation

Amsterdam v. KITV 4 (David Alan Ezra, 1:10-cv-253) and Moseley v. Hawaii (Susan Oki Mollway, 1:10-cv-255) (D. Haw.)

> Two minor candidates for a special congressional election filed pro se emergency actions in the federal court to compel their inclusion in separate televised candidate forums. The district judges denied the plaintiffs relief on the papers.
>
> *Topics:* News media; campaign materials; pro se party.

At 8:45 a.m. on May 3, 2010, the day of a televised debate for a special congressional election in Hawaii, candidate Karl F. Moseley filed a pro se federal action challenging his exclusion from the debate.[4811] Moseley styled the action as an ex parte petition for a writ of mandate.[4812]

The May 22 special election was called to fill a vacancy created by Neil Abercrombie's resigning as Honolulu's representative in Congress to make a successful run for governor.[4813]

On the day that the action was filed, Judge Susan Oki Mollway construed the petition as a complaint and motion for a temporary restraining order, which she denied.[4814] Because of the press of time, she ruled without a proceeding.[4815] Moseley did not "clearly identify any basis for requiring

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4810. Order, *id.* (June 28, 2011), D.E. 43; *see* Ariz. Free Enterprise Club's Freedom Club PAC v. Bennett, 564 U.S. 721 (2011); *see also* "Campaign-Finance Regulations for Candidates Opposing Self-Funded Candidates," *infra* page 640.

4811. Petition, Moseley v. Hawaii, No. 1:10-cv-255 (D. Haw. May 3, 2010), D.E. 1.

4812. *Id.*

4813. *See Abercrombie Sets February 28 as Resignation Date*, Honolulu Advertiser, Jan. 4, 2010; Derrick DePledge, *Abercrombie Wins All but 1 District*, Honolulu Star-Advertiser, Nov. 4, 2010.

Abercrombie's reelection was thwarted by David Ige's victory in the August 10, 2014, Democratic primary election. *See* Ian Lovett, *Hawaiian Governor Loses Primary by Wide Margin; Senate Race Is Undecided*, N.Y. Times, Aug. 11, 2014, at A9; Sean Sullivan, *Abercrombie Loses Democratic Primary in Hawaii*, Wash. Post, Aug. 11, 2014, at A2.

4814. Opinion at 2, *Moseley*, No. 1:10-cv-255 (D. Haw. May 3, 2010), D.E. 8 [hereinafter *Moseley* Opinion], 2010 WL 1783570; *see Bid to Halt Debates Refused*, Honolulu Advertiser, May 4, 2010.

Tim Reagan interviewed Judge Mollway for this report by telephone on January 23, 2013.

4815. Interview with Judge Susan Oki Mollway, Jan. 23, 2013.

the sponsors and broadcasters of tonight's congressional debate to include every candidate for office, as opposed to having only the three candidates furthest ahead in the polls."[4816] Judge Mollway also struck the petition for failure to present "a short and plain statement" of his claims, as required by Federal Rule of Civil Procedure 8, and granted Moseley leave to file a proper amended complaint.[4817]

At 2:10 p.m., Moseley filed a notice of appeal.[4818] Moseley also faxed to the court of appeals a handwritten writ request.[4819] The court of appeals denied Moseley mandamus relief that day.[4820] On May 11, Moseley filed in the district court a request for dismissal of the appeal,[4821] and the court of appeals granted the dismissal on June 7.[4822]

On May 6, another candidate, Kaui Jochanan Amsterdam, called the court to say that his April 30 pro se motion for injunctive relief[4823] was intended as a motion for a temporary restraining order requiring his participation in a televised candidate forum to be held on May 7.[4824] On May 7, Judge David Alan Ezra directed the defendant television station to respond by noon.[4825] As did Judge Mollway, Judge Ezra ruled without the need for a proceeding.[4826] He denied Amsterdam relief, because legal precedents did not require television stations to include minor candidates in programs of this type.[4827] On August 31, Judge Ezra granted the television station's motion to dismiss the case.[4828]

4816. *Moseley* Opinion, *supra* note 4814, at 4.

4817. *Id.* at 2, 5–7; *see* Fed. R. Civ. P. 8(a)(1).

4818. Notice of Appeal, *Moseley*, No. 1:10-cv-255 (D. Haw. May 3, 2010), D.E. 9.

4819. Petition, *In re* Moseley, No. 10-71427 (9th Cir. May 3, 2010).

4820. Order, *id.* (May 3), *cert. denied*, 562 U.S. 1028 (2010).

4821. Request for Dismissal, *Moseley*, No. 1:10-cv-255 (D. Haw. May 3, 2010), D.E. 15.

4822. Order, Moseley v. Hawaii, No. 10-16039 (9th Cir. June 7, 2010).

4823. Injunction Motion, Amsterdam v. KITV 4, No. 1:10-cv-253 (D. Haw. Apr. 30, 2010), D.E. 4; *see* Complaint, *id.* (Apr. 30, 2010), D.E. 1; *see also Bid to Halt Debates Refused*, *supra* note 4814.

4824. Opinion at 1, *Amsterdam*, No. 1:10-cv-253 (D. Haw. May 7, 2010), D.E. 8 [hereinafter May 7, 2010, *Amsterdam* Opinion].

4825. *Id.* at 1.

Tim Reagan interviewed Judge Ezra for this report by telephone on February 25, 2013.

4826. Interview with Judge David Alan Ezra, Feb. 25, 2013.

4827. May 7, 2010, *Amsterdam* Opinion, *supra* note 4824, at 2–5.

4828. Opinion, *Amsterdam*, No. 1:10-cv-253 (D. Haw. Aug. 31, 2010), D.E. 18, 2010 WL 3489358.

In the election, Amsterdam came in ninth out of fourteen candidates, with 170 votes, or less than 0.1%, and Moseley came in last, with eighty votes or less than 0.05%.[4829]

Constitutionality of a Campaign Expenditure Reporting Statute

National Organization for Marriage v. McKee (D. Brock Hornby and John H. Rich III, D. Me. 1:09-cv-538)

> Advocacy organizations filed a federal challenge to campaign finance reporting regulations two weeks before an election including a ballot initiative. Able to rule before the election, the court denied the plaintiffs injunctive relief. After the election, the court of appeals affirmed the legal holding.
>
> *Topics:* Campaign finance; ballot measure.

Thirteen days before the November 3, 2009, election in Maine, which featured a referendum on Maine's provision for same-sex marriage, two advocacy organizations filed a federal complaint challenging Maine's registration and reporting requirements for organizations collecting or spending money to support or defeat a ballot measure.[4830] With their complaint, the plaintiffs filed motions for a temporary restraining order,[4831] for a preliminary injunction,[4832] and to expedite the action.[4833]

The court assigned the case to District Judge D. Brock Hornby.[4834] Judge Hornby delegated to Magistrate Judge John H. Rich III initial contact with the plaintiffs.[4835] In emergency cases, Judge Hornby often asked a

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4829. Hawaii Office of Elections, Elections Results, 2010 Special Vacancy Election—U.S. House of Representatives, District 1 (May 22, 2010), files.hawaii.gov/elections/files/results/2010/special/special2010-summary.pdf.

4830. Complaint, Nat'l Org. for Marriage v. McKee, No. 1:09-cv-538 (D. Me. Oct. 21, 2009), D.E. 1; Nat'l Org. for Marriage v. McKee, 666 F. Supp. 2d 193, 197–98 (D. Me. 2009); *see* Me. Rev. Stat. tit. 21-A, § 1056-B; *see also* David Hench, *Campaign Disclosure Ruling Slated*, Portland Press Herald, Oct. 27, 2009, at B1.

4831. Temporary-Restraining-Order Motion, *Nat'l Org. for Marriage*, No. 1:09-cv-538 (D. Me. Oct. 21, 2009), D.E. 3; *Nat'l Org. for Marriage*, 666 F. Supp. 2d at 198.

4832. Preliminary-Injunction Motion, *Nat'l Org. for Marriage*, No. 1:09-cv-538 (D. Me. Oct. 21, 2009), D.E. 4.

4833. Motion, *id.* (Oct. 21, 2009), D.E. 5.

4834. Docket Sheet, *id.* (Oct. 21, 2009) [hereinafter *Nat'l Org. for Marriage* Docket Sheet].

Tim Reagan interviewed Judge Hornby for this report by telephone on August 6, 2012.

4835. Report, *Nat'l Org. for Marriage*, No. 1:09-cv-538 (D. Me. Oct. 21, 2009), D.E. 10 [hereinafter Oct. 21, 2009, *Nat'l Org. for Marriage* Report]; Interview with Judge D. Brock

magistrate judge to make prompt initial contact with the plaintiffs to get an early assessment of what would be required from the court.[4836] He also typically asked his law clerks to begin legal research on the matter immediately, focusing the research as papers were filed.[4837]

The main task of Judge Rich's teleconference with plaintiffs' counsel, which was held at 4:15 p.m. on Wednesday, October 21, the day the case was filed, was to make sure that the plaintiffs served the defendants promptly.[4838] On Thursday afternoon at 3:00, Judge Rich had a teleconference with both sides.[4839]

> I initially explored with the parties whether it was possible for them to reach an agreement that would obviate the need for an expedited hearing in advance of Election Day, November 3, 2009. Following lengthy discussion, the parties were unable to reach such an agreement. Accordingly, I noted that it would be necessary for the court to schedule a hearing on an expedited basis before Judge Hornby, most likely on Monday, October 26, 2009.[4840]

For planning purposes, Judge Rich asked the parties to let him know by Friday morning whether any witnesses would be called at the hearing.[4841] His case manager was informed by telephone that there would be no need for witnesses at the hearing.[4842]

The Monday hearing was greatly facilitated by experienced lawyers on both sides.[4843] Two days later, Judge Hornby denied the plaintiffs immediate relief.[4844] "It is important to emphasize that the Maine statute does not

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Hornby, Aug. 6, 2012; Interview with Judge John H. Rich III, Aug. 2, 2012 (observing that Judge Hornby, who was the district's first full-time magistrate judge, used magistrate judges very effectively).

Tim Reagan interviewed Judge Rich for this report by telephone. Judge Rich retired on April 1, 2022. Retirement of U.S. Magistrate Judge John H. Rich III, www.med.uscourts.gov/news/retirement-us-magistrate-judge-john-h-rich-iii.

4836. Interview with Judge D. Brock Hornby, Aug. 6, 2012.

4837. *Id.*

4838. Oct. 21, 2009, *Nat'l Org. for Marriage* Report, *supra* note 4835; Interview with Judge John H. Rich III, Aug. 2, 2012.

4839. Report, *Nat'l Org. for Marriage*, No. 1:09-cv-538 (D. Me. Oct. 22, 2009), D.E. 14 [hereinafter Oct. 22, 2009, *Nat'l Org. for Marriage* Report]; *Nat'l Org. for Marriage* Docket Sheet, *supra* note 4834.

4840. Oct. 22, 2009, *Nat'l Org. for Marriage* Report, *supra* note 4839, at 1–2.

4841. *Id.* at 2.

4842. Interview with Judge John H. Rich III, Aug. 2, 2012.

4843. Interview with Judge D. Brock Hornby, Aug. 6, 2012; Transcript, *Nat'l Org. for Marriage*, No. 1:09-cv-538 (D. Me. Oct. 26, 2009, filed Nov. 5, 2009), D.E. 23.

4844. Nat'l Org. for Marriage v. McKee, 666 F. Supp. 2d 193 (D. Me. 2009); *see* Trevor

prohibit contributions or expenditures. Instead, it is a registration and reporting statute."[4845]

On November 3, Maine voters overturned same-sex marriage.[4846]

Reviewing Judge Hornby's decisions[4847] on the plaintiffs' second amended complaint,[4848] the court of appeals determined that Maine's laws in question passed constitutional muster.[4849]

Ballot-Petition Signatures in Public Housing

Mendenhall v. Akron Metropolitan Housing Authority (Sara Lioi, N.D. Ohio 5:09-cv-742)

> A district judge determined that it was not a First Amendment violation for a housing authority to prohibit door-to-door solicitation, including the collection of ballot-petition signatures, in public housing.
>
> *Topics:* Door-to-door canvassing; getting on the ballot.

Nine days before the April 10, 2009, deadline for ballot-petition signatures to recall the mayor of Akron, a voter and a political action committee filed a federal complaint in the Northern District of Ohio challenging the voter's expulsion from an apartment building owned by the city and managed by the city's housing authority when the voter was in the building seeking

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Maxwell, *Judge: State Can Press for Disclosure of Donors*, Portland Press Herald, Oct. 29, 2009, at A1.

4845. *Nat'l Org. for Marriage*, 666 F. Supp. 2d at 204.

4846. *See* Susan M. Cover, *Mainers Vote Down Gay-Marriage Law*, Portland Press Herald, Nov. 4, 2009, at A1; Kevin Miller & Judy Harrison, *Gay Marriage Rejected*, Bangor Daily News, Nov. 4, 2009, at 1.

4847. Nat'l Org. for Marriage v. McKee, 765 F. Supp. 2d 38 (D. Me. 2011); Nat'l Org. for Marriage v. McKee, 723 F. Supp. 2d 245 (D. Me. 2010); *see Campaign Finance Law Stands Up to Challenge*, Portland Press Herald, Aug. 20, 2010, at A1; Kevin Miller, *All But Two PAC Provisions in Campaign Finance Law OK'd*, Bangor Daily News, Aug. 20, 2010, at 1; Kevin Miller, *Another Legal Setback for Gay Marriage Foes*, Bangor Daily News, Feb. 19, 2011, at 5.

4848. Second Amended Complaint, *Nat'l Org. for Marriage*, No. 1:09-cv-538 (D. Me. June 25, 2010), D.E. 114.

4849. Nat'l Org. for Marriage v. McKee, 669 F.3d 34 (1st Cir.), *cert. denied*, 568 U.S. 928 (2012); Nat'l Org. for Marriage v. McKee, 649 F.3d 34 (1st Cir. 2011), *cert. denied*, 565 U.S. 1234 (2012); *see also* Nat'l Org. for Marriage v. Daluz, 654 F.3d 115 (1st Cir. 2011) (finding a challenge to Rhode Island's reporting statute unlikely to prevail).

ballot-petition signatures.[4850] With their complaint, the plaintiffs filed a motion for a temporary restraining order.[4851]

On the day that the complaint was filed, Judge Sara Lioi held a conference with the parties and denied the plaintiffs immediate relief.[4852] Judge Lioi heard the case two days later.[4853] Following the hearing, Judge Lioi upheld the proscription on door-to-door solicitation in the residential apartment building as a reasonable and viewpoint-neutral restriction of speech in a nonpublic forum.[4854]

On October 30, following additional proceedings, Judge Lioi issued a final judgment against the plaintiffs.[4855]

Although the recall effort collected enough signatures for the ballot, the recall was unsuccessful.[4856]

Campaign-Finance Regulations for Candidates Opposing Self-Funded Candidates

McComish v. Brewer (Roslyn O. Silver, D. Ariz. 2:08-cv-1550)

> On August 21, 2008, candidates for office in Arizona filed a federal complaint challenging a campaign-finance provision that provided a benefit to candidates whose challengers exceeded statutory thresholds of expenditures. The suit was filed eight weeks after a Supreme Court decision invalidating a similar law. Reluctant to disrupt the finances of an ongoing campaign season, the district court denied immediate injunctive relief. After full litigation, the district court struck down the campaign-finance scheme, and the Supreme Court ultimately affirmed the district court's ruling.
>
> *Topics:* Campaign finance; laches; attorney fees.

Eight weeks after the Supreme Court's invalidation on June 26, 2008, of the Millionaire Amendment, which increased contribution limits to can-

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4850. Complaint, Mendenhall v. Akron Metro. Hous. Auth., No. 5:09-cv-742 (N.D. Ohio Apr. 1, 2009), D.E. 1; *see* Amended Complaint, *id.*(Apr. 3, 2009), D.E. 6.

4851. Temporary-Restraining-Order Motion, *id.* (Apr. 1, 2009), D.E. 2.

4852. Docket Sheet, *id.* (Apr. 1, 2009) [hereinafter *Mendenhall* Docket Sheet] (minutes); Transcript at 2, *id.* (Apr. 3, 2009, filed Sept. 4, 2009), D.E. 21 [hereinafter *Mendenhall* Transcript].

4853. *Mendenhall* Transcript, *supra* note 4852; *Mendenhall* Docket Sheet, *supra* note 4852.

4854. Opinion, *Mendenhall*, No. 5:09-cv-742 (N.D. Ohio Apr. 3, 2009), D.E. 10.

4855. Opinion, *id.* (Oct. 30, 2009), D.E. 25.

4856. *See* Laura Johnston, *Akron Mayor Survives as Voters Reject Recall*, Cleveland Plain Dealer, June 24, 2009, at B1.

didates opposing candidates who spent large amounts of their own wealth on the campaign,[4857] six candidates for election to Arizona's legislature filed a federal complaint in the District of Arizona's Phoenix courthouse, seeking to invalidate the matching-funds provisions of the 1998 Arizona Clean Elections Act.[4858]

In *Davis v. FEC*, the Supreme Court held that the Millionaire Amendment violated the First Amendment because it created negative consequences for spending a candidate's own money on campaign speech.[4859] Arizona's Clean Elections Act provided matching funds to candidates participating in public campaign financing when nonparticipating candidates' expenditures exceeded a statutory threshold.[4860]

On August 26, five days after the complaint was filed, Judge Roslyn O. Silver ordered the plaintiffs to file their motion for a temporary restraining order by 5:00 p.m. that day, and she set a hearing on the motion for two days later.[4861]

At the August 28 hearing, Judge Silver's first question was why the case had been filed so recently.[4862] The plaintiffs responded that the statute had not applied to the first of them until July 25.[4863] On August 29, Judge Silver denied the temporary restraining order.[4864] Although the plaintiffs established a constitutional violation, Arizona has a "clear interest in running a smooth and orderly election" and "the length of time Plaintiffs waited to file their [temporary restraining order] also weighs in the balance against the Plaintiffs on the public interest determination."[4865]

After an October 9 hearing,[4866] Judge Silver denied the plaintiffs a preliminary injunction on October 14.[4867] On October 17, she explained that

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4857. Davis v. FEC, 554 U.S. 724 (2008); *see* Daniel P. Tokaji, Election Law in a Nutshell 308 (2013).

4858. Complaint, McComish v. Brewer, No. 2:08-cv-1550 (D. Ariz. Aug. 21, 2008), D.E. 1; *see* Ariz. Rev. Stat. §§ 16-940 to -961; *see also Funding System Spurs Lawsuit*, Ariz. Republic, Aug. 23, 2008, at B1.

4859. *Davis*, 554 U.S. at 736–44.

4860. §§ 16-941, -952.

4861. Order, *McComish*, No. 2:08-cv-1550 (D. Ariz. Aug. 21, 2008), D.E. 10; *see* Temporary-Restraining-Order Motion, *id.* (Aug. 26, 2008), D.E. 13.

For this report, Tim Reagan interviewed Judge Silver and her law clerk Mike Newman by telephone on September 11, 2012.

4862. Transcript at 3, *McComish*, No. 2:08-cv-1550 (D. Ariz. Aug. 28, 2008, filed Sept. 10, 2008), D.E. 89.

4863. *Id.*

4864. Order, *id.* (Aug. 29, 2008), D.E. 30.

4865. *Id.* at 7–8

4866. Transcript, *id.* (Oct. 9, 2008, filed Nov. 4, 2008), D.E. 192; Minutes, *id.* (Oct. 9,

again "[p]laintiffs have shown a very strong likelihood of success on the merits. However, given the extraordinary balance of the harms required in the context of an ongoing election, Plaintiffs have not met their burden in showing that they are entitled to a preliminary injunction."[4868]

A serious difficulty with the plaintiffs' case was the crafting of a suitable remedy.[4869] Would campaign contributions have to be returned? The plaintiffs did not propose to the court a plan for workable relief.[4870]

After full litigation of the plaintiffs' second amended complaint,[4871] Judge Silver declared, on January 20, 2010, that Arizona's matching scheme for participating candidates opposing nonparticipating candidates was unconstitutional.[4872] The court of appeals reversed her ruling on May 21.[4873] The Supreme Court, however, agreed with Judge Silver, on June 27, 2011.[4874]

The parties stipulated awards totaling $2 million in attorney fees and costs.[4875]

2008), D.E. 170.

4867. Order, *id.* (Oct. 14, 2008), D.E. 181; *see Challenge to Clean Elections Is Rejected*, Ariz. Republic, Oct. 15, 2008, at B1.

4868. Findings of Fact and Conclusions of Law at 18, *McComish*, No. 2:08-cv-1550 (D. Ariz. Oct. 17, 2008), D.E. 185, 2008 WL 4629337.

4869. Interview with Judge Roslyn O. Silver and her law clerk Mike Newman, Sept. 11, 2012.

4870. *Id.*

4871. Second Amended Complaint, *McComish*, No. 2:08-cv-1550 (D. Ariz. May 11, 2009), D.E. 260; *see also* First Amended Complaint, *id.* (Sept. 4, 2008), D.E. 56.

4872. Opinion, *id.* (Jan. 20, 2010), D.E. 454, 2010 WL 2292213; *see U.S. Judge: End Part of Clean Elections*, Ariz. Republic, Jan. 21, 2010, at A1.

4873. McComish v. Bennett, 611 F.3d 510 (9th Cir. 2010) (amended opinion); *see Arizona Funding Law Is Upheld*, Ariz. Republic, May 22, 2010, at A1.

4874. Ariz. Free Enterprise Club's Freedom Club PAC v. Bennett, 564 U.S. 721 (2011); *see* McComish v. Bennett, 653 F.3d 1106 (9th Cir. 2011) (affirming summary judgment for the plaintiffs); *see also* Tokaji, *supra* note 4803, at 319–22; Robert Barnes, *High Court Strikes Matching Funds in Ariz. Campaign Law*, Wash. Post, June 28, 2011, at A4; Adam Liptak, *Justices Reject Another Campaign Finance Law*, N.Y. Times, June 28, 2011, at A15; *Matching Funds Rejected*, Ariz. Republic, June 28, 2011, at A1; Jeffrey Toobin, The Oath 256–60 (2012).

4875. Order, *McComish*, No. 2:08-cv-1550 (D. Ariz. Sept. 12, 2011), D.E. 528; Stipulation, *id.* (Sept. 9, 2011), D.E. 526 (intervenors); Order, *id.* (Aug. 17, 2011) (approving plaintiffs' stipulation), D.E. 519; Stipulation, *id.* (Sept. 2, 2011), D.E. 521 (plaintiffs).

Last-Minute Challenge to a Debate Exclusion

Barr v. Saddleback Valley Community Church (David O. Carter, C.D. Cal. 8:08-cv-927)

> On a Friday afternoon, the Libertarian Party's candidate for President filed a federal complaint challenging his exclusion from a candidate's forum to be held on the next day. The district judge denied immediate relief, noting that laches is especially problematic in ex parte proceedings.
>
> *Topic:* Laches.

At 3:43 p.m. on Friday, August 15, 2008, Bob Barr, the Libertarian Party's candidate for President, filed a complaint in the Central District of California's Santa Ana courthouse against the Saddleback Valley Community Church, alleging that a program scheduled by the church for the following afternoon would include Democratic and Republican presidential candidates but would exclude Barr without applying well-established objective criteria.[4876] With their complaint, Barr and his vice presidential candidate filed an ex parte application for a preliminary injunction.[4877]

Judge David O. Carter denied immediate relief on the day that the action was filed.[4878] "Plaintiffs have known about the pendency of this event since at least July . . . ."[4879] Noting that "[a]n *ex parte* Motion resides on the fringes of due process," Judge Carter observed that the late filing suggested hubris and that the plaintiffs were "manipulating the *ex parte* procedure rather than suffering an actual emergency."[4880] In addition, the action made a weak showing of merit.[4881]

Improper Support for School-Board Incumbents

Jacob v. Board of Directors (G. Thomas Eisele, E.D. Ark. 4:06-cv-1007)

> A federal complaint alleged that incumbent school-board candidates, and not other candidates, were improperly allowed to appear before school-district staff meetings. Just over two weeks later, the district judge denied the plaintiffs immediate relief on a finding that the school board had not conspired to advance the

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4876. Complaint, Barr v. Saddleback Valley Cmty. Church, No. 8:08-cv-927 (C.D. Cal. Aug. 15, 2008), D.E. 1; *see* Maeve Reston & Seema Mehta, Chi. Trib., *At Megachurch, Candidates Talk of Personal Faith*, June 17, 2008, at 22 (describing the event).

4877. Ex Parte Application, *Barr*, No. 8:08-cv-927 (C.D. Cal. Aug. 15, 2008), D.E. 6; Preliminary-Injunction Motion, *id.* (Aug. 15, 2008), D.E. 3.

4878. Opinion, *id.* (Aug. 15, 2008), D.E. 7.

4879. *Id.* at 3.

4880. *Id.*

4881. *Id.* at 3–4.

incumbents' candidacies. The incumbents were defeated in the election.

Topics: Early voting; intervention; equal protection.

Two African American voters filed a federal complaint on August 17, 2006, in the Eastern District of Arkansas, claiming that two White incumbent Little Rock school-board members running to retain their seats in a September 19 election were improperly allowed, "to the exclusion of other candidates, to appear before school employees such as teachers and non certified staff meeting to attend workshops and meetings as a condition of employment."[4882] The complaint also mentioned the election commission's refusal to establish early voting sites in addition to the county courthouse.[4883]

Pulaski County's election commission, a defendant, filed an answer and a motion to dismiss the action on Friday, August 25.[4884] The plaintiffs filed a motion for a preliminary injunction on Monday.[4885] On Tuesday, Judge G. Thomas Eisele issued a four-page letter to the attorneys asking them to address specific questions at a Wednesday afternoon telephone conference.[4886] After hearing from the parties at the telephone conference, Judge Eisele scheduled a hearing for Thursday morning.[4887]

On Thursday, African American candidates for the two races in question filed pro se motions to intervene,[4888] which Judge Eisele granted, thereby curing the standing defect of voters challenging the treatment of candidates.[4889]

On Friday, Judge Eisele denied the plaintiffs a preliminary injunction, stating that a written opinion would follow.[4890] He concluded in an opinion issued later that day that the plaintiffs had presented no evidence of the

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4882. Complaint at 4–5, Jacob v. Bd. of Dirs., No. 4:06-cv-1007 (E.D. Ark. Aug. 17, 2006), D.E. 1.

4883. *Id.* at 3.

4884. Motion to Dismiss, *id.* (Aug. 25, 2006), D.E. 4; Answer, *id.* (Aug. 25, 2006), D.E. 3.

4885. Preliminary-Injunction Motion, *id.* (Aug. 28, 2006), D.E. 7.

4886. Letter Order, *id.* (Aug. 29, 2006), D.E. 10.

Judge Eisele died on November 26, 2017. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

4887. Docket Sheet, *Jacob*, No. 4:06-cv-1007 (E.D. Ark. Aug. 17, 2006); *see* Minutes, *id.* (Aug. 31, 2006, filed Sept. 1, 2006), D.E. 26.

4888. Motions to Intervene, *id.* (Aug. 31, 2006), D.E. 16, 18.

4889. Opinion at 3, 22, *id.* (Sept. 1, 2006), D.E. 28 [hereinafter Sept. 1, 2006, *Jacob* Opinion].

4890. Letter Order, *id.* (Sept. 1, 2006), D.E. 22.

alleged "conspiratorial conduct by the Defendants to advance the incumbent candidates."[4891] As to the issue of additional early voting locations, "mindful of its importance," Judge Eisele concluded, "Plaintiffs have failed to present any evidence that the failure to open additional early voting sites results in the protected class having less opportunity to vote than other members of the electorate."[4892]

On September 28, Judge Eisele denied a second motion for a preliminary injunction establishing additional early voting sites for an October 10 runoff election.[4893]

In the event, both intervenors were elected.[4894] On a finding that the plaintiffs did not wish to pursue the case further, Judge Eisele dismissed the action on December 15.[4895]

Issue Ads During Election Season

Christian Civic League of Maine v. FEC (Louis F. Oberdorfer, D.D.C. 1:06-cv-614)

> An issue-advocacy organization filed a declaratory action in the U.S. District Court for the District of Columbia to challenge a proscription on issue advertising that mentions a candidate close to an election. A three-judge district court denied a preliminary injunction against enforcement of the proscription.
>
> *Topics:* Campaign materials; corporate electioneering; three-judge court; intervention; recusal; interlocutory appeal.

On Monday, April 3, 2006, the Christian Civic League of Maine (CCL) filed an action against the Federal Election Commission in the U.S. District Court for the District of Columbia claiming that it was a violation of CCL's First Amendment rights for the Bipartisan Campaign Reform Act of 2002 (BCRA)[4896] to proscribe CCL's issue advertisement during the thirty days preceding Maine's June 13, 2006, primary elections.[4897] The radio ad

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4891. Sept. 1, 2006, *Jacob* Opinion, *supra* note 4889, at 6.

4892. *Id.* at 16.

4893. Opinion, *Jacob*, No. 4:06-cv-1007 (E.D. Ark. Sept. 28, 2006), D.E. 40, 2006 WL 2792172.

4894. *See Little Rock School Board Has First Black Majority*, N.Y. Times, Oct. 13, 2006, at A23; Jennifer Barnett Reed, *A Change of Leadership*, Ark. Times, Nov. 30, 2006, at 13.

4895. Order, *Jacob*, No. 4:06-cv-1007 (E.D. Ark. Dec. 15, 2006), D.E. 46; *see* Order to Show Cause, *id.* (Dec. 5, 2006), D.E. 44.

4896. Pub. L. No. 107-155, 116 Stat. 81 (2002); *see* 52 U.S.C. § 30118 (regulating corporate electioneering).

4897. Complaint, Christian Civic League of Me., Inc. v. FEC, No. 1:06-cv-614 (D.D.C. Apr. 3, 2006), D.E. 1 [hereinafter *Christian Civic League* Complaint]; Christian Civic

that CCL wished to air extolled the sanctity of heterosexual marriage, criticized Maine's Senators Olympia Snowe and Susan Collins for voting against a proposed Marriage Protection Amendment in 2004, and encouraged listeners to urge the senators to vote the other way in June.[4898] The statute forbade a corporation from using general corporate funds for a broadcast, cable, or satellite communication that clearly identifies a candidate for federal office during the thirty days preceding a primary election or the sixty days preceding a general election.[4899] Senator Snowe was up for reelection in 2006.[4900] CCL sought declaratory and injunctive relief in favor of (1) its intended ad and (2) similar communications, which CCL referred to as "grass-roots lobbying."[4901] With its complaint, CCL filed a motion for a preliminary injunction,[4902] an application pursuant to BCRA for a three-judge district court,[4903] and a motion to expedite the case.[4904]

On Wednesday, Judge Louis F. Oberdorfer granted the application for a three-judge court and the motion to expedite the case, and he ordered briefing on the preliminary-injunction motion completed by Friday, April 21.[4905] The three-judge court was named on Friday, April 7, including District Judge Colleen Kollar-Kotelly, but on the following Monday, Circuit Judge Judith W. Rogers replaced Circuit Judge Karen LeCraft Henderson.[4906]

League of Me., Inc. v. FEC, 433 F. Supp. 2d 81, 84–85 (D.D.C. 2006); *see* David Farmer, *Christian Civic League Files Suit Over Election Law*, Lewiston Sun J., Apr. 19, 2006, at A2; Bart Jansen, *League Targets Snowe, Ad Limits*, Portland Press Herald, Apr. 23, 2006, at C2.

4898. Ex. A, *Christian Civic League* Complaint, *supra* note 4897; *Christian Civic League*, 433 F. Supp. 2d at 84; *see* Farmer, *supra* note 4897; Jansen, *supra* note 4897.

4899. *Christian Civic League*, 433 F. Supp. 2d at 84.

4900. *Id.*; *see* Farmer, *supra* note 4897 (reporting also that Senator Snowe coauthored the antielectioneering legislation); Jansen, *supra* note 4897 (same).

4901. *Christian Civic League* Complaint, *supra* note 4897, at 13.

4902. Preliminary-Injunction Motion, *Christian Civic League*, No. 1:06-cv-614 (D.D.C. Apr. 3, 2006), D.E. 4.

4903. Application, *id.* (Apr. 3, 2006), D.E. 3; *see* Pub. L. No. 107-155, 116 Stat. 81 § 403 (2002), 52 U.S.C. § 30110 note.

4904. Motion, *Christian Civic League*, No. 1:06-cv-614 (D.D.C. Apr. 3, 2006), D.E. 5.

4905. Order, *id.* (Apr. 5, 2006), D.E. 8.

Judge Oberdorfer died on February 21, 2013. Federal Judicial Center Biographical Directory of Article III Federal Judges [hereinafter FJC Biographical Directory], www.fjc.gov/history/judges.

4906. Docket Sheet, *Christian Civic League*, No. 1:06-cv-614 (D.D.C. Apr. 3, 2006) [hereinafter *Christian Civic League* Docket Sheet].

On April 17, five members of Congress—two senators and three representatives—moved to intervene to defend the statute.[4907] Judge Oberdorfer's former law firm, which he left in 1977, represented the intervenors.[4908] He notified the parties of this fact and stated that he ordinarily disqualified himself from cases under such circumstances, but he stated that his recusal was not required and his recusal might be disruptive in this expedited case, and any party was free to make a confidential recusal motion with the clerk.[4909] The record did not reflect a recusal motion,[4910] and the court granted the intervention motion on April 20.[4911]

The court heard oral argument on the preliminary-injunction motion on April 24[4912] and denied the motion on May 9,[4913] five days before the primary-election blackout on corporate electioneering in Maine.

On June 7, the Senate held a cloture vote on the Marriage Protection Amendment.[4914] The amendment failed to advance with a vote of forty-nine favoring cloture and forty-eight opposed.[4915] Senators Snowe and Collins opposed cloture.[4916]

On September 27, the three-judge court determined that claims pertaining to the proposed radio ad were moot and claims pertaining to grassroots lobbying were too speculative to be justiciable.[4917]

CCL's May 12 interlocutory appeal to the Supreme Court on denial of its preliminary-injunction motion was dismissed as moot on October 2.[4918]

4907. Intervention Motion, *id.* (Apr. 17, 2006), D.E. 18 [hereinafter *Christian Civic League* Intervention Motion].

4908. Notice to Counsel, *id.* (Apr. 19, 2006), D.E. 21; *Christian Civic League* Intervention Motion, *supra* note 4907; FJC Biographical Directory, *supra* note 4905.

4909. *Christian Civic League* Intervention Motion, *supra* note 4907.

4910. *Christian Civic League* Docket Sheet, *supra* note 4906.

4911. Order, *Christian Civic League*, No. 1:06-cv-614 (D.D.C. Apr. 20, 2006), D.E. 25; *see* Christian Civic League of Me., Inc. v. FEC, 433 F. Supp. 2d 81, 85 (D.D.C. 2006).

4912. Transcript, *Christian Civic League*, No. 1:06-cv-614 (D.D.C. Apr. 24, 2006, filed Apr. 26, 2006), D.E. 28.

4913. *Christian Civic League*, 433 F. Supp. 2d 81; *see* Bart Jansen, *Christian Group to Appeal for Right to Air Political Ad*, Portland Press Herald, May 11, 2006, at B1.

4914. Status Report at 1, *Christian Civic League*, No. 1:06-cv-614 (D.D.C. June 25, 2006), D.E. 40.

4915. *See* Chris Casteel, *Marriage Amendment Falls Short in Senate*, Oklahoman, June 8, 2006, at 1A; Carolyn Lochhead, *Same-Sex Marriage Ban Rejected by Senate*, S.F. Chron., June 8, 2006, at A1.

4916. Roll Call Vote, www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=2&vote=00163.

4917. Opinion, *Christian Civic League*, No. 1:06-cv-614 (D.D.C. Sept. 27, 2006), D.E. 52, 2006 WL 2792683.

CCL's October 26 appeal from dismissal of its complaint resulted in a June 29, 2007, remand for reconsideration[4919] in light of an intervening Supreme Court case, *Federal Election Commission v. Wisconsin Right to Life*,[4920] which was decided on June 25, 2007.

In *Wisconsin Right to Life*, Chief Justice Roberts and Justice Alito determined that BCRA could proscribe "campaign advocacy," but it could not proscribe "issue advocacy," absent narrow tailoring to serve a compelling interest.[4921] Justices Scalia, Kennedy, and Thomas would have struck down the proscription on corporate electioneering altogether.[4922] All five of these justices agreed that cases similar to CCL's "fit comfortably within the established exception to mootness for disputes capable of repetition, yet evading review."[4923]

CCL's case came to a close on August 21, 2007.[4924] The three-judge court determined that BCRA could not proscribe CCL's proposed 2006 radio ad, but CCL's other claims were still too speculative for relief.[4925]

Get-Out-the-Vote Canvassing

Service Employees International Union v. Municipality of Mt. Lebanon (Arthur J. Schwab, W.D. Pa. 2:04-cv-1651)

> A district court was asked to resolve the constitutionality of county requirements for persons who wanted to go door to door over the weekend before a general election to encourage voting. In the short term, the counties relaxed their restrictions; in the long term, they revised them.
>
> *Topics:* Door-to-door canvassing; recusal.

At approximately 1:00 p.m. on the Thursday before the 2004 general election, persons who wanted to go door to door over the weekend to encour-

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4918. Christian Civic League of Me., Inc. v. FEC, 549 U.S. 801 (2006).

4919. Christian Civic League of Me., Inc. v. FEC, 551 U.S. 1160 (2007).

4920. 551 U.S. 449 (2007).

4921. *Id.* at 456–57, 464–76 (opinion by Chief Justice Roberts, joined by Justice Alito); *see* Robert Barnes, *5–4 Supreme Court Weakens Curbs on Pre-Election TV Ads*, Wash. Post, June 26, 2007, at A1.

4922. *Wisconsin Right to Life*, 551 U.S. at 483–504 (opinion by Justice Scalia concurring in part and concurring in the judgment, joined by Justices Kennedy and Thomas); *see* Barnes, *supra* note 4921; Linda Greenhouse & David D. Kirkpatrick, *Justices Loosen Ad Restrictions in Campaign Law*, N.Y. Times, June 26, 2007, at A1.

4923. *Wisconsin Right to Life*, 551 U.S. at 462 (opinion by Chief Justice Roberts, joined by Justices Scalia, Kennedy, Thomas, and Alito).

4924. *Christian Civic League* Docket Sheet, *supra* note 4906.

4925. Order, Christian Civic League of Me., Inc. v. FEC, No. 1:06-cv-614 (D.D.C. Aug. 21, 2007), D.E. 61.

age voting and inform residents of their polling places filed an action in the Western District of Pennsylvania's Pittsburgh Division claiming that canvassing ordinances in the Allegheny County municipalities of Monroeville and Mt. Lebanon unduly burdened First Amendment canvassing rights.[4926] The plaintiffs sought a declaration that the ordinances were unconstitutional, a temporary restraining order, and both preliminary and permanent injunctive relief.[4927]

Because the plaintiffs requested a temporary restraining order, the clerk's office contacted the assigned judge's chambers immediately.[4928] Judge Terrence F. McVerry recused himself,[4929] and the case was reassigned to Judge Arthur J. Schwab.[4930]

Between 11:00 and 11:30 that morning, the plaintiffs faxed to the municipalities' lawyers a copy of the complaint.[4931] The attorney for Mt. Leba-

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4926. Complaint, Service Employees Int'l Union v. Municipality of Monroeville, No. 2:04-cv-1651 (W.D. Pa. Oct. 28, 2004), D.E. 1 [hereinafter *Service Employees Int'l Union* Complaint], Ohio State University Moritz College of Law, Election Law @ Moritz [hereinafter ELM], moritzlaw.osu.edu/electionlaw/docs/penn/seiu-complaint.pdf, *archived at* web.archive.org/web/20161217192154/moritzlaw.osu.edu/electionlaw/docs/penn/seiu-complaint.pdf; Service Employees Int'l Union v. Municipality of Mt. Lebanon, 446 F.3d 419, 421 (3d Cir. 2006); Transcript at 2, *Service Employees Int'l Union*, No. 2:04-cv-1651 (W.D. Pa. Oct. 28, 2004, filed Jan. 11, 2005), D.E. 23 [hereinafter Oct. 28, 2004, *Service Employees Int'l Union* Transcript]; *see* Torsten Ove, *ACLU Sues to Overturn Anti-Canvassing Laws*, Pittsburgh Post-Gazette, Oct. 29, 2004, at A10 [hereinafter *ACLU Sues*]; Torsten Ove, *Agreement Clears Way for Canvassers in Communities*, Pittsburgh Post-Gazette, Oct. 30, 2004, at A13 [hereinafter *Agreement Clears Way*].

4927. *Service Employees Int'l Union* Complaint, *supra* note 4926; Motion, *Service Employees Int'l Union*, No. 2:04-cv-1651 (W.D. Pa. Oct. 28, 2004), D.E. 2, ELM, moritzlaw.osu.edu/electionlaw/docs/penn/seiu-TRO.pdf, *archived at* web.archive.org/web/20161217192200/moritzlaw.osu.edu/electionlaw/docs/penn/seiu-TRO.pdf; Brief, *id.* (Oct. 28, 2004), D.E. 3, ELM, moritzlaw.osu.edu/electionlaw/docs/penn/seiu-TROmemo.pdf, *archived at* web.archive.org/web/20161217192203/moritzlaw.osu.edu/electionlaw/docs/penn/seiu-TROmemo.pdf.

4928. Interview with Judge Arthur J. Schwab, Jan. 31, 2012.

Tim Reagan interviewed Judge Schwab for this report by telephone.

4929. Judge McVerry was Allegheny County's solicitor from 2000 to 2002. Federal Judicial Center Biographical Directory of Article III Federal Judges [hereinafter FJC Biographical Directory], www.fjc.gov/history/judges. Both he and his wife were active in Mt. Lebanon politics. Interview with Judge Arthur J. Schwab, Jan. 31, 2012. Judge McVerry died on March 8, 2021. FJC Biographical Directory, *supra*.

4930. Docket Sheet, *Service Employees Int'l Union*, No. 2:04-cv-1651 (W.D. Pa. Oct. 28, 2004) [hereinafter *Service Employees Int'l Union* Docket Sheet]; Transcript at 2–3, *id.* (Oct. 29, 2004, filed Jan. 11, 2005), D.E. 24 [hereinafter Oct. 29, 2004, *Service Employees Int'l Union* Transcript].

4931. Oct. 28, 2004, *Service Employees Int'l Union* Transcript, *supra* note 4926, at 2.

non became aware of the fax between 12:00 and 1:00 in the afternoon, about the time that the complaint was filed.[4932] The attorney for Monroeville became aware of the complaint when Channel 11 News called to ask for a comment.[4933] About half an hour after Judge Schwab received the case, he conducted a telephonic proceeding in open court with attorneys for all of the parties.[4934] Judge Schwab obtained from the attorneys an agreement to meet in court at 10:00 on Friday morning with decision-makers for all parties.[4935] He asked the defendants to come with memoranda in response to the plaintiffs' request for immediate relief.[4936]

On Friday morning, Judge Schwab greeted the parties and received oral summaries of the defendants' responses.[4937] His principal question for the plaintiffs was whether they wanted a lawsuit or they wanted to canvass.[4938]

The complaint alleged that Monroeville required each person going door to door there to obtain a permit—which would take at least two days—and pay a $10 fee, and the complaint alleged that the organization had to pay an additional fee of $50 per week.[4939] At the Friday morning proceeding, Monroeville represented that its ordinance did not apply to political canvassers not soliciting contributions.[4940] That afternoon, the plaintiffs and Monroeville memorialized the plaintiffs' right to canvass

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4932. *Id.* at 2–4.

4933. *Id.* at 3.

4934. *Id.* at 2, 10.

4935. *Id.* at 4–11.

4936. Oct. 28, 2004, *Service Employees Int'l Union* Transcript, *supra* note 4926, at 11; Opinion at 3, Service Employees Int'l Union v. Municipality of Monroeville, No. 2:04-cv-1651 (W.D. Pa. Dec. 9, 2004), D.E. 19 [hereinafter W.D. Pa. *Service Employees Int'l Union* Opinion]; Oct. 29, 2004, *Service Employees Int'l Union* Transcript, *supra* note 4930, at 3.

4937. Oct. 29, 2004, *Service Employees Int'l Union*, *supra* note 4930, at 2–13; *see Service Employees Int'l Union* Docket Sheet, *supra* note 4930.

4938. Interview with Judge Arthur J. Schwab, Jan. 31, 2012; Oct. 28, 2004, *Service Employees Int'l Union* Transcript, *supra* note 4926, at 6 ("Everyone has legitimate interests and we can spend days and weeks litigating the respective positions, and if that's what people want, then I'm happy to do that. I'm just saying that there may be a way that reasonable people can sit down and work through something that would satisfy everyone in this regard.").

4939. *Service Employees Int'l Union* Complaint, *supra* note 4926, at 4–7; *see* Ove, *ACLU Sues*, *supra* note 4926.

4940. Oct. 29, 2004, *Service Employees Int'l Union* Transcript, *supra* note 4930, at 9–12; W.D. Pa. *Service Employees Int'l Union* Opinion, *supra* note 4936, at 3.

without a permit in a consent decree that Judge Schwab immediately signed.[4941] Monroeville was dismissed as a defendant that day.[4942]

The plaintiffs and Mt. Lebanon spent all Friday working out a consent decree, which Judge Schwab signed that day, allowing the plaintiffs to canvass in Mt. Lebanon over the weekend and deferring the constitutionality of Mt. Lebanon's canvassing ordinance for resolution later.[4943] As part of the compromise, instead of individual canvassers appearing at the police station for individual permits, the union would submit a list of canvassers and their driver-license numbers.[4944] Judge Schwab made himself and his staff available over the weekend in case they were needed, and they were not.[4945]

If Judge Schwab received a case like this again, he would refer it to the court's alternative-dispute-resolution program for immediate mediation by an expert in election law.[4946]

On December 2, Judge Schwab determined that Mt. Lebanon's ordinance was constitutional,[4947] but the court of appeals, on April 28, 2006, determined that it was not.[4948] Mt. Lebanon decided not to seek reconsideration of the appellate opinion.[4949] Judge Schwab ordered mediation on

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4941. Oct. 29, 2004, *Service Employees Int'l Union* Transcript, *supra* note 4930, at 16–19; *Service Employees Int'l Union* Docket Sheet, *supra* note 4930; W.D. Pa. *Service Employees Int'l Union* Opinion, *supra* note 4936, at 3–4.

4942. W.D. Pa. *Service Employees Int'l Union* Opinion, *supra* note 4936, at 3; *see* Ove, *Agreement Clears Way*, *supra* note 4926.

4943. Oct. 29, 2004, *Service Employees Int'l Union* Transcript, *supra* note 4930, at 21–28; W.D. Pa. *Service Employees Int'l Union* Opinion, *supra* note 4936, at 4; W.D. Pa. *Service Employees Int'l Union* Docket Sheet, *supra* note 4930.

4944. Oct. 29, 2004, *Service Employees Int'l Union* Transcript, *supra* note 4930, at 26–27; W.D. Pa. *Service Employees Int'l Union* Opinion, *supra* note 4936, at 4; *see* Ove, *Agreement Clears Way*, *supra* note 4926.

4945. Oct. 29, 2004, *Service Employees Int'l Union* Transcript, *supra* note 4930, at 5; W.D. Pa. *Service Employees Int'l Union* Opinion, *supra* note 4936, at 4–5.

4946. Interview with Judge Arthur J. Schwab, Jan. 31, 2012.

4947. W.D. Pa. *Service Employees Int'l Union* Opinion, *supra* note 4936, at 17; *see* Paula Reed Ward, *Mt. Lebanon Can't Force Door-to-Door Canvassers to Register, Court Rules*, Pittsburgh Post-Gazette, Apr. 29, 2006, at B1.

4948. Service Empoloyees Int'l Union v. Municipality of Mt. Lebanon, 446 F.3d 419 (3d Cir. 2006); *see* Ward, *supra* note 4947.

4949. Status Report, Service Employees Int'l Union v. Municipality of Monroeville, No. 2:04-cv-1651 (W.D. Pa. June 5, 2006), D.E. 28.

attorney-fee matters,[4950] but by the time the parties worked out the logistics of mediation they apparently came to an agreement on their own.[4951]

Voter Interference

Democratic National Committee v. Republican National Committee (Dickinson R. Debevoise and John Michael Vazquez, D.N.J. 2:81-cv-3876), Arizona Democratic Party v. Arizona Republican Party (John J. Tuchi, D. Ariz. 2:16-cv-3752), Nevada State Democratic Party v. Nevada Republican Party (Richard F. Boulware II, D. Nev. 2:16-cv-2514), Ohio Democratic Party v. Ohio Republican Party (James S. Gwin, N.D. Ohio 1:16-cv-2645), Pennsylvania Democratic Party v. Republican Party of Pennsylvania (Paul S. Diamond, E.D. Pa. 2:16-cv-5664), North Carolina Democratic Party v. North Carolina Republican Party (Catherine C. Eagles, M.D.N.C. 1:16-cv-1288), and Michigan Democratic Party v. Michigan Republican Party (Mark A. Goldsmith, E.D. Mich. 2:16-cv-13924)

> In 2004, a voter in Ohio moved to intervene in a 1981 District of New Jersey case, complaining that widespread voter-registration challenges in Ohio violated a consent decree between the two major political parties in the New Jersey case. On the day before the election, the district court in New Jersey granted injunctive relief. A panel of the court of appeals, over a dissent, denied the defendants a stay, but the full court ordered en banc review on election day. Because the plaintiff was allowed to vote, the appeal was subsequently declared moot. In 2016, a suit was again filed in the District of New Jersey to enforce and extend the consent decree. Related actions were filed in six other states, plaintiffs were denied immediate relief there, and the actions were dismissed voluntarily after the election. A little more than one year later, the consent decree was terminated.
>
> *Topics:* Registration challenges; intervention; enforcing orders; laches; case assignment.

A consent decree issued as a result of 1981 litigation between the two major parties was litigated in advance of the 2004, 2008, and 2016 general elections. The consent decree was terminated on January 8, 2018.[4952]

4950. Order, *id.* (June 29, 2006), D.E. 31.

4951. *Service Employees Int'l Union* Docket Sheet, *supra* note 4930; Motion, *Service Employees Int'l Union*, No. 2:04-cv-1651 (W.D. Pa. Aug. 21, 2006), D.E. 33.

4952. Consent-Decree Termination Order, Democratic Nat'l Comm. v. Republican Nat'l Comm., No. 2:81-cv-3876 (D.N.J. Jan. 8, 2018), D.E. 213, *aff'd*, Opinion, No. 18-1215 (3d Cir. Jan. 7, 2019) [hereinafter Consent Decree Termination Affirmance], 2019 WL 117555.

Ohio 2004

Five days before the 2004 general election, two Ohio voters filed a motion in the District of New Jersey to reopen and intervene in a 1981 case, alleging that widespread voter-registration challenges in Ohio violated consent decrees in the New Jersey case.[4953] With their intervention motion, the plaintiffs filed a motion for a preliminary injunction.[4954]

Judge Dickinson R. Debevoise was the presiding judge in the New Jersey case.[4955] The consent decrees arose from concerns that ballot-security initiatives, which are efforts to prevent or remedy voter fraud, were used to suppress minority voting.[4956] The consent decrees only covered actions by the national parties, but frequently during election cycles Judge Debevoise was called upon to determine whether the national parties engaged in activities in cooperation with local parties in violation of the decrees.[4957]

Judge Debevoise heard the intervention motion at 2:00 p.m. on October 28, the day that it was filed, and he granted the motion as to one of the two voters.[4958]

On November 1, Judge Debevoise heard and granted the preliminary-injunction motion.[4959] He observed that Judge Susan J. Dlott in the Southern District of Ohio had issued a temporary restraining order on October

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4953. Motion, *id.* (Oct. 28, 2004), D.E. 1; Intervention Complaint, *id.* (Oct. 28, 2004), D.E. 6; Democratic Nat'l Comm. v. Republican Nat'l Comm., 673 F.3d 192, 198 (3d Cir. 2012); Democratic Nat'l Comm. v. Republican Nat'l Comm., 671 F. Supp. 2d 575, 582 (D.N.J. 2009).

4954. Preliminary-Injunction Motion, *Democratic Nat'l Comm.*, No. 2:81-cv-3876 (D.N.J. Oct. 28, 2004), D.E. 5.

4955. Docket Sheet, *id.* (Dec. 14, 1981) [hereinafter D.N.J. *Democratic Nat'l Comm.* Docket Sheet]; *Democratic Nat'l Comm.*, 673 F.3d at 196 n.1.

Tim Reagan interviewed Judge Debevoise for this report by telephone on August 14, 2012.

4956. *Democratic Nat'l Comm.*, 673 F.3d at 196–98; *Democratic Nat'l Comm.*, 671 F. Supp. 2d at 578–81. *See generally* Richard L. Hasen, Election Meltdown 108–12 (2020).

4957. Interview with Judge Dickinson R. Debevoise, Aug. 14, 2012.

4958. Order, *Democratic Nat'l Comm.*, No. 2:81-cv-3876 (D.N.J. Oct. 28, 2004), D.E. 17; Minutes, *id.* (Oct. 28, 2004), D.E. 11; *see* John P. Martin, *Fight in A Battleground Lands in Newark Court*, Newark Star-Ledger, Oct. 29, 2004, at 1.

4959. Order, *Democratic Nat'l Comm.*, No. 2:81-cv-3876 (D.N.J. Nov. 1, 2004), D.E. 25 [hereinafter Nov. 1, 2004, *Democratic Nat'l Comm.* Order]; Minutes, *id.* (Nov. 1, 2004), D.E. 24; *Democratic Nat'l Comm.*, 673 F.3d at 198–99; *Democratic Nat'l Comm.*, 671 F. Supp. 2d at 582–83; *see* Lisa A. Abraham, *Federal Judges Issue Stay of 2 Earlier Rulings*, Akron Beacon J., Nov. 2, 2004, at A1; Amy Klein, *GOP Dealt Setback on Ohio Voter Challenges*, N.J. Record, Nov. 2, 2004, at A1; John P. Martin, *Judge Bars GOP Poll Challenges*, Newark Star-Ledger, Nov. 2, 2004, at 9; Greg B. Smith, *GOP Wins Early Legal Skirmish in Ohio*, N.Y. Daily News, Nov. 2, 2004, at 4.

27 against administrative proceedings on the Republican Party's widespread registration challenges.[4960] Judge Debevoise enjoined the Republican National Committee "from using or permitting to be used a challenger list originally containing 3500 names prepared by the Republican Party in the State of Ohio for use at the November 2, 2004 election."[4961]

The Republican Party immediately appealed.[4962] Over the dissent of one judge, a panel of the court of appeals denied the party a stay of Judge Debevoise's order, finding "ample support for the factual findings of the District Court."[4963] On the morning of election day, however, the court of appeals ordered en banc rehearing.[4964] Because the intervenor was allowed to vote on election day, the court of appeals later dismissed the appeal as moot.[4965]

Judge Debevoise approved a stipulated dismissal of his case on February 3, 2005.[4966]

2008

On the day before the 2008 general election, the Democratic National Committee moved to reopen the case again.[4967] After extensive litigation, on December 1, 2009, Judge Debevoise denied the Republican Party's mo-

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4960. Transcript at 2, 73, *Democratic Nat'l Comm.*, No. 2:81-cv-3876 (D.N.J. Nov. 1, 2004, filed Nov. 12, 2004), D.E. 29; *see* Temporary Restraining Order, Miller v. Blackwell, No. 1:04-cv-735 (S.D. Ohio Oct. 27, 2004), D.E. 11; *see also* "Widespread Voter-Registration Challenges," *supra* page 134.

4961. Nov. 1, 2004, *Democratic Nat'l Comm.* Order, *supra* note 4959.

4962. Docket Sheet, Democratic Nat'l Comm. v. Republican Nat'l Comm., No. 04-4186 (3d Cir. Nov. 1, 2004); *Democratic Nat'l Comm.*, 673 F.3d at 199; *Democratic Nat'l Comm.*, 671 F. Supp. 2d at 582.

4963. Opinion, *Democratic Nat'l Comm.*, No. 04-4186 (3d Cir. Nov. 1, 2004), *filed as* Opinion, *Democratic Nat'l Comm.*, No. 2:81-cv-3876 (D.N.J. Nov. 9, 2004), D.E. 32; *Democratic Nat'l Comm.*, 673 F.3d at 199; *Democratic Nat'l Comm.*, 671 F. Supp. 2d at 583; *see* Martin, *supra* note 4958.

4964. Order, *Democratic Nat'l Comm.*, No. 04-4186 (3d Cir. Nov. 2, 2004), *filed as* Order, *Democratic Nat'l Comm.*, No. 2:81-cv-3876 (D.N.J. Nov. 9, 2004), D.E. 34; *Democratic Nat'l Comm.*, 673 F.3d at 199; *Democratic Nat'l Comm.*, 671 F. Supp. 2d at 583; *see* Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 Geo. Wash. L. Rev. 1206, 1237–38, 1245 (2005).

4965. Order, *Democratic Nat'l Comm.*, No. 04-4186 (3d Cir. Dec. 20, 2004), *filed as* Order, *Democratic Nat'l Comm.*, No. 2:81-cv-3876 (D.N.J. Dec. 20, 2004), D.E. 36; *Democratic Nat'l Comm.*, 673 F.3d at 199; *Democratic Nat'l Comm.*, 671 F. Supp. 2d at 583.

4966. Dismissal, *Democratic Nat'l Comm.*, No. 2:81-cv-3876 (D.N.J. Feb. 3, 2005), D.E. 37.

4967. Letter, *id.* (Nov. 3, 2008), D.E. 38; *Democratic Nat'l Comm.*, 673 F.3d at 199; *Democratic Nat'l Comm.*, 671 F. Supp. 2d at 581.

tion to vacate the consent decrees, but he agreed to modify applicable particulars, including the addition of a presumptive expiration date of eight years hence.[4968] The court of appeals affirmed his decision on March 8, 2012.[4969]

The 2016 Presidential Election

Thirteen nights before the 2016 general election, alleging an effort "to intimidate and discourage minority voters," the Democratic National Committee filed a motion in the District of New Jersey to enforce the consent decree.[4970]

Because Judge Debevoise died in 2015,[4971] the court reassigned the case to Judge John Michael Vazquez,[4972] who scheduled a telephone conference for the afternoon of October 27, the day after the motion was filed.[4973] At the conference, Judge Vazquez denied the committee immediate relief:[4974] "I believe right now the way the Court's looking at it is that it's teed-up as an issue over concerns that are going to occur on election day, as opposed to what's going on at the present time."[4975]

Judge Vazquez set a schedule for a discovery motion and set additional telephonic proceedings for October 31 and November 2.[4976] "[T]ruthfully,

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4968. *Democratic Nat'l Comm.*, 671 F. Supp. 2d 575.

4969. Democratic Nat'l Comm. v. Republican Nat'l Comm., 673 F.3d 192 (3d Cir.), *cert. denied*, 568 U.S. 1138 (2013); *see* Daniel P. Tokaji, *HAVA in Court: A Summary and Analysis of Litigation*, 12 Election L.J. 203, 208 (2013).

4970. Motion, *Democratic Nat'l Comm.*, No. 2:81-cv-3876 (D.N.J. Oct. 26, 2016), D.E. 95; Transcript at 3, 5, *id.* (Oct. 27, 2016, filed Jan. 17, 2017), D.E. 150 [hereinafter Oct. 27, 2016, *Democratic Nat'l Comm.* Transcript]; *see* Jonathan D. Salant, *DNC Accuses GOP of Trying to Intimidate Voters in N.J.*, Newark Star-Ledger, Oct. 28, 2016, at 3.

4971. Federal Judicial Center Biographical Directory of Article III Federal Judges [hereinafter FJC Biographical Directory], www.fjc.gov/history/judges (noting Judge Debevoise's death on August 14, 2015).

4972. D.N.J. *Democratic Nat'l Comm.* Docket Sheet, *supra* note 4955 (D.E. 99).

Judge Vazquez resigned on September 8, 2023. FJC Biographical Directory, *supra* note 4971.

4973. D.N.J. *Democratic Nat'l Comm.* Docket Sheet, *supra* note 4955 (D.E. 100); *see* Oct. 27, 2016, *Democratic Nat'l Comm.* Transcript, *supra* note 4970; *id.* at 5 (noting that the case was assigned to Judge Vazquez on the morning of the conference).

4974. Oct. 27, 2016, *Democratic Nat'l Comm.* Transcript, *supra* note 4970, at 18–21.

4975. *Id.* at 20–21.

4976. Order, *Democratic Nat'l Comm.*, No. 2:81-cv-3876 (D.N.J. Oct. 27, 2016), D.E. 102; D.N.J. *Democratic Nat'l Comm.* Docket Sheet, *supra* note 4955 (D.E. 115); *see* Transcript, *Democratic Nat'l Comm.*, No. 2:81-cv-3876 (D.N.J. Nov. 2, 2016, filed Jan. 17, 2017), D.E. 149 [hereinafter Nov. 2, 2016, *Democratic Nat'l Comm.* Transcript]; Transcript, *id.* (Oct. 31, 2016, filed Jan. 17, 2017), D.E. 147.

I'd like to have full discovery, because it allows me to make a decision with a full record. That being said, we're under serious time constraints here."[4977] Following these two proceedings, he ordered some discovery.[4978]

He denied[4979] an October 31 motion to intervene by a California attorney and his wife who alleged that the political parties "are both parties to the long term conspiracy to permanently overthrow the duly elected government of the United States."[4980]

On November 4, Judge Vazquez denied the enforcement motion and deferred until after the election the question of whether the consent decree should be extended past 2017.[4981] He found that the consent decree governed the national Republican Party but not its presidential candidate, Donald Trump, "unless the [Trump Campaign] acted as an agent or representative of the [party]."[4982] The quick discovery permitted by the tight time frame did not result in evidence of coordination between the party and the campaign on ballot-security measures.[4983]

Citing the consent decree, state Democratic Parties in Arizona,[4984] Michigan,[4985] Nevada,[4986] North Carolina,[4987] Ohio,[4988] and Pennsylvania[4989]

4977. Oct. 27, 2016, *Democratic Nat'l Comm.* Transcript, *supra* note 4970, at 24.

4978. Order, *Democratic Nat'l Comm.*, No. 2:81-cv-3876 (D.N.J. Nov. 2, 2016), D.E. 118; Order, *id.* (Oct. 31, 2017), D.E. 113; *see* Transcript, *id.* (Jan. 4, 2017, filed Apr. 28, 2017), D.E. 156; *see also* Jonathan D. Salant, *Judge Orders RNC, Trump to Disclose Poll Watcher Sites*, Newark Star-Ledger, Nov. 3, 2016, at 3; Jonathan D. Salant, *Judge Wants to Know if Trump Campaign Worked with RNC*, Newark Star-Ledger, Nov. 2, 2016, at 3; *see also DNC Seeks Order on RNC Push*, Newark Star-Ledger, Nov. 5, 2016, at 6; Thomas Moriarty, *Judge to Hear Arguments Today on Voter-Monitoring Challenge*, Newark Star-Ledger, Nov. 4, 2016, at 2.

4979. Opinion, Kaighn v. Democratic Nat'l Comm., No. 2:16-cv-8107 (D.N.J. Nov. 3, 2016), D.E. 5, 2016 WL 6542830.

4980. Motion, *id.* (Oct. 31, 2016), D.E. 1; *see* Nov. 2, 2016, *Democratic Nat'l Comm.* Transcript, *supra* note 4976, at 3 (Judge Vazquez's summarizing the intervention motion: "the long and short is that the Illuminati control the election").

4981. Opinion, *Democratic Nat'l Comm.*, No. 2:81-cv-3876 (D.N.J. Nov. 4, 2016), D.E. 138 [hereinafter Nov. 4, 2016, *Democratic Nat'l Comm.* Opinion], 2016 WL 6584915; *see* Transcript, *id.* (Nov. 4, 2016, filed Jan. 17, 2017), D.E. 148; *see also Federal Judge Rejects Voter Intimidation Arguments*, Miami Herald, Nov. 6, 2016, at 16A; Brent Kendall, *Courts Rule Quickly on Campaign Procedures*, Wall St. J., Nov. 7, 2016, at A8.

4982. Nov. 4, 2016, *Democratic Nat'l Comm.* Opinion, *supra* note 4981, at 24.

4983. *Id.* at 26–27.

4984. Complaint, Ariz. Democratic Party v. Ariz. Republican Party, No. 2:16-cv-3752 (D. Ariz. Oct. 31, 2016), D.E. 1.

4985. Complaint, Mich. Democratic Party v. Mich. Republican Party, No. 2:16-cv-13924 (E.D. Mich. Nov. 4, 2016), D.E. 1; *see* Tresa Baldas, *Dems Sue Trump Campaign to Ward Off Intimidation*, Detroit Free Press, Nov. 5, 2016, at A10; Michael Gerstein, *Dems*

filed federal voter-intimidation complaints from October 30 to November 4 against defendants that included state Republican Parties and the Donald Trump presidential campaign.[4990] A third defendant was Roger Stone, an alleged "vocal proselytizer of Trump's false voter fraud claims and his calls for vigilante action."[4991] The fourth defendant was Stop the Steal, Inc., an organization allegedly "devoted to promoting [the third defendant's] conspiracy theories regarding voter fraud, and to using fears of a 'rigged' election to organize and recruit poll watchers to harass and intimidate perceived Democratic voters on Election Day."[4992]

Accuse GOP, Trump of Voter Intimidation, Detroit News, Nov. 5, 2016, at A13.

4986. Complaint, Nev. State Democratic Party v. Nev. Republican Party, No. 2:16-cv-2514 (D. Nev. Oct. 30, 2016), D.E. 1.

4987. Complaint, N.C. Democratic Party v. N.C. Republican Party, No. 1:16-cv-1288 (M.D.N.C. Nov. 3, 2016), D.E. 1; Motion, *id.* (Nov. 4, 2016), D.E. 4.

4988. Complaint, Ohio Democratic Party v. Ohio Republican Party, No. 1:16-cv-2645 (N.D. Ohio Oct. 30, 2016), D.E. 1; *see* Jessie Balmert, *Democrats Sue Trump, GOP, to Head Off Voter Intimidation*, Cincinnati Enquirer, Nov. 2, 2016, at A6; Eric Heisig, *Democrats' Fears of Intimidation of Voters to Be Aired*, Cleveland Plain Dealer, Nov. 4, 2016, at A16; Eric Heisig, *Trump Campaign Lawyer Defends "Poll Watching" Targeted in Lawsuit*, Cleveland Plain Dealer, Nov. 3, 2016, at A3.

4989. Complaint, Pa. Democratic Party v. Republican Party of Pa., No. 2:16-cv-5664 (E.D. Pa. Oct. 30, 2016), D.E. 1; *see* Chris Brennan, *PA Democrats Ask Judge to Bar Trump's Polling Place Observers*, Phila. Inquirer, Nov. 1, 2016, at A4; Tracie Mauriello, *Lawsuits Charge Voter Intimidation*, Pittsburgh Post-Gazette, Nov. 1, 2016, at A4; Daniel Simmons-Ritchie, *Suit Accuses Trump of Intimidation*, Harrisburg Patriot News, Nov. 1, 2016, at A15.

4990. *See* Mark Berman & William Wan, *Lawsuits Allege Voter Intimidation in 4 States*, Wash. Post, Nov. 2, 2016, at A6.

4991. *E.g.*, *Ohio Democratic Party* Complaint, *supra* note 4988, at 5.

"Roger J. Stone Jr., the onetime political consultant and full-time provocateur, has been one of the few constants—a loyalist and self-proclaimed 'dirty trickster' who nurtured the dream of a presidential run by the developer-turned-television-star for 30 years." Maggie Haberman, *Early Loyalist for Trump Finds Spotlight Turned on Him*, N.Y. Times, Mar. 22, 2017, at A12.

Stone was arrested on January 25, 2019, on a federal indictment for obstruction, false statements, and witness tampering related to Trump's 2016 presidential campaign. *See* Devlin Barrett, Rosalind S. Helderman, Lori Rozsa & Manuel Roig-Franzia, *Stone Hit with Charges of Lying, Obstruction*, Wash. Post, Jan. 26, 2019, at A1; Rosalind S. Helderman, *Indictment Portrays Stone as Campaign-WikiLeaks Link*, Wash. Post, Jan. 26, 2019, at A7; Mark Mazzetti, Eileen Sullivan & Maggie Haberman, *President's Ally Facing 7 Counts*, N.Y. Times, Jan. 26, 2019, at A1; Aruna Viswanatha, Rebecca Balhaus & Shelby Holliday, *Stone Is Charged in Russia Inquiry*, Wall St. J., Jan. 26, 2019, at A1; *see also* Docket Sheet, United States v. Stone, No. 1:19-cr-18 (D.D.C. Jan. 24, 2019).

4992. *E.g.*, *Ohio Democratic Party* Complaint, *supra* note 4988, at 5.

Ohio

On November 1, Northern District of Ohio Judge James S. Gwin ordered a defense response by the following day.[4993] Following a November 4 hearing[4994] on a November 3 motion for a temporary restraining order,[4995] Judge Gwin issued an injunction against defendants other than the Republican Party against engaging in voter-intimidation activity.[4996] "While 'obey the law' injunctions are generally disfavored, this motion for injunctive relief does not fit in that category. . . . [W]here there is a legitimate possibility that particular laws may be imminently violated, ordering compliance with those laws is appropriate."[4997] On Sunday, November 6, the court of appeals issued an emergency stay of Judge Gwin's order, "conclud[ing] that the Plaintiff did not demonstrate before the district court a likelihood of success on the merits."[4998] The Supreme Court declined to interfere, and Justice Ginsburg noted "that Ohio law proscribes voter intimidation."[4999]

Arizona

"In light of the absence of a request for a hearing and considering the little time left for the Court to resolve Plaintiff's claims, [District of Arizona Judge John J. Tuchi] *sua sponte* [set] a schedule for briefing and a [November 3] hearing."[5000]

4993. Docket Sheet, Ohio Democratic Party v. Ohio Republican Party, No. 1:16-cv-2645 (N.D. Ohio Oct. 30, 2016); *see* Eric Heisig, *GOP, Trump Ordered to Respond to Dems' Claims*, Cleveland Plain Dealer, Nov. 2, 2016, at A13.

4994. Transcript, *Ohio Democratic Party*, No. 1:16-cv-2645 (N.D. Ohio Nov. 4, 2016, filed Nov. 6, 2016), D.E. 30 (noting that the hearing lasted from 10:06 a.m. to 12:41 p.m.); Minutes, *id.* (Nov. 4, 2016), D.E. 26.

4995. Motion, *id.* (Nov. 2, 2016), D.E. 8.

4996. Order, *id.* (Nov. 4, 2016), D.E. 27 [hereinafter Nov. 4, 2016, *Ohio Democratic Party* Order], 2016 WL 6542486; *see* Eric Heisig, *Judge's Order Aims to Head Off Voter Intimidation*, Cleveland Plain Dealer, Nov. 5, 2016, at A10; Kendall, *supra* note 4981; Michael Wines, *Judge's Ruling Preserves Voting Rights for Thousands in North Carolina*, N.Y. Times, Nov. 5, 2016, at A13.

4997. Nov. 4, 2016, *Ohio Democratic Party* Order, *supra* note 4996, at 2.

4998. Order, Ohio Democratic Party v. Donald J. Trump for President, Inc., No. 16-4268 (6th Cir. Nov. 6, 2016), D.E. 18; *see* Kendall, *supra* note 4981.

The parties later agreed to dismiss the appeal. Order, *Ohio Democratic Party*, No. 16-4268 (6th Cir. Dec. 13, 2016), D.E. 36.

4999. Ohio Democratic Party v. Donald J. Trump for President, 580 U.S. 978 (2016).

5000. Order, Ariz. Democratic Party v. Ariz. Republican Party, No. 2:16-cv-3752 (D. Ariz. Oct. 31, 2016), D.E. 7 [hereinafter Oct. 31, 2016, *Ariz. Democratic Party* Order]; *see* Motion, *id.* (Nov. 1, 2016), D.E. 10.

The Democratic Party served the Republican Party on October 31, but it did not serve Stone or Stop the Steal until November 2,[5001] the day that defendants' briefs were due.[5002] Judge Tuchi, therefore, accepted briefing after the hearing.[5003]

At the beginning of the 1:30 p.m. hearing, Judge Tuchi announced, "I'm going to give each side up to two hours to use however they want, whether that's presentation of argument or evidence."[5004] So as to not slow down the case, Judge Tuchi denied the plaintiffs' request for additional documentary discovery.[5005] The hearing concluded at 5:49.[5006]

Although Judge Tuchi denied on November 4 a defense motion to dismiss the complaint, he also denied the Democratic Party immediate injunctive relief.[5007] The evidence presented did not show a likely risk of voter intimidation.[5008]

Pennsylvania

Three days after the complaint was filed, Eastern District of Pennsylvania Judge Paul S. Diamond ordered service on the defendants by the following day, ordered the filing of a motion for the emergency relief sought in the complaint, and set a hearing in the Eastern District of Pennsylvania for November 7.[5009]

Following the hearing, Judge Diamond denied the Democratic Party immediate relief.[5010]

> Remarkably, Plaintiff did not actually move for injunctive relief until Thursday, November 3, after I ordered it to do so. Plaintiff has not ex-

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5001. Proof of Service, *id.* (Nov. 4, 2016), D.E. 26 (Stone); Proof of Service, *id.* (Nov. 3, 2016), D.E. 19 (Stop the Steal).

5002. Opinion at 1–2, *id.* (Nov. 4, 2016), D.E. 31 [hereinafter *Ariz. Democratic Party* Opinion], 2016 WL 8669978; *see* Oct. 31, 2016, *Ariz. Democratic Party* Order, *supra* note 5000.

5003. *Ariz. Democratic Party* Opinion, *supra* note 5002, at 2; Minutes, *Ariz. Democratic Party*, Nov. 3, 2016), D.E. 24.

5004. Transcript at 6, *Ariz. Democratic Party*, No. 2:16-cv-3752 (D. Ariz. Oct. 31, 2016), D.E. 7.

5005. *Id.* at 8–10.

5006. *Id.* at 167.

5007. *Ariz. Democratic Party* Opinion, *supra* note 5002; *see* Howard Fischer, *No Evidence That Arizona Voters Will Face Intimidation, Judge Finds*, Ariz. Daily Star, Nov. 5, 2016, at C1; Wines, *supra* note 4996.

5008. *Ariz. Democratic Party* Opinion, *supra* note 5002.

5009. Order, Pa. Democratic Party v. Republican Party of Pa., No. 2:16-cv-5664 (E.D. Pa. Nov. 2, 2016), D.E. 10; *see* Transcript, *id.* (Nov. 7, 2016, filed Nov. 7, 2016), D.E. 49; Motion, *id.* (Nov. 3, 2016), D.E. 14.

5010. Opinion, *id.* (Nov. 7, 2016), D.E. 47, 2016 WL 6582659.

> plained this delay, which has crippled Defendants' ability to respond, made relief impracticable, and likely precluded appellate review of this Memorandum and Order before tomorrow's election. Moreover, Plaintiff has produced no evidence of any planned voter intimidation in this District. Finally, insofar as Plaintiff asks me to enjoin conduct that is already prohibited by criminal statutes, such an injunction is impermissible.[5011]

North Carolina

Middle District of North Carolina Judge Catherine C. Eagles set her case for hearing on November 7.[5012] She also denied the Democratic Party immediate relief.[5013]

> While the statements of the defendant Roger Stone, the defendants' presidential nominee, and the nominee's surrogates, taken in context, may be susceptible to the interpretation that Mr. Stone and the Trump campaign are encouraging their supporters to intimidate voters, there is little evidence that supporters are acting on these indirect suggestions. . . .
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> . . .
>
> . . . On Election Day, if it becomes apparent that agents of any defendant or supporters encouraged by any defendant are making an effort to intimidate minority voters or to further incite intimidation of voters, the plaintiff may renew the motion.[5014]

Nevada

District of Nevada Judge Richard F. Boulware II set his case for hearing on November 2, 3, 4, and 7.[5015] Because Stone and Stop the Steal promised to inform persons on their contact list about what would constitute improper voter interference, Judge Boulware decided that a court order was not necessary.[5016]

5011. *Id.* at 1.

5012. Docket Sheet, N.C. Democratic Party v. N.C. Republican Party, No. 1:16-cv-1288 (M.D.N.C. Nov. 3, 2016); *see* Minutes, *id.* (Nov. 7, 2016), D.E. 27.

5013. Opinion, *id.* (Nov. 7, 2016), D.E. 30.

5014. *Id.* at 2, 4.

5015. Docket Sheet, Nev. State Democratic Party v. Nev. Republican Party, No. 2:16-cv-2514 (D. Nev. Oct. 30, 2016) (D.E. 15, 17, 33, 65, 74, 75, 76); Order, *id.* (Nov. 3, 2016), D.E. 47; Order, *id.* (Nov. 1, 2016), D.E. 16; Transcripts, *id.* (Nov. 2 and 3, 2016, filed Nov. 5, 2016), D.E. 56, 57; *see* Motion, *id.* (Nov. 1, 2016), D.E. 6.

5016. *See Nev. State Democratic Party* Docket Sheet, *supra* note 5015 (D.E. 71, 72); Notice, *Nev. State Democratic Party*, No. 2:16-cv-2514 (D. Nev. Nov. 7, 2016), D.E. 70; Declaration, *id.* (Nov. 6, 2016), D.E. 60; *see also* David Ferrara, *Trump Supporter's Group "Stop the Steal" to Inform Pollsters About Federal Voting Laws*, Lax Vegas Rev.-J., Nov. 7, 2016.

Voluntary Dismissals
On the day after the election, the state Democratic Parties voluntarily dismissed the actions in Arizona,[5017] Michigan,[5018] Nevada,[5019] North Carolina,[5020] Ohio,[5021] and Pennsylvania.[5022]

Termination of the Consent Decree
On January 8, 2018, following additional discovery in the District of New Jersey action, Judge Vazquez terminated the consent decree because the Democratic National Committee had not shown recent violation of it.[5023] The court of appeals affirmed the termination on January 7, 2019.[5024]

The Right to Campaign in Housing Projects

Vasquez v. Housing Authority of El Paso (3:00-cv-89) and De la O v. Housing Authority of El Paso (3:02-cv-456) (David Briones, W.D. Tex.)

> Successive federal complaints challenged proscriptions on door-to-door campaigning in housing projects. The district judge found the campaign restrictions reasonable as part of viewpoint-neutral regulations that protect housing projects from criminal activity. A panel of the court of appeals held the proscriptions to be unconstitutional, but the full court voted to rehear the appeal en banc. The second case was filed because the first appeal was dismissed when the appellant died. A second panel of the court of appeals agreed with the district judge that the proscriptions were reasonable.

5017. Docket Sheet, Ariz. Democratic Party v. Ariz. Republican Party, No. 2:16-cv-3752 (D. Ariz. Oct. 19, 2016) (D.E. 33); Voluntary Dismissal, *id.* (Nov. 9, 2016), D.E. 32.

5018. Order, Mich. Democratic Party v. Mich. Republican Party, No. 2:16-cv-13924 (E.D. Mich. Nov. 17, 2016), D.E. 18; Order, *id.* (Nov. 9, 2016), D.E. 16.

5019. *Nev. State Democratic Party* Docket Sheet, *supra* note 5015; Notice, *Nev. State Democratic Party*, No. 2:16-cv-2514 (D. Nev. Nov. 9, 2016), D.E. 73.

5020. Notice, N.C. Democratic Party v. N.C. Republican Party, No. 1:16-cv-1288 (M.D.N.C. Nov. 9, 2016), D.E. 31.

5021. Order, Ohio Democratic Party v. Ohio Republican Party, No. 1:16-cv-2645 (N.D. Ohio Nov. 10, 2016), D.E. 35; Notice, *id.* (Nov. 9, 2016), D.E. 33.

5022. Notice, Pa. Democratic Party v. Republican Party of Pa., No. 2:16-cv-5664 (E.D. Pa. Nov. 9, 2016), D.E. 31.

5023. *Democratic Nat'l Comm.* Consent Decree Termination Order, *supra* note 4952; *see* Minutes, Democratic Nat'l Comm. v. Republican Nat'l Comm., No. 2:81-cv-3876 (D.N.J. Jan. 8, 2018), D.E. 214; Transcript, *id.* (Jan. 8, 2018, filed Apr. 27, 2018), D.E. 219; *see also* Rosalind S. Helderman, Josh Dawsey & Matt Zapotosky, *Trump Poll Plan Feared as Effort to Intimidate*, Wash. Post, Aug. 22, 2020, at A1.

5024. Consent Decree Termination Affirmance, *supra* note 4952; *see id.* at 10 ("While it is possible that another court would have allowed further discovery or managed the cause differently, we review only for abuse of discretion.").

Topics: Door-to-door canvassing; case assignment.

On March 30, 2000, a candidate for office and a housing-project resident filed a federal complaint in the Western District of Texas against El Paso's housing authority to challenge proscriptions against door-do-door campaigning that resulted from limits on access to housing projects by nonresidents.[5025] The plaintiffs also filed a motion for a temporary restraining order.[5026]

On the following day, Judge David Briones issued a temporary restraining order requiring access to housing projects for door-to-door campaigning between 9:00 a.m. and 8:00 p.m.[5027] Early voting was scheduled for April 3, and April 11 was election day.[5028] Judge Briones heard the case on April 7 and agreed to accept merits briefing thereafter.[5029]

On July 13, he dismissed the case.[5030] He found the housing authority's content-neutral access rules "are a reasonable means of combating . . . criminal activity that, according to Defendant's uncontradicted summary judgment evidence, occurs on its property by non-residents."[5031]

Finding some of the plaintiffs' less challenging claims without merit, including a claim based on a statute repealed in 1948, Judge Briones cautioned,

> Before addressing Plaintiffs' claims, however, the Court begins by expressing its exasperation with the briefing by the Parties, which contains more than its fair share of typographical errors, bold assertions of law without citation to supporting authority, and which often times cites a correct assertion of the law, but for the wrong proposition.[5032]

5025. Docket Sheet, Vasquez v. Housing Auth. of El Paso, No. 3:00-cv-89 (W.D. Tex. Mar. 30, 2000) [hereinafter *Vasquez* Docket Sheet] (D.E. 1); Vasquez v. Housing Auth. of El Paso, 103 F. Supp. 2d 927, 929–30 (W.D. Tex. 2000) (noting that the candidate was campaigning for the office of county party chair); *see Candidate Suing Housing Authority*, El Paso Times, Mar. 31, 2000, Borderland, at 1.

5026. *Vasquez* Docket Sheet, *supra* note 5025 (D.E. 2); *Vasquez*, 103 F. Supp. 2d at 929–30.

5027. Temporary Restraining Order, *Vasquez*, No. 3:00-cv-89 (W.D. Tex. Mar. 30, 2000), D.E. 4; *Vasquez*, 103 F. Supp. 2d at 930.

5028. *Vasquez*, 103 F. Supp. 2d at 929.

5029. *Id.* at 930.

5030. *Id.* at 934–35, *appeal dismissed*, Order, Vasquez v. Housing Auth. of El Paso, No. 00-50702 (5th Cir. Sept. 23, 2002) [hereinafter *Vasquez* Appeal Dismissal Order], *filed as* Order, *Vasquez*, No. 3:00-cv-89 (W.D. Tex. Oct. 2, 2002), D.E. 17, *cert. denied*, 539 U.S. 914 (2003).

5031. *Vasquez*, 103 F. Supp. 2d at 933.

5032. *Id.* at 931.

On November 5, 2001, resolving the project resident's appeal, the court of appeals held by a two-to-one vote that the trespass regulation was unconstitutional as applied to political campaigns.[5033] "The effect of the trespass regulation, as applied in the matter before us, is to isolate a significant portion of the El Paso community from one of the most time-honored and effective means of political discourse."[5034]

The court of appeals agreed with Judge Briones that the housing projects were not public fora and the trespass proscriptions were viewpoint neutral, but the court of appeals found a proscription on campaigning to be unreasonable.[5035] "We note with some focus that the record reflects that [the housing authority] does not ban all nonresidents, as the trespass regulation does not apply to certain individuals."[5036] Housing-authority contractors and law-enforcement officers were among the permitted exceptions.[5037]

On April 19, 2002, the court of appeals decided to rehear the appeal en banc,[5038] but the court dismissed the appeal on September 27 because of the appellant's death.[5039]

On October 1, the appellant's widow and another housing-project resident filed a second complaint.[5040] The court assigned the case to Judge Philip R. Martinez, who transferred it to Judge Briones.[5041] Judge Briones issued a temporary restraining order against campaign proscriptions on

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5033. Vasquez v. Housing Auth. of El Paso, 271 F.3d 198 (5th Cir. 2001) (opinion by Circuit Judge Henry A. Politz, joined by Eastern District of Louisiana District Judge Eldon E. Fallon, sitting by designation; dissenting opinion by Circuit Judge Rhesa Hawkins Barksdale), *appeal dismissed*, *Vasquez* Appeal Dismissal Order, *supra* note 5030; *see* David Crowder, *Housing Authority Loses Ruling*, El Paso Times, Nov. 7, 2001, at 1B.

5034. *Vasquez*, 271 F.3d at 205.

5035. *Id.* at 202–06.

5036. *Id.* at 205.

5037. *Id.*

5038. Vasquez v. Housing Auth. of El Paso, 289 F.3d 350 (5th Cir. 2002).

5039. *Vasquez* Appeal Dismissal Order, *supra* note 5030; De la O v. Housing Auth. of El Paso, 417 F.3d 495, 498 (5th Cir. 2005) ("the absence of a living plaintiff rendered the case moot, and it was dismissed"); *see* Tammy Fonce-Olivas, *"Folk Hero" Chuy De la O Dies at 74*, El Paso Times, Apr. 9, 2007, at 1B (reporting that the appellant died on April 8, 2002).

5040. Docket Sheet, De la O v. Housing Auth. of El Paso, No. 3:02-cv-456 (W.D. Tex. Oct. 1, 2002) (complaint, D.E. 1; amended complaint, D.E. 14); *De la O*, 417 F.3d at 498; De la O v. Housing Auth. of El Paso, 316 F. Supp. 2d 481, 484 (W.D. Tex. 2004).

5041. Transfer Order, *De la O*, No. 3:02-cv-456 (W.D. Tex. Oct. 7, 2002), D.E. 6.

Judge Martinez died on February 26, 2021. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

October 7[5042] and set the case for hearing on October 17.[5043] Following the October 17 hearing, he left in place the temporary restraining order.[5044] On March 24, 2004, however, he again found the housing-project restrictions to be "a reasonable means of combating . . . criminal activity that, according to Defendant's uncontradicted summary judgment evidence, occurs on its property by nonresidents."[5045]

"After [an] appeal was filed, [the housing authority] voluntarily amended the rules, which now allow for non-residents to enter facilities to engage in political and religious activities door-to-door."[5046] A new appellate panel found both the old and the new proscriptions to be reasonable.[5047] The court remanded the case for further inquiry into whether non-resident proscriptions were applied to quell certain points of view.[5048]

Following additional proceedings in the district court, Judge Briones approved a stipulated dismissal on September 22, 2006.[5049]

5042. Temporary Restraining Order, *De la O*, No. 3:02-cv-456 (W.D. Tex. Oct. 7, 2002), D.E. 4; *De la O*, 316 F. Supp. 2d at 484.

5043. Order, *De la O*, No. 3:02-cv-456 (W.D. Tex. Oct. 7, 2002), D.E. 5.

5044. *De la O*, 316 F. Supp. 2d at 484.

5045. *Id.* at 487; *see id.* at 483 n.1 ("Needless to say, the Parties have demonstrated a difficulty in labeling their pleadings in a correct and succinct fashion."); *De la O*, 417 F.3d at 498.

5046. *De la O*, 417 F.3d at 498.

5047. *Id.* at 507–08 (opinion by Circuit Judge Jerry E. Smith, joined by Circuit Judges James L. Dennis and Edward C. Prado), *cert. denied*, 546 U.S. 1062 (2005).

5048. *Id.* at 507.

5049. Order, De la O v. Housing Auth. of El Paso, No. 3:02-cv-456 (W.D. Tex. Sept. 22, 2006), D.E. 88.

10. Election Dates

The dates for regular elections generally are fixed. But litigation can arise if the dates are changed or a special election is either called or not called.

Officials charged with setting the date for a special election, such as to fill a vacancy, may have strategic reasons for setting it at the same time as an already scheduled election, or they may have strategic reasons for scheduling the special election at a different time, perhaps sooner.[5050] Strategic reasons can include both considerations of efficiency and considerations of political outcome.

A member of Congress resigned on March 9, 2010, and a May 3 lawsuit sought an order requiring the governor to schedule a special election to fill the vacancy.[5051] After the lawsuit was filed, the governor scheduled a special election for the same day as the November general election, eight months after the vacancy occurred, so there would be two elections on the same day for the same office: one for the remainder of the term, until early January, and one for the next term. The district judge determined that the governor was not legally required to call for a special election sooner than that.[5052]

The result was different when the vacancy occurred earlier in a term: on January 5, 2015, twenty-two months before the general election. Following federal-court litigation, the governor set a special election for May.[5053] The district judge issued an interim ruling explaining that special elections to fill congressional seats must be conducted as soon after the vacancy arises as reasonably possible, because of the democratic importance of each member of Congress.[5054]

5050. *See, e.g.*, "Rushed Election to Fill a Vacancy," *infra* page 685; "Section 5 Preclearance and Holding a Special Election on the Same Day as a General Election," *infra* page 688.

5051. *See* "Promptness of a Special Election to Fill a Congressional Vacancy," *infra* page 681.

5052. Fox v. Paterson, 715 F. Supp. 2d 431, 442 (W.D.N.Y. 2010).

5053. *See* "Promptness of a Special Election to Fill a Congressional Vacancy," *infra* page 681.

5054. Rossito-Canty v. Cuomo, 86 F. Supp. 3d 175, 180–81, 195 (E.D.N.Y. 2015).

In 2020, a judge held inapplicable to a congressional election a Minnesota statute that would have required a delay in the election because the Legal Marijuana Now Party's nominee died before the election.[5055] The judge also ruled that the death of a candidate did not create a vacancy requiring a special election.[5056]

Nor was it proper to cancel a presidential primary in New York that year just because all but one of the candidates had suspended their campaigns; they had not withdrawn their candidacies, and their prospective delegates were entitled to seek participation in the nominating convention.[5057]

The Uniformed and Overseas Citizens Absentee Voting Act of 1986 (UOCAVA),[5058] as amended by the Military and Overseas Voter Empowerment Act of 2009 (MOVE Act),[5059] requires that election officials send absentee ballots to voters in the military and otherwise overseas at least forty-five days before an election for a federal office.[5060] That requirement imposes constraints on an election schedule that includes a primary election, with a possible runoff primary election, before a general election. There typically has to be enough time between each election in the cycle to determine who prevails and to print and mail ballots for the next election in the cycle.[5061]

Before the MOVE Act required it, sending absentee ballots overseas forty-five days before a federal election was a recommendation of the federal Election Assistance Commission, which was created by the Help America Vote Act in 2002.[5062]

5055. Craig v. Simon, 493 F. Supp. 3d 773 (D. Minn. 2020), *as reported in* "Whether a State Can Delay a Congressional Election When a Candidate Dies," *infra* page 668.

5056. *Craig*, 493 F. Supp. 3d 773.

5057. Yang v. Kellner, 458 F. Supp. 3d 199 (S.D.N.Y.), *aff'd*, 960 F.3d 119 (2d Cir. 2020), *as reported in* "Canceling an Election During a Pandemic," *infra* page 671.

5058. Pub. L. No. 99-410, 100 Stat. 924, *as amended*, 52 U.S.C. §§ 20301–20311. *See generally* Robert Timothy Reagan, Overseas Voting: The Uniformed and Overseas Citizens Absentee Voting Act (Federal Judicial Center 2016).

5059. National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, 123 Stat. 2190, 2318–35.

5060. *See, e.g.*, "Extension for Overseas Voters in Wisconsin," *infra* page 845; "Overseas Absentee Ballot Consent Decree in the Virgin Islands," *infra* page 847; "Late Overseas Ballots in Michigan," *infra* page 848; "Timely Overseas Ballots in Alabama," *infra* page 852; "Prompt Delivery of Absentee Ballots by Guam," *infra* page 857; *see also* "Holding an Election Before University Students Can Register," *infra* page 697.

5061. *See, e.g.*, "Mailing Overseas Absentee Ballots on Time in Georgia in 2012," *infra* page 850.

5062. Report of the U.S. Election Assistance Commission on Best Practices for Facili-

Much emergency litigation over election dates included lawsuits to enforce section 5 of the Voting Rights Act,[5063] which required federal approval—known as preclearance—of changes to election administration in jurisdictions with a statutorily recognized history of improper discrimination.[5064] In 2013, the Supreme Court held unconstitutionally outdated the statutory list of covered jurisdictions,[5065] and section 5 has not been a topic of litigation since then.

Preclearance cases were not always only about preclearance. In one instructive case, a school board's change in composition had not yet been precleared, but a district judge decided in response to last-minute litigation that there would be time to challenge election results after the election was held.[5066] Because voters at one polling place were erroneously informed for a time that the judge had canceled the school-board part of the election, the judge ended up nullifying the election even though the composition change was eventually precleared.[5067]

An unusual but instructive case arose in the District of Columbia in 2011. An inflexible statute required a special election during Passover, but the issue was not litigated until about three weeks before the election.[5068] The district judge said that had the case been brought earlier, as it should have been by election officials, he could have ordered a different date as religious accommodation without undue disruption to the election process.[5069] But because of the imminent election date coupled with opportu-

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tating Voting by U.S. Citizens Covered by the Uniformed and Overseas Citizens Absentee Voting Act (Sept. 2004), www.eac.gov/sites/default/files/eac_assets/1/6/Best%20Practices%20for%20UOCAVA%20Voters%20Report%202004.zip; *see* Pub. L. No. 107-252, 116 Stat. 1666 (2002), *as amended*, 52 U.S.C. §§ 20901–21145; Marie Leary & Robert Timothy Reagan, The Help America Vote Act (Federal Judicial Center 2012); *see also, e.g.*, "Approving a Compressed Special Election," *infra* page 687.

5063. Case studies involving section 5 have "section 5 preclearance" among their case-study topics.

5064. 52 U.S.C. § 10304.

5065. Shelby County v. Holder, 570 U.S. 529 (2013).

5066. Injunction at 2, Lyde v. Glynn Ct. Bd. of Elections, No. 2:04-cv-91 (S.D. Ga. July 20, 2004), D.E. 9 [hereinafter *Lyde* Injunction], *as reported in* "Nullifying an Election Held Without Preclearance," *infra* page 700.

5067. *Lyde* Injunction, *supra* note 5066; Notice, *Lyde*, No. 2:04-cv-91 (S.D. Ga. July 30, 2004), D.E. 12.

5068. *See* "Election Day on the Last Day of Passover," *infra* page 674.

5069. Transcript at 90–91, Herzfeld v. D.C. Bd. of Elections & Ethics, No. 1:11-cv-721 (D.D.C. Apr. 15, 2011, filed Jan. 9, 2012), D.E. 42.

nities for early and absentee voting, the judge declined to order relief in the emergency case.[5070]

For the presidential election of 2008, conflicts among states, state parties, and national parties over the calendar for primary elections resulted in litigation, including emergency federal litigation. One case alleged that the Michigan Democratic Party's holding its primary election earlier than permitted by the national party caused the plaintiff's preferred candidate to drop out of the state's primary election.[5071] The district judge denied immediate relief, reluctant to interfere with an election to be held in a matter of days and uncertain about the court's jurisdiction over a dispute within a political party.[5072] Federal judges in Florida that year also were reluctant to interfere with intraparty disputes.[5073]

Whether a State Can Delay a Congressional Election When a Candidate Dies

Craig v. Simon (0:20-cv-2066) and Overby v. Simon (0:20-cv-2250) (Wilhelmina M. Wright, D. Minn.)

> A congressional candidate died shortly before the election, and Minnesota's law specified that the election would be delayed from November to February. A district judge granted the incumbent an injunction against a delay of the election.
>
> *Topics:* Enjoining elections; intervention; interlocutory appeal; pro se party; case assignment; party procedures.

A member of Congress running for reelection in Minnesota and a voter filed a federal complaint in the District of Minnesota on September 28, 2020, challenging a Minnesota statute that would postpone the candidate's election from November 3 to February 9, 2021, because an opposing candidate—Adam Weeks, the Legal Marijuana Now Party's nominee—died on September 21.[5074] On September 29, the plaintiffs filed a motion for a preliminary injunction.[5075]

5070. *Id.* at 102.

5071. Complaint, Hayes v. Mich. Democratic Party, No. 1:07-cv-1237 (W.D. Mich. Dec. 10, 2007), D.E. 1, *as reported in* "Consequences of an Early Primary," *infra* page 691.

5072. Order, *Hayes*, No. 1:07-cv-1237 (W.D. Mich. Jan. 7, 2008), D.E. 19; Transcript at 72, *id.* (Jan. 7, 2008, filed Jan. 14, 2008), D.E. 21.

5073. Order, Ausman v. Browning, No. 4:07-cv-519 (N.D. Fla. Jan. 8, 2008), D.E. 20; Opinion, DiMaio v. Democratic Nat'l Comm., No. 8:07-cv-1552 (M.D. Fla. Aug. 30, 2007), D.E. 1; *see* "Punishment for Early Florida Primaries," *infra* page 693.

5074. Complaint, Craig v. Simon, No. 0:20-cv-2066 (D. Minn. Sept. 28, 2020), D.E. 1; Craig v. Simon, 493 F. Supp. 3d 773, 778–79 (D. Minn. 2020); *see* Jessie Van Berkel, *Craig Sues Over Election Delay in U.S. House Race*, Minneapolis Star Trib., Sept. 29, 2020, at 2B.

Judge Wilhelmina M. Wright set the case for a telephonic hearing on October 7, providing contact information for the call in the public docket sheet.[5076] Judge Wright added to the hearing's agenda consideration of a motion by the Republican nominee to intervene in opposition to the suit.[5077] The judge began the telephonic hearing with several reminders, including instructions that speakers identify themselves every time they speak and that no one may record or broadcast the hearing.[5078]

Judge Wright granted intervention and granted the plaintiffs relief on October 9.[5079] Minnesota's statute conflicted with federal law on the election of members of Congress, and the death of a candidate did not create a vacancy requiring a special election.[5080]

On October 23, the court of appeals denied the Republican candidate a stay of Judge Wright's injunction.[5081] "It is an open question whether a State may refuse to certify results of an election for United States Representative based on a natural disaster, death of a candidate, or other event beyond the State's control."[5082] "But it is unlikely that federal law allows Minnesota to cancel the election on account of Week's death and to select a new date in February 2021 to fill a vacancy caused by the cancellation."[5083]

"Minnesota law accords 'major' party status to the [Legal Marijuana Now] Party because the party's candidate for state auditor received at least five percent of the statewide vote in 2019." Craig v. Simon, 978 F.3d 1043, 1045 (8th Cir. 2020).

5075. Preliminary-Injunction Motion, *Craig*, No. 0:20-cv-2066 (D. Minn. Sept. 29, 2020), D.E. 14; *Craig*, 493 F. Supp. 3d at 778–79.

5076. Briefing Schedule, *Craig*, No. 0:20-cv-2066 (D. Minn. Sept. 29, 2020), D.E. 21; Docket Sheet, *id.* (Sept. 28, 2020) [hereinafter *Craig* Docket Sheet] (D.E. 22); *see* Minutes, *id.* (Oct. 7, 2020), D.E. 48; Notice, *id.* (Oct. 1, 2020), D.E. 38.

5077. *See* Notice, *id.* (Oct. 1, 2020), D.E. 36; Intervention Brief, *id.* (Sept. 30, 2020), D.E. 26; Intervention Motion, *id.* (Sept. 30, 2020), D.E. 24; *see also* Jessie Van Berkel, *Timing Matters for Craig vs. Kistner*, Minneapolis Star Trib., Oct. 6, 2020, at 1B.

5078. Transcript at 4–7, *Craig*, No. 0:20-cv-2066 (D. Minn. Oct. 7, 2020, filed Oct. 30, 2020), D.E. 64.

5079. *Craig*, 493 F. Supp. 3d 773; *see Craig* Docket Sheet, *supra* note 5076 (order denying a stay, D.E. 60).

5080. *Craig*, 493 F. Supp. 3d 773.

5081. Craig v. Simon, 978 F.3d 1043 (8th Cir. 2020); *see* Jessie Van Berkel, *Appeals Court Rules for Rep. Craig*, Minneapolis Star Trib., Oct. 24, 2020, at 3B.

The appeal was heard by videoconference on November 13, 2020. Docket Sheet, Craig v. Simon, No. 20-3126 (8th Cir. Oct. 13, 2020).

5082. *Craig*, 978 F.3d at 1049.

5083. *Id.* at 1050.

On October 29, a pro se complaint filed in the District of Minnesota sought an order recognizing the Legal Marijuana Now Party's selection of the plaintiff as Week's replacement on the ballot.[5084] The court assigned the case to Judge Wright as related to the earlier filed case.[5085] She denied immediate relief on November 2, finding the plaintiff's case inadequately briefed.[5086]

The deceased candidate received 6% of the vote on November 3, and the plaintiff candidate came in first with 48%.[5087] On November 20, the court of appeals affirmed Judge Wright's injunction: "Federal law establishes a uniform date for congressional elections."[5088] Judge Wright approved a stipulated dismissal of the case on February 4, 2021.[5089]

Meanwhile, the pro se plaintiff's efforts to keep her case alive were unsuccessful. A motion for a declaratory order dated September 30, 2020, but filed on November 2[5090] resulted in an order to show cause why the motion was not mooted by Judge Wright's November 2 ruling.[5091] Judge Wright denied the motion for failure to respond to the show-cause order.[5092] In December, Judge Wright denied a motion seeking relief from the failure to show cause.[5093] On June 21, 2021, Judge Wright granted with prejudice a dismissal motion.[5094]

5084. Complaint, Overby v. Simon, No. 0:20-cv-2250 (D. Minn. Oct. 29, 2020), D.E. 1; *see* Amended Complaint, *id.* (Nov. 2, 2020), D.E. 31; *see also* Order, *id.* (Nov. 3, 2020), D.E. 37 (granting permission for the pro se plaintiff to file electronically).

5085. Order, Craig v. Simon, No. 0:20-cv-2066 (D. Minn. Oct. 30, 2020), D.E. 65.

5086. Opinion, *Overby*, No. 0:20-cv-2250 (D. Minn. Nov. 2, 2020), D.E. 30; *see also* Opinion, *id.* (Nov. 2, 2020), D.E. 27, 2020 WL 6391287 (allowing plaintiffs in the other case to intervene).

5087. Craig v. Simon, 980 F.3d 614, 617 (8th Cir. 2020); *see* Jessie Van Berkel, *Craig Is Re-Elected in Second District*, Minneapolis Star Trib., Nov. 6, 2020, at 2B.

5088. *Craig*, 980 F.3d at 617–18.

5089. Dismissal Order, *Craig*, No. 0:20-cv-2066 (D. Minn. Feb. 4, 2021), D.E. 87 (dismissing the case without prejudice).

5090. Motion, *Overby*, No. 0:20-cv-2250 (D. Minn. Sept. 30, 2020, filed Nov. 2, 2020), D.E. 32.

5091. Docket Sheet, *id.* (Oct. 29, 2021) (D.E. 34).

5092. *Id.* (D.E. 39).

5093. Order, *id.* (Dec. 2, 2020), D.E. 48; *see* Motion, *id.* (Nov. 13, 2020), D.E. 40.

5094. Opinion, *id.* (June 21, 2021), D.E. 55, 2021 WL 2529920.

Canceling an Election During a Pandemic

Yang v. New York State Board of Elections (1:20-cv-3325) and Key v. Cuomo (1:20-cv-3533) (Analisa Torres, S.D.N.Y.)

> Because all but one candidate for a party's presidential nomination had announced suspension of their campaigns, and in light of a global infectious pandemic, election officials in New York canceled the party's 2020 presidential primary election, leaving in place primary elections for other offices in most of the state's counties. A district judge and the court of appeals concluded that it was unconstitutional to remove from the ballots candidates who had merely suspended their campaigns.
>
> *Topics:* Enjoining elections; Covid-19; primary election; getting on the ballot; intervention; absentee ballots; party procedures; class action.

At a time of widespread social distancing, both mandatory and voluntary, because of the global Covid-19 infectious pandemic, New York's governor announced on March 28, 2020, that the state's April 28 presidential primary election would be moved to June 23, the same day as primary elections for other offices.[5095] On April 27, at a time when all major Democratic candidates but former Vice President Joe Biden had already left the race, the state's board of elections decided to remove from the state's Democratic primary election the presidential primary election.[5096] Using newly enacted authority, election officials removed from the presidential primary ballot all candidates who had suspended their campaigns, leaving Biden as the only candidate and declaring him the winner.[5097] In twenty of the state's sixty-two counties, the office of President was the only office on the ballot, so voters in those counties would be spared a trip to the polls.[5098]

On April 28, Andrew Yang, a Biden challenger earlier in the election season, and seven other voters filed an emergency class-action federal complaint in the Southern District of New York against the board of elec-

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5095. Yang v. Kosinski, 960 F.3d 119, 125 (2d Cir. 2020); Yang v. Kellner, 458 F. Supp. 3d 199, 204 (S.D.N.Y. 2020); *see Presidential Primary*, N.Y. Times, Mar. 29, 2020, at 9; Stephen Williams, *Cuomo Delays Primary*, Schenectady Daily Gazette, Mar. 29, 2020, at 1.

5096. *Yang*, 960 F.3d at 123, 125–26; *see* Stephanie Saul & Nick Corasaniti, *Sanders Camp Fumes as New York Cancels Primary*, N.Y. Times, Apr. 28, 2020, at A18; *see also Yang*, 960 F.3d at 123 (noting that candidates other than Biden had "chosen to 'suspend,' rather than formally terminate, their campaigns").

5097. *Yang*, 458 F. Supp. 3d at 204–05.

5098. *See* Saul & Corasaniti, *supra* note 5096.

tions, seeking restoration of the election of delegates to the presidential nominating convention.[5099]

The court assigned the case to Judge Analisa Torres on April 29;[5100] on that day, she set the case for a telephonic hearing on May 12.[5101] If not for Covid-19, Judge Torres would have conducted the hearing in person.[5102] Because the court had not yet established secure videoconference capabilities, the hearing was not conducted on video.[5103]

The board of elections immediately requested that briefing and argument be completed no later than May 4,[5104] and Judge Torres reset the hearing for May 4.[5105] On April 30, Judge Torres instructed the parties to address the court's jurisdiction over the case, including the effect of the Eleventh Amendment.[5106] On May 1, the plaintiffs filed an amended complaint adding individual election officials as defendants.[5107]

Also on April 30, supporters of Bernie Sanders, who had suspended his challenge to Biden but who would still be on the ballot, asked Judge Torres to delay the hearing one day to facilitate their intervention.[5108] Judge Torres declined to change the hearing date,[5109] but on May 3, she granted the intervention motion.[5110]

Judge Torres began the May 4 telephonic hearing with instructions for members of the public dialing in:

5099. Complaint, Yang v. N.Y. State Bd. of Elections, No. 1:20-cv-3325 (S.D.N.Y. Apr. 28, 2020), D.E. 1; *Yang*, 960 F.3d at 126; *Yang*, 458 F. Supp. 3d at 202, 205; *see* Amended Complaint, *Yang*, No. 1:20-cv-3325 (S.D.N.Y. May 1, 2020), D.E. 18.

5100. Docket Sheet, *Yang*, No. 1:20-cv-3325 (S.D.N.Y. Apr. 28, 2020) [hereinafter *Yang* Docket Sheet].

Tim Reagan interviewed Judge Torres for this report by telephone on September 1, 2020.

5101. Order, *Yang*, No. 1:20-cv-3325 (S.D.N.Y. Apr. 29, 2020), D.E. 3.

5102. Interview with Judge Analisa Torres, Sept. 1, 2020.

5103. *Id.*

5104. Letter Motion, *Yang*, No. 1:20-cv-3325 (S.D.N.Y. Apr. 29, 2020), D.E. 4.

5105. Order, *id.* (Apr. 29, 2020), D.E. 5; Yang v. Kosinski, 960 F.3d 119, 126 (2d Cir. 2020).

5106. Order, *Yang*, No. 1:20-cv-3325 (S.D.N.Y. Apr. 30, 2020), D.E. 9.

5107. Second Amended Complaint, Yang v. Kellner, *id.* (May 1, 2020), D.E. 20; *see Yang*, 960 F.3d at 124–26.

5108. Letter Motion, *Yang*, No. 1:20-cv-3325 (S.D.N.Y. Apr. 30, 2020), D.E. 12; *see* Intervention Complaint, *id.* (May 5, 2020), D.E. 42; Intervention Complaint, *id.* (May 3, 2020), D.E. 37; Letter Intervention Motion, *id.* (May 1, 2020), D.E. 29.

5109. *Yang* Docket Sheet, *supra* note 5100 (D.E. 14).

5110. Order, *Yang*, No. 1:20-cv-3325 (S.D.N.Y. May 3, 2020), D.E. 38; Yang v. Kellner, 458 F. Supp. 3d 199, 205 (S.D.N.Y. 2020).

> Before the attorneys make their appearances, I would like you to know that this is an open proceeding and members of the public and the press are welcome. If you are not an attorney for a party, please mute your phone and refrain from speaking during the hearing. Also, recording of this proceeding is not permitted.[5111]

On May 5, Judge Torres ruled that removing from the ballot presidential candidates who had publicly announced suspension of their campaigns but who had not sought removal from the ballot infringed associational rights protected by the Constitution's First and Fourteenth Amendments.[5112]

> [T]he removal of presidential contenders from the primary ballot not only deprived those candidates of the chance to garner votes for the Democratic Party's nomination, but also deprived their pledged delegates of the opportunity to run for a position where they could influence the party platform, vote on party governance issues, pressure the eventual nominee on matters of personnel or policy, and react to unexpected developments at the Convention. And it deprived Democratic voters of the opportunity to elect delegates who could push their point of view in that forum. Delegate Plaintiffs, who had planned to compete in the primary, express a strong continuing interest in doing so if given the chance, and affirm that they have made significant personal sacrifices for the opportunity.
>
> . . .
>
> Protecting the public from the spread of COVID-19 is an important state interest. But the Court is not convinced that canceling the presidential primary would meaningfully advance that interest—at least not to the degree as would justify the burdensome impingement on Plaintiffs' and Plaintiff-Intervenors' rights. As Plaintiffs and Plaintiff-Intervenors point out, Governor Cuomo has already issued executive orders allowing every voter statewide to request an absentee ballot and providing absentee ballot request forms. Even if not every voter can vote by mail—because they fail to request or do not receive an absentee ballot, because they need assistance voting, or because they are ineligible to cast an ordinary ballot but may cast a ballot with an affidavit—there is no doubt that many voters will avail themselves of the opportunity to do so.
>
> This, in turn, will make it substantially easier for voters and poll workers to practice social distancing at voting sites. . . .

5111. Transcript at 3, *Yang*, No. 1:20-cv-3325 (S.D.N.Y. May 4, 2020, filed May 12, 2020), D.E. 45.

5112. *Yang*, 458 F. Supp. 3d at 210–11, *aff'd*, 960 F.3d 119; *see* Matt Stevens & Nick Corasaniti, *New York Must Hold Primary, Judge Rules*, N.Y. Times, May 6, 2020, at A12.

> Moreover, in large portions of the state, including the most populous counties, elections besides the presidential primary are scheduled for June 23. Primaries are still taking place in 42 out of 62 counties in New York . . . .[5113]

Following a May 15 hearing,[5114] the court of appeals affirmed, on May 19, Judge Torres's ruling "for substantially the reasons given by the District Court in its thorough May 5, 2020 Opinion and Order."[5115] The appellate court issued its opinion on June 1.[5116]

Meanwhile, Judge Torres issued an order on May 11 staying a May 6 class action by eight voters seeking reinstatement of the presidential primary election on behalf of voters, because she had already granted the relief requested and the matter was on appeal.[5117]

On September 1, Judge Torres approved an attorney-fee settlement in the main case of $220,000.[5118]

Election Day on the Last Day of Passover

Herzfeld v. District of Columbia Board of Elections and Ethics (Emmet G. Sullivan, D.D.C. 1:11-cv-721)

> A rabbi filed a federal complaint when he realized that a special election to fill municipal vacancies was going to be held on the last day of Passover, a day when he could not vote until after the polls would be closed. The district judge scolded the board of elections for not seeking a court order allowing them to adjust the statutorily mandated special-election date, but the judge denied the plaintiff immediate injunctive relief, because the rabbi had early and absentee voting alternatives. The statute was subsequently amended by an act of Congress.
>
> *Topics:* Polling hours; intervention; absentee ballots.

On April 3, 2011, Rabbi Shmuel Herzfeld was taking a walk with his children and he noticed a sign for an April 26 special election to fill vacancies

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5113. *Yang*, 458 F. Supp. 3d at 213–16.

5114. Telephonic Oral Argument, Yang v. N.Y. State Bd. of Elections, No. 20-1494 (2d Cir. May 15, 2020), D.E. 140, ww3.ca2.uscourts.gov/decisions/isysquery/b9ef4dde-9d45-4db6-b365-85284935953a/1/doc/20-1494.mp3 (audio recording).

5115. Yang v. Kosinski, 805 F. App'x 63 (2d Cir. 2020).

5116. *Yang*, 960 F.3d 119.

5117. Order, Key v. Cuomo, No. 1:20-cv-3533 (S.D.N.Y. May 11, 2020), D.E. 11, 2020 WL 6554934; *see* Complaint, *id.* (May 6, 2020), D.E. 1, 4; Related Case Statement, *id.* (May 8, 2020), D.E. 9.

5118. Approved Settlement, Yang v. N.Y. State Bd. of Elections, No. 1:20-cv-3325 (S.D.N.Y. Sept. 1, 2020), D.E. 58.

in the city council and board of education for the District of Columbia.[5119] This was an issue, because April 26 was the last day of Passover, so Rabbi Herzfeld would not be able to vote on election day unless voting hours were extended.[5120] On April 13, he filed a federal complaint in the District of Columbia seeking such a remedy.[5121] With his complaint, he filed a motion for a temporary restraining order and a preliminary injunction.[5122]

The court assigned the case to Judge Emmet G. Sullivan, who held a telephonic status conference on the day that the complaint was filed.[5123] Judge Sullivan set a hearing for April 15 and granted the district's oral motion to intervene.[5124]

When Judge Sullivan was presented with a motion for a temporary restraining order, it was his practice to look for two types of opportunity: (1) to consolidate the motion for a temporary restraining order with consideration of a more durable injunction or an otherwise more conclusive determination of the case's merits and (2) settlement possibilities, perhaps with the assistance of a magistrate judge.[5125] In this case, he also employed a common practice of his in emergency cases between parties with sufficient resources: he required the parties to present to the court binders of authorities on which the parties would be relying in advance of the scheduled hearing, so that resolution of the matter would not be delayed by court staff hunting down authorities and making photocopies.[5126]

On April 15, Judge Sullivan denied the rabbi immediate injunctive relief.[5127]

5119. *See* Transcript at 6–7, Herzfeld v. D.C. Bd. of Elections & Ethics, No. 1:11-cv-721 (D.D.C. Apr. 15, 2011, filed Jan. 9, 2012), D.E. 42 [hereinafter *Herzfeld* Transcript]; Shmuel Herzfeld, Op-Ed, *Voting Rights Denied on a Religious Holiday*, Wash. Post, Apr. 24, 2011, at C5.

5120. *See* Herzfeld, *supra* note 5119.

5121. Complaint, *Herzfeld*, No. 1:11-cv-721 (D.D.C. Apr. 13, 2011), D.E. 1; *see* Second Amended Complaint, *id.* (May 27, 2011), D.E. 17; Amended Complaint, *id.* (Apr. 22, 2011), D.E. 12; *see also* Mike DeBonis, *Rabbi Sues Over Timing of Special Vote: During Passover*, Wash. Post, Apr. 14, 2011, at B6.

5122. Motion, *Herzfeld*, No. 1:11-cv-721 (D.D.C. Apr. 13, 2011), D.E. 3.

5123. Docket Sheet, *id.* (Apr. 13, 2011) [hereinafter *Herzfeld* Docket Sheet]; *see Herzfeld* Transcript, *supra* note 5119, at 18.

Tim Reagan interviewed Judge Sullivan for this report by telephone on August 1, 2012.

5124. *Herzfeld* Docket Sheet, *supra* note 5123.

5125. Interview with Judge Emmet G. Sullivan, Aug. 1, 2012.

5126. *Id.*

5127. *Herzfeld* Transcript, *supra* note 5119, at 93, 107–08; *Herzfeld* Docket Sheet, *supra* note 5123; *see* Mike DeBonis, *Judge Denies Rabbi's Bid to Extend D.C. Election*, Wash.

> Before I issue my ruling, I want to put on the record my extreme, I emphasize that, disappointment that this issue could not have been resolved by the parties. While I agree with the D.C. Board of Elections that it does not have the authority to extend the polling hours as requested by plaintiff, this court does. . . .
>
> What I wish had happened in this case is that the District, with the Board of elections or both, upon learning that the April 26th election was scheduled for the last day of Passover, would have come to this court with a consent motion requesting that, given the unique and indeed unprecedented facts presented in this case, the Court ordered that the polls be held open for two additional hours in order to afford observant Jewish voters the opportunity to go to the poll and vote on Election Day. This court would have happily granted such a motion, but that unfortunately is not what happened in this case.[5128]

Despite Judge Sullivan's sympathy for the rabbi's position, the judge noted that early and absentee voting options were available.[5129] "While the Court is profoundly sympathetic to Plaintiff's desire to be able to vote in the Special Election by going to his local polling station, the Court cannot conclude, as a matter of law, that plaintiff's right to vote has been severely restricted based on his inability to do so."[5130] The elections board agreed to offer additional early voting on Easter Sunday, April 24.[5131]

On September 14, the case was reassigned to Judge James S. Gwin of the Northern District of Ohio, who frequently assisted the District of Columbia court as a visiting judge.[5132] On January 10, 2012, Judge Gwin approved a stipulated dismissal of the action without prejudice.[5133] The mayor had agreed to propose legislation that would give the board of elections greater flexibility to avoid religious holidays when setting election dates.[5134] On February 10, the parties filed a stipulated dismissal with prejudice.[5135]

Post, Apr. 16, 2011, at B6.

5128. *Herzfeld* Transcript, *supra* note 5119, at 90–91.

5129. *Id.* at 102–06; *see* DeBonis, *supra* note 5127.

5130. *Herzfeld* Transcript, *supra* note 5119, at 102.

5131. *See* DeBonis, *supra* note 5127.

5132. Order, Herzfeld v. D.C. Bd. of Elections & Ethics, No. 1:11-cv-721 (D.D.C. Sept. 15, 2011), D.E. 32 (chief circuit judge's order); Order, *id.* (Sept. 15, 2011), D.E. 33 (district court's reassignment order); Interview with Judge Emmet G. Sullivan, Aug. 1, 2012.

5133. Order, *Herzfeld*, No. 1:11-cv-721 (D.D.C. Jan. 10, 2012), D.E. 43.

5134. *See City Settles Rabbi's Suit Over Special Election Scheduled During Passover*, Wash. Post, Jan. 10, 2012, at B2.

5135. Stipulation, *Herzfeld*, No. 1:11-cv-721 (D.D.C. Feb. 10, 2012), D.E. 44.

On July 18, the President signed the District of Columbia Special Election Reform Act, which gives the board of elections flexibility to schedule special elections more quickly and to avoid religious holidays.[5136]

Preclearance Required for a Special-Election Schedule Ordered by a State Court

LULAC of Texas v. Ramon (Alia Moses, Jerry E. Smith, and Xavier Rodriguez, W.D. Tex. 2:10-cv-58)

> A three-judge district court enjoined a special election set by a state court for lack of preclearance pursuant to section 5 of the Voting Rights Act. Once an uncontested schedule had received preclearance, the district court dissolved the injunction.
>
> *Topics:* Section 5 preclearance; three-judge court; enjoining elections; matters for state courts; primary election.

A federal complaint filed in the Western District of Texas on September 9, 2010, challenged a state-court-ordered election schedule for a special Democratic primary election for a Val Verde County commissioner—which the state court ordered on a finding of undue influence in the original close primary election—alleging that the tight time frame would disadvantage minority voters in violation of sections 2[5137] and 5[5138] of the Voting Rights Act.[5139]

The circuit's chief judge named Circuit Judge Jerry E. Smith and Western District of Texas Judge Xavier Rodriguez to join Judge Alia Moses, the originally assigned judge, as a three-judge district court to hear the section 5 claim.[5140] Observing that "[t]he Defendants . . . do not dispute that these changes are at variance with the Texas Election Code and have not been submitted to, or precleared by, the Department of Justice," the three-judge

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5136. Pub. L. No. 112-145, 126 Stat. 1133 (2012).

5137. Pub. L. No. 89-110, § 2, 79 Stat. 437, 437, *as amended*, 52 U.S.C. § 10301.

5138. *Id.*, § 5, 79 Stat. at 439, *as amended*, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination and requiring that preclearance disputes be heard by a three-judge district court).

On June 25, 2013, the Supreme Court declined to hold section 5 unconstitutional, but the Court did hold unconstitutional the criteria for which jurisdictions require section 5 preclearance. Shelby County v. Holder, 570 U.S. 529 (2013).

5139. Complaint, LULAC of Texas v. Ramon, No. 2:10-cv-58 (W.D. Tex. Sept. 9, 2010), D.E. 1.

5140. Order, *id.* (Sept. 10, 2010), D.E. 2 (referring to Judge Moses as Judge Alia Moses Ludlum); *see* Docket Sheet, *id.* (Sept. 10, 2010).

court issued a preliminary injunction on September 14 against the election schedule ordered by the state court.[5141]

Upon preclearance of "proposed uncontested election changes" on October 1, the three-judge court issued an order on October 5 dissolving the preliminary injunction.[5142]

Preclearance for a Special Election

Buell v. Monterey County (Jeremy Fogel, N.D. Cal. 5:10-cv-1952)

> A federal complaint alleged that polling-place consolidations and the date of the election had not been precleared for a special election to fill a vacancy in the state senate, as required by section 5 of the Voting Rights Act for a county overlapping the senate district. By the time a three-judge district court met to hear the case, the special election had been precleared.
>
> *Topics:* Poll locations; section 5 preclearance; three-judge court; enjoining elections; intervention.

On May 6, 2010, voters filed a federal complaint in the Northern District of California's San Jose courthouse to challenge special-election procedures planned to fill a vacancy in California's senate.[5143] The plaintiffs claimed that the date of the election and the limited number of polling places planned for it had not been precleared pursuant to section 5 of the Voting Rights Act, as required for elections in Monterey County.[5144] At the time, the senate district and Monterey County overlapped.[5145]

The special election was necessary because President Obama appointed Ellen Tauscher, a member of Congress, to be under secretary of state for arms control and international security.[5146] On November 3, 2009, Lieu-

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5141. Order, *id.* (Sept. 14, 2010), D.E. 3.

5142. Order, *id.* (Oct. 5, 2010), D.E. 6; *see* Amended Complaint, *id.* (Oct. 4, 2010), D.E. 4.

5143. Complaint, Buell v. Monterey County, No. 5:10-cv-1952 (N.D. Cal. May 6, 2010), D.E. 1 [hereinafter *Buell* Complaint]; *see* Amended Complaint, *id.* (May 13, 2010), D.E. 24; *see also* Bob Egelko, *Dems Sue to Halt Election for Maldonado Seat*, S.F. Chron., May 8, 2010, at C2.

5144. *Buell* Complaint, *supra* note 5143; *see* Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination and requiring that preclearance disputes be heard by a three-judge district court).

5145. Senate Districts, web.archive.org/web/20100428055427/www.legislature.ca.gov/legislators_and_districts/districts/senatedistricts.html (fifteenth district).

5146. *See* Dan Walters, *2 Vacancies Give Governor Opportunity*, Sacramento Bee, June 1, 2009, at A3.

tenant Governor John Garamendi won a special election for her seat.[5147] On April 26, 2010, California's legislature confirmed Governor Arnold Schwarzenegger's appointment of Abel Maldonado to replace Garamendi.[5148] That left Maldonado's seat in the state senate vacant, which the governor could fill either by special election or by consolidating the election with the regular June 8 primary and November 2 general elections.[5149] The governor chose to go special: a June 22 first round and an August 17 runoff.[5150]

The court assigned the case to a magistrate judge,[5151] but the plaintiffs sought reassignment to a district judge.[5152] The court reassigned the case to Judge Jeremy Fogel[5153] because of his experience in 2003 with section 5 litigation.[5154] On the case's second day, the plaintiffs moved for a temporary restraining order.[5155] On May 10, three voters moved to intervene as defendants.[5156]

5147. *See* Joe Garofoli, *Democrat Wins Easy House Victory*, S.F. Chron., Nov. 4, 2009, at A1; Lisa Vorderbrueggen, *Garamendi Easily Defeats Surprisingly Tough GOP Rival*, San Jose Mercury News, Nov. 4, 2009, at 4B.

5148. *See* Patrick McGreevy, *Maldonado Takes Office as Lieutenant Governor*, L.A. Times, Apr. 27, 2010, at 6; Torey Van Oot, *Maldonado Wins Senate Confirmation as Lieutenant Governor*, Sacramento Bee, Apr. 27, 2010.

5149. *See* McGreevy, *supra* note 5148.

5150. *See* Laith Agha, *Special Election Likely to Cost County $500K*, Monterey Herald, Apr. 28, 2010, at A1; Kurtis Alexander, *Special Election on Aug. 17*, San Jose Mercury News, Apr. 28, 2010, at 5B; Egelko, *supra* note 5143.

5151. Initial Case Management Order, Buell v. Monterey County, No. 5:10-cv-1952 (N.D. Cal. May 6, 2010), D.E. 3.

5152. Declination, *id.* (May 6, 2010), D.E. 4.

5153. Reassignment Order, *id.* (May 6, 2010), D.E. 7.

Tim Reagan interviewed Judge Fogel for this report at the Federal Judicial Center on August 2, 2012. Judge Fogel was the Center's director from October 3, 2011, through his retirement on September 14, 2018. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges; *see* Supreme Court Press Release, July 25, 2018, www. fjc.gov/sites/default/files/07.25.18-Press%20Release-FJCAnnouncement.pdf (announcing General John Cooke as Judge Fogel's successor).

5154. Interview with Judge Jeremy Fogel, Aug. 2, 2012; *see* Temporary Restraining Order, Oliverez v. California, No. 5:03-cv-3658 (N.D. Cal. Aug. 15, 2003), D.E. 20, 2003 WL 22025009 (concerning the holding of a special recall election); Temporary Restraining Order, Salazar v. Monterey County, No. 5:03-cv-3584 (N.D. Cal. Aug. 15, 2003), D.E. 20, 2003 WL 22025010 (concerning the moving of a ballot-initiative election from a primary election to an earlier special recall election).

5155. Temporary-Restraining-Order Motion, *Buell*, No. 5:10-cv-1952 (N.D. Cal. May 7, 2010), D.E. 8.

5156. Intervention Motion, *id.* (May 10, 2010), D.E. 14.

On May 12, Judge Fogel granted intervention,[5157] set a hearing for May 20,[5158] and asked the circuit's chief judge to designate a three-judge court to hear the section 5 claim.[5159] "Pending the hearing, the County is restrained from sending any absentee ballots to voters registered in Monterey County until Section 5 preclearance has been obtained or until further order of the Court."[5160] At the hearing, the U.S. Department of Justice announced that it had precleared the special election.[5161] The three-judge court determined on the following day that the plaintiffs, therefore, were not entitled to immediate injunctive relief.[5162]

This case did not get as much public attention as a section 5 case seven years previously involving the recall of Governor Gray Davis and election of Schwarzenegger as a replacement.[5163] For the state-senate case, a regular courtroom could be used, and the circuit-judge member of the panel participated by video conference.[5164] The court's and the county's experience with the earlier case helped to make this case run more smoothly.[5165]

The governor's party won the special election.[5166] Judge Fogel approved a voluntary dismissal of the case on September 27.[5167]

5157. Order, *id.* (May 12, 2010), D.E. 19.

5158. Order to Show Cause, *id.* (May 12, 2010), D.E. 21 [hereinafter *Buell* Order to Show Cause]; *see* Larry Parsons, *Hearing Set on Election Suit*, Monterey Herald, May 13, 2010, at A4.

5159. Letter, *Buell*, No. 5:10-cv-1952 (N.D. Cal. May 12, 2010), D.E. 22; *see* Order, *id.* (May 19, 2010), D.E. 32 (chief circuit judge's designation of a three-judge district court).

5160. *Buell* Order to Show Cause, *supra* note 5158, at 4.

5161. Notice, *Buell*, No. 5:10-cv-1952 (N.D. Cal. May 20, 2010), D.E. 36; *see* Bob Egelko, *Special Election for Senate Seat Vacated by Maldonado OKd*, S.F. Chron., May 21, 2010, at C7.

5162. Order, *Buell*, No. 5:10-cv-1952 (N.D. Cal. May 21, 2010), D.E. 37; *see* Kurtis Alexander, *Special Election for Senator OK'd*, Monterey Herald, May 22, 2010, at A2.

5163. Interview with Judge Jeremy Fogel, Aug. 2, 2012; *see* "Preclearance of a Gubernatorial Recall Election," *supra* page 510.

5164. Interview with Judge Jeremy Fogel, Aug. 2, 2012.

5165. *Id.*

5166. *See* Robin Hindery, *Laird Concedes Senate Election*, Monterey Herald, Aug. 19, 2010, at A1.

5167. Order, *Buell*, No. 5:10-cv-1952 (N.D. Cal. Sept. 27, 2010), D.E. 49.

Promptness of a Special Election to Fill a Congressional Vacancy

Fox v. Paterson (David G. Larimer, W.D.N.Y. 6:10-cv-6240), Rossito-Canty v. Cuomo (Jack B. Weinstein, E.D.N.Y. 1:15-cv-568), and Seubert v. Cuomo (Frank P. Geraci, Jr., W.D.N.Y. 6:18-cv-6303)

> A 2010 federal lawsuit sought an injunction requiring a prompt special election to fill a congressional vacancy. After the complaint was filed, the governor decided to combine the special election with the general election occurring in six months. The district judge determined that the Constitution did not require a special election more prompt than that. A 2015 case filed in another district within the same state concerned a vacancy occurring much more in advance of the regular general election, and the district judge ordered the governor to promptly set a special-election date. A 2018 case with a timeline similar to the 2010 case had a result similar to the 2010 case's.
>
> *Topic:* Enjoining elections.

District judges in New York heard cases on how long the governor could allow a congressional seat to remain vacant before a special election to fill it.

2010 in the Western District of New York

Three voters filed a federal complaint in the Western District of New York on Monday, May 3, 2010, seeking an order requiring the governor to call a special election to fill a congressional vacancy created by a resignation on March 9.[5168] With their complaint, the voters filed motions for a temporary restraining order and a preliminary injunction[5169] and expedited hearing.[5170]

Judge David G. Larimer heard the motions on Friday and ordered briefing on venue.[5171] On the following Wednesday, the governor an-

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5168. Complaint, Fox v. Paterson, No. 6:10-cv-6240 (W.D.N.Y. May 3, 2010), D.E. 1; Fox v. Paterson, 715 F. Supp. 2d 431, 432–33 (W.D.N.Y. 2010); *see* Ray Finger, *Lawsuit Filed for Special Election*, Elmira Star-Gazette, May 5, 2010, at A3; Jim O'Hara, *Local Attorney's Suit Seeks Special Election in 29th District*, Syracuse Post-Standard, May 7, 2010, at A5; Joseph Spector, *Paterson: Special Election for Massa Seat Not Imminent*, Poughkeepsie J., May 5, 2010, at A9; Jill Terreri, *Lawsuit Seeks Special Election in 29th District*, Elmira Star-Gazette, May 4, 2010, at A12; *see also* Jerry Zremski, *Massa to Resign Southern Tier House Seat*, Buffalo News, Mar. 6, 2010, at A1.

5169. Motion, *Fox*, No. 6:10-cv-6240 (W.D.N.Y. May 3, 2010), D.E. 3.

5170. Motion, *id.* (May 3, 2010), D.E. 2.

5171. Docket Sheet, *id.* (May 3, 2010) (D.E. 5) [hereinafter *Fox* Docket Sheet].

In advance of [the hearing], the Court advised counsel by letter that they "should be pre-

nounced that he would call a special election for the day of the general election, November 2, so the winner of the special election would serve until January, at which time the winner of the regular election would assume the office.[5172] On Thursday, May 13, 2010, Judge Larimer ruled that venue in the Western District was proper, because the congressional district at issue was wholly within the district and the governor had an office there.[5173]

Following a May 25 hearing,[5174] Judge Larimer decided on June 4 against requiring the governor to order a special election in advance of the general-election date.[5175] Judge Larimer determined that the U.S. Constitution required the governor to call a special election, but a decision to hold the special election on November 2 was within the governor's discretion.[5176] In fact, a special election was held on November 2.[5177]

On April 21, 2011, Judge Larimer denied the plaintiffs a recovery of attorney fees because (1) the motion for fees was not filed promptly after the June 4, 2010, ruling, and (2) the June 4 ruling did not grant the plaintiffs an election earlier than the date the governor had already announced.[5178]

2015 in the Eastern District of New York

A federal class-action complaint filed in the Eastern District of New York on February 5, 2015, by eight voters sought a special-election date to fill a congressional vacancy that arose much longer in time before a general congressional election: January 5, 2015.[5179] Judge William F. Kuntz II set

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pared to discuss whether venue is proper in the Western District of New York in a suit against Governor Paterson, who performs his official duties in, and is therefore deemed a 'resident' of, the Northern District of New York."

Opinion at 3, *id.* (May 13, 2010), D.E. 9 [hereinafter May 13, 2010, *Fox* Opinion].

5172. *Fox*, 715 F. Supp. 2d at 432–33; May 13, 2010, *Fox* Opinion, *supra* note 5171, at 3–4 & n.1; *see* Tom Precious, *Vote for Massa Seat Will Be Nov. 2*, Buffalo News, May 13, 2010, at B1.

5173. May 13, 2010, *Fox* Opinion, *supra* note 5171, at 6–14; *see* Ray Finger, *Judge Upholds Special Election Lawsuit*, Elmira Star-Gazette, May 14, 2010, at A3.

5174. *Fox* Docket Sheet, *supra* note 5171 (D.E. 18); *see* Ray Finger, *Decision Delayed on Election Lawsuit*, Elmira Star-Gazette, May 27, 2010, at A3.

5175. *Fox*, 715 F. Supp. 2d at 433; *see* Jill Terreri, *Judge Upholds Nov. 2 Date for 29th District Election*, Elmira Star-Gazette, June 5, 2010, at A4.

5176. *Fox*, 715 F. Supp. 2d at 442.

5177. Opinion at 2 n.1, Fox v. Paterson, No. 6:10-cv-6240 (W.D.N.Y. Apr. 21, 2011), 2011 WL 1549475.

5178. *Id.* at 3–9.

5179. Complaint, Rossito-Canty v. Cuomo, No. 1:15-cv-568 (E.D.N.Y. Feb. 5, 2015), D.E. 1; Rossito-Canty v. Cuomo, 86 F. Supp. 3d 175, 182–83 (E.D.N.Y. 2015).

the case for hearing before Judge Jack B. Weinstein on February 13.[5180] At the hearing, "Defense counsel contended that the Governor would ultimately issue a proclamation for a special election; they denied that this court could decide timing."[5181]

On February 16, concluding that the "plaintiffs have made a *prima facie* case for a preliminary injunction,"[5182] Judge Weinstein ruled, "Unless the Governor announces the date for a special election on or before noon on Friday, February 20, 2015, or justifies a further delay at a hearing to be conducted by this court at that time and date, this court will fix the date for a special election as promptly as the law will allow."[5183]

Judge Weinstein concluded, "Special elections in New York to fill vacant congressional seats must be conducted in the shortest space of time reasonably possible."[5184]

> There are three categories of critical losses when a seat in our nation's legislature body is unfilled: *first*, the loss to persons and institutions in the district who forfeit their power to help decide both the nation's policies at large, and those national decisions that impact the particular needs and views of the district; *second*, the loss to those in the district of a vital, powerful, individual channel to and from the government's bureaucracy and its benefits—the Congressperson and his or her staff acting as an ombudsperson for those in the district; and, *third*, the loss to the nation as a whole which gives up the input from a unique group of people represented by an individual with the opportunity to contribute meaningfully to national debates and policy and whose views should be available to temper those of colleagues.[5185]

5180. Order to Show Cause, *Rossito-Canty*, No. 1:15-cv-568 (E.D.N.Y. Feb. 5, 2015), D.E. 6; *Rossito-Canty*, 86 F. Supp. 3d at 183.

Judge Weinstein retired in 2020 and died on June 15, 2021. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges; *see* Alan Feuer, *At 98, a Judicial Lion Lays Down His Gavel to Pursue New Interests*, N.Y. Times, Feb. 18, 2020, at A19; Laura Mansnerus, *Jack B. Weinstein, Activist Judge Both Revered and Feared, Dies at 99*, N.Y. Times, June 16, 2021, at A22.

5181. *Rossito-Canty*, 86 F. Supp. 3d at 183; *see* Minutes, *Rossito-Canty*, No. 1:15-cv-568 (E.D.N.Y. Feb. 13, 2015), D.E. 19.

5182. *Rossito-Canty*, 86 F. Supp. 3d at 200.

5183. *Id.* at 180; *see* Alexander Burns, *Cuomo Given Deadline to Schedule House Election*, N.Y. Times, Feb. 18, 2015, at A18.

5184. *Rossito-Canty*, 86 F. Supp. 3d at 195; *see id.* at 180 ("The right to representation in government is the central pillar of democracy in this country. Unjustified delay in filling a vacancy cannot be countenanced.").

5185. *Id.* at 181.

On February 20, the governor set May 5 as the date for the special election, so Judge Weinstein dismissed the action as moot.[5186]

2018 in the Western District of New York

Seven voters filed a federal class-action complaint in the Western District on April 17, 2018, seeking an order, by writ of mandamus or otherwise, compelling the governor to schedule a special election to fil a congressional vacancy—which occurred because of a March 16 death—at the same time as a June 26 primary election.[5187] With their complaint, the plaintiffs filed a proposed order to show cause.[5188]

Louise Slaughter, the oldest member of Congress, fell in her home and died about a week later.[5189] The district included Rochester and surrounding suburbs.[5190]

On April 26, Judge Frank P. Geraci, Jr., ruled, "The Court does not have the power . . . to issue a writ of mandamus compelling a state official to perform a duty."[5191]

In August, the governor determined that the vacancy would be filled by special election at the same time as the general election on November 6.[5192]

On March 15, 2019, noting that the "Plaintiffs have taken no further action; they have not served their complaint on Defendants and no De-

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5186. Order, *Rossito-Canty*, No. 1:15-cv-568 (E.D.N.Y. Feb. 23, 2015), D.E. 18; Minutes, *id.* (Feb. 20, 2015), D.E. 20; *see* Jesse McKinley, *Special Vote Is Set to Fill Seat Vacated by Grimm*, N.Y. Times, Feb. 21, 2015, at A16; *see also* Alexander Burns, *Staten Island Prosecutor Wins Congressional Seat Grimm Held*, N.Y. Times, May 6, 2015, at A19 ("The victory makes Mr. Donovan the lone Republican from New York City in the House.").

5187. Complaint, Seubert v. Cuomo, No. 6:18-cv-6303 (W.D.N.Y. Apr. 17, 2018), D.E. 1; *see* Will Cleveland & Jon Campbell, *Gov. Andrew Cuomo Sued for Not Declaring Special Election*, Rochester Democrat & Chron., Apr. 20, 2018, at A2.

5188. Motion, *Seubert*, No. 6:18-cv-6303 (W.D.N.Y. Apr. 17, 2018), D.E. 2.

5189. *See* Victoria E. Freile, *Louise Slaughter Hospitalized After Falling in Her D.C. Home*, Rochester Democrat & Chron., Mar. 15, 2018, at A5; Joseph P. Fried, *Louise Slaughter, Liberal Congresswoman in 16th Term, Dies at 88*, N.Y. Times, Mar. 17, 2018, at A24.

5190. *See* Jon Campbell & Steve Orr, *Slaughter's Seat to Be Filled by Election*, Rochester Democrat & Chron., Mar. 17, 2018, at A14; Jon Campbell & Joseph Spector, *Joe Morelle to Run for Congress*, Rochester Democrat & Chron., Mar. 26, 2018, at A2.

5191. Order, *Seubert*, No. 6:18-cv-6303 (W.D.N.Y. Apr. 26, 2018), D.E. 8; *see* Brian Sharp, *Judge Tosses Lawsuit Over Slaughter Seat*, Rochester Democrat & Chron., Apr. 28, 2018, at A6.

5192. *See Date of Special Election for Slaughter's Seat Set for Nov. 6*, Rochester Democrat & Chron., Aug. 12, 2018, at A17.

fendant has appeared," Judge Geraci issued an order that the plaintiffs show cause why the case should not be dismissed.[5193] Noting no response, Judge Geraci dismissed the action on April 19.[5194]

Rushed Election to Fill a Vacancy

Butler v. City of Columbia (Cameron McGowan Currie, D.S.C. 3:10-cv-794)

> When a city council member resigned, the city had to decide whether to follow the normal schedule for a replacement election or add the replacement election to an earlier city election already scheduled. The state's supreme court determined that the replacement election should be on the earlier date. A retired law professor filed a pro se complaint claiming that the early election had not been precleared pursuant to section 5 of the Voting Rights Act. A three-judge district court enjoined the early election because it had not been precleared.
>
> *Topics:* Section 5 preclearance; three-judge court; enjoining elections; pro se party; intervention.

A member of the city council for Columbia, South Carolina, resigned on March 9, 2010.[5195] The city decided to depart from its normal timetable and add an election for the vacancy to a city election scheduled for April 6.[5196] The city was faced with a choice between (1) giving candidates and voters, respectively, enough time to file and register and (2) ensuring that residents of the unrepresented district were not unrepresented during budget deliberations.[5197] South Carolina's supreme court approved inclusion of an election for the vacated office in the April 6 election.[5198]

On March 30, a retired law professor filed a pro se federal complaint alleging that the rushing of the vacancy election had not been precleared pursuant to section 5 of the Voting Rights Act.[5199] She and her coplaintiffs

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5193. Order, *Seubert*, No. 6:18-cv-6303 (W.D.N.Y. Mar. 15, 2019), D.E. 9.

5194. Order, *id.* (Apr. 19, 2019), D.E. 10.

5195. Denman v. City of Columbia, 387 S.C. 131, 691 S.E.2d 465, 466 (S.C. 2010); Opinion at 2, Butler v. City of Columbia, No. 3:10-cv-794 (D.S.C. Apr. 5, 2010), D.E. 38 [hereinafter *Butler* Opinion], 2010 WL 1372299; *see* Adam Beam, *Columbia Sets District 2 Vote for April 6*, Columbia State, Mar. 10, 2010.

5196. *Denman*, 387 S.C. 131, 691 S.E.2d at 466; *Butler* Opinion, *supra* note 5195; *see* Beam, *supra* note 5195.

5197. *See* Adam Beam, *Judge Rules on Columbia Election*, Columbia State, Mar. 19, 2010.

5198. *Denman*, 387 S.C. 131, 691 S.E.2d 465; *see* Adam Beam, *Supreme Court Sets April 6 Election Day*, Columbia State, Mar. 24, 2010.

5199. Complaint, *Butler*, No. 3:10-cv-794 (D.S.C. Mar. 30, 2010), D.E. 1; *see* Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C.

sought a temporary restraining order[5200] and a three-judge district court to hear the complaint.[5201]

The pro se plaintiff wished to proceed with three coplaintiffs represented by counsel.[5202] Because court rules required attorneys to file documents electronically and required pro se parties to file documents traditionally, the pro se plaintiff filed her complaint traditionally and sought to join the other plaintiffs with notices of joinder.[5203]

The court assigned the case to Judge Cameron McGowan Currie,[5204] who authorized the pro se plaintiff—an attorney licensed elsewhere—to appear pro hac vice without payment of fees and to receive service electronically but not to file electronically.[5205]

On the following day, a voter moved to intervene in support of the defendant; he had prevailed in the state court lawsuit.[5206] The circuit's chief judge named a three-judge panel,[5207] but amended the panel's composition on the next day because of a schedule conflict.[5208]

In matters before a three-judge district court, the original judge may issue interim orders.[5209] At a proceeding on Wednesday, March 31, Judge Currie granted joinder and intervention, deferred ruling on the temporary

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§ 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination and requiring that preclearance disputes be heard by a three-judge district court); *see also* Adam Beam, *District 2 Election Back in Court*, Columbia State, Mar. 31, 2010; Adam Beam, *Law Prof Asks Judge to Halt Columbia Election*, Columbia State, Mar. 30, 2010.

5200. Temporary-Restraining-Order Motion, *Butler*, No. 3:10-cv-794 (D.S.C. Mar. 30, 2010), D.E. 15.

5201. Motion, *id.* (Mar. 30, 2010), D.E. 5.

5202. Notices of Joinder, *id.* (Mar. 30, 2010), D.E. 4, 13.

5203. *Id.*; *see* D.S.C. ECF Policies and Procedures ¶¶ 2.1, 3.3 (May 12, 2006).

5204. Tim Reagan interviewed Judge Currie for this report by telephone on September 6, 2012.

5205. Docket Sheet, *Butler*, No. 3:10-cv-794 (D.S.C. Mar. 30, 2010) [hereinafter *Butler* Docket Sheet] (specifying that these decisions were not intended as precedents for future cases).

5206. Intervention Motion, *id.* (Mar. 31, 2010), D.E. 19.

5207. Order, *id.* (Mar. 31, 2010), D.E. 25.

5208. Order, *id.* (Apr. 1, 2010), D.E. 29.

When there was time, it was Judge Currie's practice to have her law clerks prepare a bench memorandum for the other two judges on the panel. Interview with Judge Cameron McGowan Currie, Sept. 6, 2012.

5209. 28 U.S.C. § 2284(b)(3).

restraining order until Monday, and ordered the city to advise the Justice Department of the action.[5210]

On Friday, after consultation with the other judges on the panel and with the consent of the parties, Judge Currie converted the motion for a temporary restraining order to a motion for a preliminary injunction, which the full panel would hear on Monday.[5211]

The job of a section 5 three-judge court was clarified by the Supreme Court in *Lopez v. Monterey County*: determine (1) whether section 5 covers a contested change, (2) whether section 5's approval requirements were satisfied, and (3) if the requirements were not satisfied, what temporary remedy, if any, is appropriate.[5212] After Monday's evidentiary hearing, the court enjoined the inclusion of the election for the unexpired city council seat in the scheduled city election, pending preclearance.[5213]

A special election was held on July 13 following previously precleared procedures.[5214] A runoff election was held on July 27.[5215]

On June 25, 2013, the Supreme Court declined to hold section 5 unconstitutional, but the Court did hold unconstitutional the criteria for which jurisdictions require section 5 preclearance.[5216]

Approving a Compressed Special Election

Chicago Board of Election Commissioners v. Illinois State Board of Elections (Samuel Der-Yeghiayan, N.D. Ill. 1:09-cv-82)

> Election officials sought the blessing of a federal court to compress election deadlines, including those concerning overseas voters, to accommodate a special election set for a vacancy in the U.S. House of Representatives. The district judge approved an election schedule proposed by the parties.
>
> *Topics:* Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA); absentee ballots; intervention.

5210. *Butler* Docket Sheet, *supra* note 5205; *see* Adam Beam, *Judge to Rule Monday if Election Can Proceed Tuesday*, Columbia State, Apr. 1, 2010.

5211. Order, *Butler*, No. 3:10-cv-794 (D.S.C. Apr. 2, 2010), D.E. 33.

Judge Currie advised other judges to seek a complete and accurate record of previous relevant preclearances. Interview with Judge Cameron McGowan Currie, Sept. 6, 2012.

5212. 519 U.S. 9, 23 (1996).

5213. *Butler* Opinion, *supra* note 5195; *see* Adam Beam, *Court: No District 2 Election Without Federal OK*, Columbia State, Apr. 5, 2010.

5214. *See* Adam Beam, *District 2 Election Will Be July 13*, Columbia State, Apr. 7, 2010.

5215. *See* Adam Beam, *Newman Tops Howard in District 2 Race*, Columbia State, July 28, 2010.

5216. Shelby County v. Holder, 570 U.S. 529 (2013).

On January 7, 2009, five days after Rahm Emanuel resigned as a U.S. Representative to become President Obama's chief of staff, Chicago's election officials filed a federal complaint in the Northern District of Illinois against the state board of elections to obtain the court's blessing for a time schedule to elect Emanuel's replacement that, among other things, compressed the voting time for overseas voters.[5217] The special election was set for April 7 to correspond with an already scheduled local election, with a primary set for March 3 if necessary.[5218]

Two days later, Judge Samuel Der-Yeghiayan held a status conference and ordered the plaintiffs to prepare a proposed order by January 12.[5219] On January 14, the U.S. Justice Department moved to participate as an amicus curiae to address matters concerning overseas voters.[5220] At a January 15 status conference, Judge Der-Yeghiayan granted the Justice Department's motion.[5221] Also on that day, Judge Der-Yeghiayan approved the proposed election schedule.[5222]

Section 5 Preclearance and Holding a Special Election on the Same Day as a General Election

Barron v. New York City Board of Elections (Raymond J. Dearie, E.D.N.Y. 1:08-cv-3839)

> A federal complaint sought a court-ordered special election at the time of the general election to fill out the last two months of a vacancy in the state's assembly. The complaint included a claim that failure to fill the final two months had not been precleared

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5217. Complaint, Chi. Bd. of Election Comm'rs v. Ill. State Bd. of Elections, No. 1:09-cv-82 (N.D. Ill. Jan. 7, 2009), D.E. 1 [hereinafter *Chi. Bd. of Election Comm'rs* Complaint]; *see 2 Election Dates Set for Emanuel Seat*, Chi. Trib., Jan. 6, 2009, at 11 [hereinafter *2 Election Dates*].

5218. *See Chi. Bd. of Election Comm'rs* Complaint, *supra* note 5217, at 1; *see 2 Election Dates*, *supra* note 5217; *see also* Dan Mihalopoulos, *26 File for Emanuel's Congressional Seat*, Chi. Trib., Jan. 20, 2009, at 12 (reporting that primary elections would be held because party nominations were contested).

5219. Minutes, *Chi. Bd. of Election Comm'rs*, No. 1:09-cv-82 (N.D. Ill. Jan. 9, 2009), D.E. 7.

Judge Der-Yeghiayan retired on February 17, 2018. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

5220. Motion, *Chi. Bd. of Election Comm'rs*, No. 1:09-cv-82 (N.D. Ill. Jan. 14, 2009), D.E. 9.

5221. Minutes, *id.* (Jan. 15, 2009), D.E. 15.

5222. Order, *id.* (Jan. 15, 2009), D.E. 16; *see* Robert Timothy Reagan, Overseas Voting: The Uniformed and Overseas Citizens Absentee Voting Act 3–4 (Federal Judicial Center 2016).

> pursuant to section 5 of the Voting Rights Act. The district judge denied the plaintiffs immediate relief because the candidate that the plaintiffs supported was running unopposed for the seat, so omission from absentee ballots would not be injurious. A three-judge district court found that section 5 preclearance was not required for the unusual circumstances.
>
> *Topics:* Getting on the ballot; section 5 preclearance; three-judge court; laches; matters for state courts.

Five voters supporting the Democratic nominee for a seat in New York's assembly that became vacant in April 2008 because of the incumbent's felony convictions filed a federal complaint in the Eastern District of New York on September 19 seeking an injunction for a special election on the day of the November 4 general election to fill out the last two months of the vacant term.[5223]

On September 4, New York's court of appeals resolved the candidate's state-court suit by determining that state law contemplated that a vacancy arising after April 1 would remain vacant until the next legislative session.[5224] The federal complaint alleged that not including on the November 4 ballot a special election for the remainder of the term was a change in practice that had not received preclearance pursuant to section 5 of the Voting Rights Act,[5225] which applied to Kings County (Brooklyn).[5226]

The plaintiffs filed a motion for a temporary restraining order and a preliminary injunction on September 22.[5227] Judge Raymond J. Dearie met

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5223. Complaint, Barron v. N.Y. City Bd. of Elections, No. 1:08-cv-3839 (E.D.N.Y. Sept. 19, 2008), D.E. 1 [hereinafter *Barron* Complaint]; Opinion, *id.* (Nov. 4, 2008), D.E. 39 [hereinafter *Barron* Section 5 Opinion], 2008 WL 4809450; *see* Amended Complaint, *id.* (Oct. 6, 2008), D.E. 18.

5224. Barron v. Bd. of Elections, 11 N.Y.3d 745, 896 N.E.2d 658, 867 N.Y.S.2d 23 (2008).

5225. *Barron* Complaint, *supra* note 5223, at 15–16; *see* Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination and requiring that preclearance disputes be heard by a three-judge district court).

On June 25, 2013, the Supreme Court declined to hold section 5 unconstitutional, but the Court did hold unconstitutional the criteria for which jurisdictions require section 5 preclearance. Shelby County v. Holder, 570 U.S. 529 (2013).

5226. U.S. Dep't of Justice, Jurisdictions Previously Covered by Section 5, justice.gov/crt/jurisdictions-previously-covered-section-5.

5227. Motion, *Barron*, No. 1:08-cv-3839 (E.D.N.Y. Sept. 21, 2008), D.E. 4, 7; *Barron* Section 5 Opinion, *supra* note 5223, at 3.

with the parties that day and ordered expedited briefing.[5228] Following a September 29 telephone conference, Judge Dearie denied the plaintiffs immediate relief on October 1.[5229]

> The Court has been advised by counsel that while the printing of absentee, military, and special ballots for the November 4, 2008 election will commence in short order, changes to the regular ballots can be made for at least several more weeks. In light of the fact that Ms. Barron is the only candidate to have filed a valid petition for the term expiring on December 31, 2008, and would therefore run unopposed if the relief plaintiffs seek is ultimately granted, plaintiffs will not suffer irreparable harm if Ms. Barron's name does not appear on the military, absentee, and special ballots for the expiring term.[5230]

Moreover, the span of fifteen days between the court of appeals' decision and the filing of the federal complaint "does call into question the emergent nature of the request for equitable intervention."[5231]

Judge Dearie requested from the circuit's chief judge a three-judge district court to hear the section 5 claim.[5232] Circuit Judge Reena Raggi, Judge Dearie, and Eastern District of New York District Judge Frederic Block heard the case on October 8 and denied the section 5 claim on November 3.[5233] Lamenting "the factually wanting submissions of both parties,"[5234] the court determined that a special election held in 2000 according to the plaintiffs' desired scheme may have been an anomaly, so failure to follow that pattern would not be a change requiring section 5 preclearance.[5235]

Noting the candidate's general-election success, Judge Dearie dismissed the case as moot on July 29, 2009.[5236]

5228. Order at 1, *Barron*, No. 1:08-cv-3839 (E.D.N.Y. Oct. 1, 2008), D.E. 16 [hereinafter Oct. 1, 2008, *Barron* Order]; *Barron* Section 5 Opinion, *supra* note 5223, at 3.

5229. Oct. 1, 2008, *Barron* Order, *supra* note 5228; *Barron* Section 5 Opinion, *supra* note 5223, at 3.

5230. Oct. 1, 2008, *Barron* Order, *supra* note 5228, at 3.

5231. *Id.* at 3–4.

5232. *Id.* at 3.

5233. *Barron* Section 5 Opinion, *supra* note 5223; Minutes, *Barron*, No. 1:08-cv-3839 (E.D.N.Y. Oct. 8, 2008), D.E. 29.

5234. *Barron* Section 5 Opinion, *supra* note 5223, at 6.

5235. *Id.* at 6–8.

5236. Order, *Barron*, No. 1:08-cv-3839 (E.D.N.Y. July 30, 2009), D.E. 40.

Consequences of an Early Primary

Hayes v. Michigan Democratic Party (Robert J. Jonker, W.D. Mich. 1:07-cv-1237)

> A party member filed a federal complaint challenging the state Democratic Party's early primary election in violation of national party rules, claiming injury because her preferred candidate decided not to participate in the primary. It was over two weeks before the plaintiff asked for expedited consideration. Less than two weeks later, the court denied immediate relief so as not to interfere with an intraparty dispute.
>
> *Topics:* Party procedures; enjoining elections.

A member of the Michigan Democratic Party filed a federal complaint against the party in the Western District of Michigan on December 10, 2007, complaining that the party's participation in an early presidential primary election—scheduled for January 15, 2008, in violation of national party rules—caused her preferred candidate to opt out.[5237]

The dispute arose because some states sought to elevate their status in the 2008 presidential nominations by moving up in time their selection of convention delegates, but the national Democratic Party sought to preserve the special status of Iowa and New Hampshire.[5238] Major candidates Barack Obama and John Edwards supported the national party's rules by opting out of the Michigan primary election, but major candidate Hillary Rodham Clinton supported the state's position by opting in.[5239]

The court assigned the case to Judge Robert J. Jonker.[5240] Judge Jonker liked to review records of filings himself, and seeing that this was an elec-

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5237. Complaint, Hayes v. Mich. Democratic Party, No. 1:07-cv-1237 (W.D. Mich. Dec. 10, 2007), D.E. 1; *see* Kathy Barks Hoffman, *Lawsuit Seeks to Halt Democratic Primary*, Grand Rapids Press, Dec. 12, 2007, at B5 (reporting that the plaintiff's candidate of choice apparently was John Edwards); *see also* Transcript at 20–22, *Hayes*, No. 1:07-cv-1237 (W.D. Mich. Jan. 7, 2008, filed Jan. 14, 2008), D.E. 21 [hereinafter *Hayes* Transcript] (observations by the judge that the record's silence on the plaintiff's preferred candidate meant that the record was consistent with the plaintiff's supporting Clinton, who was on the ballot); *id.* at 35 (testimony by the plaintiff that she supported Edwards).

5238. *See* Katharine Q. Seelye, *4 Democrats Leave Michigan's Early Primary*, N.Y. Times, Oct. 10, 2007, at A19.

5239. *See* Jim Harger, *Edwards Supporter Heads to Court Over Primary Date*, Grand Rapids Press, Jan. 5, 2008, at A2; Seelye, *supra* note 5238.

5240. Docket Sheet, *Hayes*, No. 1:07-cv-1237 (W.D. Mich. Dec. 10, 2007) [hereinafter *Hayes* Docket Sheet].

Tim Reagan interviewed Judge Jonker for this report by telephone on October 3, 2012.

tion case he asked the law clerk assigned to this case to begin legal research immediately.[5241]

The plaintiff filed a motion for a preliminary injunction with expedited consideration on December 26, 2007.[5242] On the following day, Judge Jonker held a telephone status conference, granted the motion to expedite, and set hearing on the injunction motion for January 7, 2008.[5243] Judge Jonker wanted to allow both enough time to get it right and enough time for a possible appeal.[5244]

At the hearing, the plaintiff's attorney announced that he was backing away from a demand that the election be halted while retaining a plea that the election results not be used for the selection of delegates.[5245]

After the hearing, Judge Jonker denied the plaintiff preliminary injunctive relief.[5246] In addition to a reluctance to interfere with an election, especially one to be held only days later, Judge Jonker expressed doubt about the plaintiff's standing:

> And so a voter has to come into court and demonstrate some imminent and substantial harm that separates the particular voter coming in from other voters so that every voter in the Democratic Party doesn't effectively have a right to lose . . . an intraparty dispute and then come to court and assert their position all over again.[5247]

On February 5, Judge Jonker approved a stipulated dismissal of the action.[5248]

This case was not filed on election day, so it was assigned to a judge by normal procedures.[5249] For possible emergency cases at the time of elections, the court asked one district judge to be on duty to handle emergency matters if necessary for cases assigned to other judges.[5250]

5241. Interview with Judge Robert J. Jonker, Oct. 3, 2012.

5242. Preliminary-Injunction Motion, *Hayes*, No. 1:07-cv-1237 (W.D. Mich. Dec. 10, 2007), D.E. 6.

5243. *Hayes* Docket Sheet, *supra* note 5240; Minutes, *Hayes*, No. 1:07-cv-1237 (W.D. Mich. Dec. 27, 2007), D.E. 10.

5244. Interview with Judge Robert J. Jonker, Oct. 3, 2012.

5245. *Hayes* Transcript, *supra* note 5237, at 9–11.

5246. Order, *Hayes*, No. 1:07-cv-1237 (W.D. Mich. Jan. 7, 2008), D.E. 19; Minutes, *id.* (Jan. 7, 2008), D.E. 18; *see* Jim Harger, *Judge Sidesteps Political Fray*, Grand Rapids Press, Jan. 8, 2008, at B1.

5247. *Hayes* Transcript, *supra* note 5237, at 72.

5248. Order, *Hayes*, No. 1:07-cv-1237 (W.D. Mich. Feb. 5, 2008), D.E. 25.

5249. Interview with Judge Robert J. Jonker, Oct. 3, 2012.

5250. *Id.*

Punishment for Early Florida Primaries

DiMaio v. Democratic National Committee (Richard A. Lazzara, M.D. Fla. 8:07-cv-1552) and Nelson v. Dean (4:07-cv-427) and Ausman v. Browning (4:07-cv-519) (Robert L. Hinkle, N.D. Fla.)

> On November 20, 2007, Florida voters filed a state-court complaint challenging the state's moving up the 2008 presidential primaries in violation of party rules. The case was removed to federal court on December 7, and a preliminary-injunction motion was filed a week later. On January 3, 2008, the district court denied the plaintiffs preliminary injunctive relief because the consequences of the early primaries were still uncertain. In related litigation, federal courts declined to interfere with either party rules or the state's election calendar.
>
> *Topics:* Primary election; party procedures; removal; case assignment.

On November 20, 2007, six Florida voters filed in Leon County's circuit court an action against Florida's secretary of state challenging the state's moving its presidential primary elections to January 29, 2008, despite possible sanctions by the major political parties, which could weaken the effectiveness of Florida voters.[5251] Nine days later, the secretary removed the case to federal court in the Northern District of Florida.[5252]

The court assigned the case to Judge Stephan P. Mickle, but five days later the case was reassigned to Judge Robert L. Hinkle because it was related to a case already pending before Judge Hinkle.[5253] To avoid an opportunity for parties to file several cases and then select which case to pursue based on the judge assigned to it, the district enforced a policy of assigning related cases to the judge assigned to the earliest filed case.[5254]

Judge Hinkle's earlier case was filed on October 4, and it sought to curtail the Democratic Party's sanctions against Florida for holding an early

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5251. Notice of Removal, Ausman v. Browning, No. 4:07-cv-519 (N.D. Fla. Dec. 7, 2007), D.E. 1 [hereinafter *Ausman* Notice of Removal] (attaching the state-court complaint); *see* Michael C. Bender, *Suit Seeks to Roll Back Florida's Primary Date*, Palm Beach Post, Nov. 21, 2007, at 4A; Mary Ellen Klas, *Lawsuit Seeks Later Florida Primary*, Miami Herald, Nov. 21, 2007, at B5.

5252. *Ausman* Notice of Removal, *supra* note 5251.

5253. Reassignment Order, *Ausman*, No. 4:07-cv-519 (N.D. Fla. Dec. 12, 2007), D.E. 5; *see* Notice of Similar Action, *id.* (Dec. 11, 2007), D.E. 3.

Tim Reagan interviewed Judge Hinkle for this report by telephone on October 10, 2012. Judge Mickle died on January 26, 2021. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

5254. Interview with Judge Robert L. Hinkle, Oct. 10, 2012.

primary election.[5255] In that action, Judge Hinkle granted the defendants summary judgment on December 5.[5256]

> The decision whether to adopt a schedule (at least if not wholly unreasonable) rests with the national party, not with a single state legislature or state party. The decision whether to seat delegates chosen outside the approved schedule also rests with the national party, not with the defiant state legislature or state party. . . .
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> . . . .
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> In the case at bar . . . , the national party has a First Amendment right to adopt delegate selection rules and to exclude delegates chosen in violation of those rules.[5257]

On December 13, in the action against Florida challenging the primary-election date, the plaintiffs filed a motion for a preliminary injunction, based on their state-court motion for a temporary injunction,[5258] and a motion to expedite consideration.[5259] Judge Hinkle held a telephonic scheduling conference on December 19,[5260] after which he ordered completion of briefing by December 28.[5261]

At the end of a hearing on the injunction motion on January 3, 2008, Judge Hinkle denied the motion.[5262] After the January primaries, Judge Hinkle stayed the case until after the 2008 general election.[5263]

The Democratic Party decided on May 31, 2008, that votes for delegates from Florida and Michigan would be halved because of the states'

5255. Complaint, Nelson v. Dean, No. 4:07-cv-427 (N.D. Fla. Oct. 4, 2007) (naming three voters as plaintiffs); Nelson v. Dean, 528 F. Supp. 2d 1271, 1275 (N.D. Fla. 2007); *see* Amended Complaint, *Nelson*, No. 4:07-cv-427 (N.D. Fla. Oct. 26, 2007), D.E. 5 (naming eight voters as plaintiffs); *see also* Lesley Clark & Beth Reinhard, *Nelson, Hastings Sue Their Party*, Miami Herald, Oct. 5, 2007, at B1; Abby Goodnough, *Senator Suing Own Party Over Discord on Florida*, N.Y. Times, Oct. 4, 2007, at A22; Larry Lipman, *Nelson, Hastings Sue Over Primary*, Palm Beach Post, Oct. 5, 2007, at 1A.

5256. Minutes, *Nelson*, No. 4:07-cv-427 (N.D. Fla. Dec. 5, 2007), D.E. 29; *see* Lloyd Dunkelberger, *Judge Tosses Out Primary Lawsuit*, Sarasota Herald Trib., Dec. 6, 2007, at 1; Mary Ellen Klas, *Primary Date Suit Dismissed*, Miami Herald, Dec. 6, 2007, at B3; Jennifer Liberto, *Florida Democrats' Suit Tossed*, St. Petersburg Times, Dec. 6, 2007, at 4B.

5257. *Nelson*, 528 F. Supp. 2d at 1272, 1278.

5258. Preliminary-Injunction Motion, *Ausman*, No. 4:07-cv-519 (N.D. Fla. Dec. 13, 2007), D.E. 6 (attaching the state-court motion).

5259. Expedition Motion, *id.* (Dec. 13, 2007), D.E. 8.

5260. Minutes, *id.* (Dec. 19, 2007), D.E. 12.

5261. Order, *id.* (Dec. 20, 2007), D.E. 13.

5262. Order, *id.* (Jan. 8, 2008), D.E. 20; Minutes, *id.* (Jan. 3, 2008), D.E. 18.

5263. Order, *id.* (Mar. 10, 2008), D.E. 35.

holding their primary elections too early.[5264] Once Barack Obama had secured enough votes for the nomination, however, all delegates were seated with full votes.[5265]

Middle District Action for Clarification

A Floridian had filed a federal declaratory action in the Middle District of Florida on August 30, 2007, seeking judicial clarification of the effect of votes in Florida's Democratic presidential primary election.[5266] Six days later, the plaintiff filed a motion for summary judgment: "a declaratory judgment determining whether the National party must accept and seat delegates elected by the State of Florida at its Presidential preference primary scheduled for January 29, 2008, regardless of National party rules and decisions to the contrary."[5267] Judge Richard A. Lazzara denied the motion as premature on September 5, especially because the defendant party had not yet been served.[5268] On October 5, Judge Lazzara dismissed the case, concluding that "it is a matter of foregone conclusion that this Court is not the appropriate entity to decide whether the Florida delegation to the Convention should be seated."[5269] On March 21, 2008, the court of appeals affirmed Judge Lazzara's additional conclusion that the plaintiff lacked standing because he "never alleged that he actually voted, nor even so much as suggested that he intended to vote in the Florida Democratic Primary."[5270]

Unsuccessful Action for a New Election

On April 7, 2008, a primary-election voter filed a federal complaint in the Northern District seeking a second Democratic presidential primary election in Florida to satisfy national party rules and avoid effective nullification of the January 29 Democratic election.[5271] On May 5, Florida's secre-

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5264. *See* Katharine Q. Seelye & Jeff Zeleny, *Democrats Approve Deal on Michigan and Florida*, N.Y. Times, June 1, 2008, at A1.

5265. *See* DiMaio v. Democratic Nat'l Comm., 555 F.3d 1343, 1345 (11th Cir. 2009); *see also* Katharine Q. Seelye, *Obama Asks Panel to Restore Votes*, N.Y. Times, Aug. 4, 2008, at A12.

5266. Complaint, DiMaio v. Democratic Nat'l Comm., No. 8:07-cv-1552 (M.D. Fla. Aug. 30, 2007), D.E. 1.

5267. Summary Judgment Motion, *id.* (Sept. 5, 2007), D.E. 4.

5268. Order, *id.* (Sept. 5, 2007), D.E. 5.

On September 26, 2007, Judge Lazzara denied a renewed motion for summary judgment while the defendants' motion to dismiss the action was pending. Order, *id.* (Sept. 26, 2007), D.E. 14.

5269. Opinion, *id.* (Oct. 5, 2007), D.E. 18.

5270. DiMaio v. Democratic Nat'l Comm., 520 F.3d 1299, 1302 (11th Cir. 2008).

5271. Complaint, McCorvey v. Browning, No. 3:08-cv-138 (N.D. Fla. Apr. 7, 2008),

tary of state notified the court that this new case was related to the other two cases over which Judge Hinkle presided.[5272] The court transferred the case from the Pensacola Division to Judge Hinkle in the Tallahassee Division.[5273] On July 13, Judge Hinkle stayed this case as well until after the 2008 election.[5274] "[T]he national parties may or may not take action at their national conventions that would moot or otherwise affect the plaintiff's claims as applicable to future elections. The prudent course is to wait until after the 2008 election to see whether there remains a controversy calling for judicial resolution."[5275] Following the general election, the plaintiff voluntarily dismissed the action.[5276]

Middle District Actions to Seat and Count All Delegates

The plaintiff in Judge Lazzara's case filed another federal complaint in the Middle District's Tampa courthouse on April 8, 2008, against the Democratic National Committee seeking an injunction requiring the party to seat and count all delegates from Florida.[5277] On April 15, Judge James S. Moody, Jr., transferred the case to Judge Lazzara.[5278] A pro se action seeking to ensure that primary voters' votes had full effect, which had been filed on March 20 in the Jacksonville Division, was transferred to Judge Lazzara on May 15.[5279] At a May 28 hearing, Judge Lazzara granted summary judgment to the party, relying in part on his resolution of the earlier declaratory action.[5280] The court of appeals dismissed an appeal as moot on January 30, 2009, after the presidential inauguration.[5281]

D.E. 1.

5272. Notice, *id.* (May 5, 2008), D.E. 12.

5273. Order, McCorvey v. Browning, No. 4:08-cv-218 (N.D. Fla. June 6, 2008), D.E. 23; Order, *id.* (May 9, 2008), D.E. 15; *see* Stipulation for Transfer, *id.* (May 5, 2008), D.E. 13.

5274. Opinion, *id.* (July 13, 2008), D.E. 24.

5275. *Id.* at 3.

5276. Order, *id.* (Nov. 11, 2008), D.E. 26.

5277. Complaint, DiMaio v. Democratic Nat'l Comm., No. 8:08-cv-672 (M.D. Fla. Apr. 8, 2008), D.E. 1.

5278. Amended Order, *id.* (Apr. 17, 2008), D.E. 5 (correcting Judge Lazzara's first name); Order, *id.* (Apr. 15, 2008), D.E. 4.

5279. Order, Bloom v. Democratic Nat'l Comm., No. 3:08-cv-284 (M.D. Fla. May 15, 2008), D.E. 14; Order, *DiMaio*, No. 8:08-cv-672 (M.D. Fla. May 8, 2008), D.E. 19; *see* Complaint, *Bloom*, No. 3:08-cv-284 (M.D. Fla. Mar. 20, 2008), D.E. 1.

5280. Order, *DiMaio*, No. 8:08-cv-672 (M.D. Fla. May 28, 2008), D.E. 24; Transcript at 54, *id.* (May 28, 2008, filed Aug. 12, 2008), D.E. 34 ("If there's any resolution in this case, in my view, it lies in the political process, not here."); Minutes, *id.* (May 28, 2008), D.E. 22.

5281. DiMaio v. Democratic Nat'l Comm., 555 F.3d 1343 (11th Cir. 2009).

Southern District Action to Seat and Count All Delegates
Three delegates filed a federal complaint against the Democratic National Committee in the Southern District of Florida on May 22, 2008, seeking an injunction requiring the party to seat and count all delegates selected as a result of the January 29 primary election.[5282] Following the party's decision to give the delegates votes,[5283] the plaintiffs voluntarily dismissed the case.[5284]

Resolution of the First Case Against Florida
On October 5, 2009, Judge Hinkle dismissed the 2007 action against Florida.[5285]

> The state statute setting the primary date remains in effect, but the national parties have not set the earliest date on which 2012 delegates can be selected. If there remains a conflict, it will be known in ample time to allow a federal court to address any issues that any person with standing may choose to present.
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> . . .
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> . . . Under the law of the circuit, an individual voter or candidate cannot challenge a state's insistence that a party participate in a primary that the party itself chooses not to challenge.[5286]

Holding an Election Before University Students Can Register

May v. City of Montgomery (Myron H. Thompson, M.D. Ala. 2:07-cv-738)

The federal action challenged the moving up of a local election, because it meant that students at a predominantly Black university would not be in town in time to vote. Soon after the action was filed, the Justice Department precleared the change. The federal court declined jurisdiction over state claims.

Topics: Student registration; section 2 discrimination; section 5 preclearance; three-judge court; matters for state courts;

5282. Complaint, Geller v. Democratic Nat'l Comm., No. 0:08-cv-60774 (S.D. Fla. May 22, 2008), D.E. 1 [hereinafter *Geller* Complaint]; *see* Mary Ellen Klas & Breanne Gilpatrick, *DNC Is Sued Over Voting*, Miami Herald, May 23, 2008, at 1B.

On June 6, 2008, after the party's decision to give the delegates half votes, the plaintiff who pledged to support Barack Obama withdrew from the case, leaving as plaintiffs a delegate pledged to support Hillary Clinton and an unpledged super delegate. Docket Sheet, *Geller*, No. 0:08-cv-60774 (S.D. Fla. May 22, 2008) (D.E. 5); Motion, *id.* (June 6, 2008), D.E. 4; *see Geller* Complaint, *supra* note 5282, at 2–4.

5283. *See* Notice, *Geller*, No. 0:08-cv-60774 (S.D. Fla. June 12, 2008), D.E. 7.

5284. Order, *id.* (Aug. 15, 2008), D.E. 12.

5285. Order, Ausman v. Browning, No. 4:07-cv-519 (N.D. Fla. Oct. 5, 2009), D.E. 65.

5286. *Id.* at 3, 5.

Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA).

On Thursday, August 16, 2007, twelve days before a city election, a member of Montgomery's city council and two mayoral candidates filed a federal action in the Middle District of Alabama complaining that the city's moving its election for mayor and city council from the second Tuesday in October to the fourth Tuesday in August disadvantaged first-time voters at predominantly Black Alabama State University because many of them would not have moved to town in time to register to vote.[5287] The election date had been moved to comply with the state's implementation of the federal Uniformed and Overseas Citizens Absentee Voting Act of 1986 (UOCAVA),[5288] which requires sufficient time between an election and a potential runoff for absentee ballots to reach overseas voters.[5289] The plaintiffs argued that UOCAVA did not apply to elections that did not include federal offices.[5290]

The complaint alleged that the earlier election violated section 2 of the Voting Rights Act because it discriminated against Black voters,[5291] violated section 5 because it had not yet been precleared,[5292] and violated state law.[5293] The plaintiffs' motion for a temporary restraining order, filed one day after the complaint was filed, discussed only section 5.[5294]

5287. Complaint, May v. City of Montgomery, No. 2:07-cv-738 (M.D. Ala. Aug. 16, 2007), D.E. 1 [hereinafter *May* Complaint]; May v. City of Montgomery, 504 F. Supp. 2d 1235, 1236 (M.D. Ala. 2007); *see* Andre Coe, *Election Prompts Lawsuit*, Montgomery Advertiser, Aug. 17, 2007.

5288. 52 U.S.C. §§ 20301–20311. *See generally* Robert Timothy Reagan, Overseas Voting: The Uniformed and Overseas Citizens Absentee Voting Act (Federal Judicial Center 2016).

5289. *May*, 504 F. Supp. 2d at 1236.

5290. *May* Complaint, *supra* note 5287, at 6.

5291. *Id.* at 10; *see* Voting Rights Act of 1965 (VRA), Pub. L. No. 89-110, § 2, 79 Stat. 437, 437, *as amended*, 52 U.S.C. § 10301.

5292. *May* Complaint, *supra* note 5287, at 10; *see* VRA, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination and requiring that preclearance disputes be heard by a three-judge district court).

On June 25, 2013, the Supreme Court declined to hold section 5 unconstitutional, but the Court did hold unconstitutional the criteria for which jurisdictions require section 5 preclearance. Shelby County v. Holder, 570 U.S. 529 (2013).

5293. *May* Complaint, *supra* note 5287, at 11.

5294. Temporary-Restraining-Order Motion, May v. City of Montgomery, No. 2:07-cv-738 (M.D. Ala. Aug. 17, 2007), D.E. 6; *see May*, 504 F. Supp. 2d at 1236–37.

The court assigned the case to Judge Myron H. Thompson, who notified the circuit's chief judge that a section 5 claim required a three-judge district court.[5295] That same day, the circuit's chief judge designated a three-judge court for the section 5 claim.[5296]

When Judge Thompson was assigned a case that was referred to a three-judge court, it was his practice to volunteer to do the logistical legwork in the case.[5297] On August 20, he conducted a conference with the parties by telephone.[5298]

The three-judge court held a short telephone oral argument with the parties and the Justice Department on August 22, and the Justice Department assured the court that the preclearance issue would be resolved promptly.[5299] On August 23, the earlier election was precleared, mooting the section 5 claim, so the three-judge court was dissolved.[5300]

Noting that the plaintiffs did not seek immediate relief on their section 2 claim, Judge Thompson declined to exercise immediate jurisdiction over the state-law claim: "It should be a *state* judge that should enjoin or vacate a *State's* municipal election under *state* law, with that judicial decision subject to review by *state* appellate judges."[5301] On February 28, 2008, the parties agreed that the plaintiffs would dismiss their section 2 claim with prejudice and dismiss their state claim without prejudice.[5302]

Preclearance for a Soil-and-Water Conservation District

Evans v. Bennett (Beverly B. Martin, N.D. Ga. 1:04-cv-2641)

> Five days before a scheduled election for soil-and-water-conservation-district supervisors, two voters filed a federal complaint claiming that matters relating to the election had not received preclearance pursuant to section 5 of the Voting Rights

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5295. Docket Sheet, *May*, No. 2:07-cv-738 (M.D. Ala. Aug. 16, 2007) [hereinafter *May* Docket Sheet]; Interview with Judge Myron H. Thompson, June 6, 2012.

Tim Reagan interviewed Judge Thompson for this report by telephone.

5296. Order, *May*, No. 2:07-cv-738 (M.D. Ala. Aug. 16, 2007), D.E. 4.

5297. Interview with Judge Myron H. Thompson, June 6, 2012.

5298. Order, *May*, No. 2:07-cv-738 (M.D. Ala. Aug. 20, 2007), D.E. 13.

5299. *May* Docket Sheet, *supra* note 5295; Interview with Judge Myron H. Thompson, June 6, 2012 (noting that three-judge oral arguments are usually held in person).

5300. Order, *May*, No. 2:07-cv-738 (M.D. Ala. Aug. 24, 2007), D.E. 27, 2007 WL 2460607; *May*, 504 F. Supp. 2d at 1236.

5301. *May*, 504 F. Supp. 2d at 1237; *see* Transcript at 3, *May*, No. 2:07-cv-738 (M.D. Ala. Aug. 23, 2007, filed Aug. 23, 2007), D.E. 23 (informing the parties at a teleconference the day before Judge Thompson's ruling how he was likely to rule).

5302. Judgment, *May*, No. 2:07-cv-738 (M.D. Ala. Feb. 28, 2008), D.E. 56.

Act. The election was canceled, and preclearance was obtained three months later.

Topics: Section 5 preclearance; enjoining elections.

On September 9, 2004, two voters filed a federal complaint in the Northern District of Georgia charging that matters relating to a September 14 election for two supervisors for the soil-and-water conservation district of DeKalb County had not received preclearance pursuant to section 5 of the Voting Rights Act.[5303] With their complaint, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction[5304] and a motion for designation of a three-judge district court to hear their case.[5305]

Judge Beverly B. Martin held a telephone conference with the parties on September 13, at which she learned that immediate action was not necessary because the election had been canceled.[5306] At a September 27 telephone conference, the parties informed Judge Martin that the elections were awaiting preclearance,[5307] and the plaintiffs withdrew their motions.[5308]

On notice that preclearance was granted on December 21,[5309] Judge Martin dismissed the action on January 20, 2006.[5310]

Nullifying an Election Held Without Preclearance

Lyde v. Glynn County Board of Elections (Anthony A. Alaimo, S.D. Ga. 2:04-cv-91)

Voters filed a federal complaint to enjoin an election for members of a county board of education until changes to the compo-

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5303. Complaint, Evans v. Bennett, No. 1:04-cv-2641 (N.D. Ga. Sept. 9, 2004), D.E. 1; *see* Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination and requiring that preclearance disputes be heard by a three-judge district court).

On June 25, 2013, the Supreme Court declined to hold section 5 unconstitutional, but the Court did hold unconstitutional the criteria for which jurisdictions require section 5 preclearance. Shelby County v. Holder, 570 U.S. 529 (2013).

5304. Motion, *Evans*, No. 1:04-cv-2641 (N.D. Ga. Sept. 9, 2004), D.E. 2.

5305. Motion, *id.* (Sept. 9, 2004), D.E. 4.

5306. Minutes, *id.* (Sept. 13, 2004), D.E. 5.

Judge Martin was elevated to the court of appeals on January 28, 2010, and she retired on September 30, 2021. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

5307. Minutes, *Evans*, No. 1:04-cv-2641 (N.D. Ga. Sept. 27, 2004), D.E. 6.

5308. Order, *id.* (Sept. 27, 2004), D.E. 7.

5309. Motion, *id.* (Jan. 18, 2006), D.E. 9.

5310. Order, *id.* (Jan. 20, 2006), D.E. 10.

> sition of the board were precleared pursuant to section 5 of the Voting Rights Act. The district judge allowed the election to proceed to avoid confusion because there was still time to enjoin the election's results. For part of election day at one polling place, a sign erroneously informed voters that the school-board primary election had been enjoined, so the judge voided the election. The new composition was precleared in time for a substitute primary election in advance of the general election.
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> *Topics:* Section 5 preclearance; enjoining elections; enjoining certification; primary election; three-judge court.

Four days before a planned July 20, 2004, primary election for members of Glynn County's board of education, three voters filed a federal complaint in the Southern District of Georgia seeking to enjoin the election until changes to the composition of the board were precleared pursuant to section 5 of the Voting Rights Act.[5311] According to the complaint, Georgia's legislature had changed the composition of the school board from two members from each of five districts to one member from each district plus two members elected at large.[5312] With their complaint, the plaintiffs filed a motion for a temporary restraining order or a preliminary injunction[5313] and a request for a three-judge district court to hear their section 5 claim.[5314] The circuit's chief judge designated a three-judge court on July 19.[5315]

Judge Anthony A. Alaimo heard the matter on July 19.[5316] The school board asked to be dismissed from the action, arguing that it had no control over its own composition and its participation would be an unnecessary

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5311. Complaint, Lyde v. Glynn Cty. Bd. of Elections, No. 2:04-cv-91 (S.D. Ga. July 16, 2004), D.E. 1 [hereinafter *Lyde* Complaint]; *see* Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination and requiring that preclearance disputes be heard by a three-judge district court).

On June 25, 2013, the Supreme Court declined to hold section 5 unconstitutional, but the Court did hold unconstitutional the criteria for which jurisdictions require section 5 preclearance. Shelby County v. Holder, 570 U.S. 529 (2013).

5312. *Lyde* Complaint, *supra* note 5311, at 4–6.

5313. Motion, *Lyde*, No. 2:04-cv-91 (S.D. Ga. July 16, 2004), D.E. 4.

5314. Request, *id.* (July 16, 2004), D.E. 3.

5315. Order, *id.* (July 19, 2004), D.E. 7.

5316. Transcript, *id.* (July 19, 2004, filed July 26, 2004), D.E. 11 [hereinafter *Lyde* Transcript]; Docket Sheet, *id.* (July 16, 2004).

Judge Alaimo died on December 30, 2009. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

expense.[5317] Judge Alaimo decided to defer that issue for the three-judge court to address.[5318]

Judge Alaimo decided that the best course was for the election to proceed on the following day, to avoid confusion, but he might enjoin giving effect to the results.[5319] On election morning, a voter, who was not one of the plaintiffs, submitted to the court an affidavit stating that a sign was posted at his polling place stating that Judge Alaimo had enjoined the election with respect to school-board members, that the sign was taken down while the voter was at the polling place, and that another voter who had skipped the school-board elections because of the sign was not permitted to return to the voting booth and vote for the school board after he realized that the sign was removed.[5320] The sign was incorrect, and because of the confusion it may have created for some voters, Judge Alaimo voided the school-board primary election.[5321]

On July 30, the county filed a notice of preclearance and a request that Judge Alaimo order a substitute primary election so that nominees could be selected in time for the general election in November.[5322] Judge Alaimo ordered the primary elections held on August 24.[5323] On December 10, Judge Alaimo approved a stipulated dismissal of the case.[5324]

Section 5 Preclearance Not Required for Misapplication of Election Law

Landry v. Kenner (Carl J. Barbier, E.D. La. 2:04-cv-85)

> In a dispute over the date for a special election to replace a mayor elected to the parish council, voters filed a federal complaint alleging that the resigning mayor's setting the election date was contrary to law and therefore a change in voting requiring preclearance pursuant to section 5 of the Voting Rights Act. The district judge concluded that actions in violation of law could not be seen as a change in the law, so he dismissed the section 5 case.

5317. *Lyde* Transcript, *supra* note 5316, at 7–8, 86–87.

5318. *Id.* at 87–88 ("if this case is subject to a special court of three judges, I am not sure that I have the power to do that").

5319. Injunction at 2, *Lyde*, No. 2:04-cv-91 (S.D. Ga. July 20, 2004), D.E. 9 [hereinafter *Lyde* Injunction].

5320. Affidavit, *id.* (July 20, 2004), D.E. 8; *see also* Letter, *id.* (July 21, 2004), D.E. 10 (letter from another voter arguing that the election should not be voided).

5321. *Lyde* Injunction, *supra* note 5319; *see* Mark Niesse, *Voting Problems Reported in Two Precincts*, Macon Telegraph, July 21, 2004, at A4.

5322. Notice, *Lyde*, No. 2:04-cv-91 (S.D. Ga. July 30, 2004), D.E. 12.

5323. Order, *id.* (Aug. 6, 2004), D.E. 17.

5324. Stipulated Dismissal, *id.* (Dec. 10, 2004), D.E. 26.

Topics: Enjoining elections; section 5 preclearance; three-judge court; matters for state courts.

On January 13, 2004, two voters filed a federal complaint in the Eastern District of Louisiana seeking to enjoin a March 9 special election called to elect a mayor of Kenner because of the incumbent's resignation.[5325] The complaint alleged that it was improper for the resigning mayor to set the election date and his doing so had not been precleared pursuant to section 5 of the Voting Rights Act.[5326]

The mayor resigned on December 15, 2003, following his election to the parish council, effective at midnight on December 31.[5327] Following the outgoing mayor's calling a special election, the city council voted to set the date for September 18, 2004, instead of March 9, an action the plaintiffs alleged to be proper procedure.[5328] After a council member became acting mayor, he confirmed the September 18 date.[5329] The defendants named in the action were the city and its acting mayor, who were on the same side of the dispute as the plaintiffs.[5330]

On January 15, 2004, Judge Carl J. Barbier set the case for hearing on January 16.[5331] On January 20, Judge Barbier determined that the section 5 claim was without merit, so a three-judge district court needn't be empanelled to resolve it, because the plaintiffs did not allege a change in election

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5325. Complaint, Landry v. Kenner, No. 2:04-cv-85 (E.D. La. Jan. 13, 2004), D.E. 1 [hereinafter *Landry* Complaint].

5326. *Id.*; *see* Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination and requiring that preclearance disputes be heard by a three-judge district court).

On June 25, 2013, the Supreme Court declined to hold section 5 unconstitutional, but the Court did hold unconstitutional the criteria for which jurisdictions require section 5 preclearance. Shelby County v. Holder, 570 U.S. 529 (2013).

5327. Opinion at 2, *Landry*, No. 2:04-cv-85 (E.D. La. Jan. 20, 2004), D.E. 10 [hereinafter *Landry* Opinion], 2004 WL 97704.

5328. *Id.* at 3; *Landry* Complaint, *supra* note 5325.

5329. *Landry* Opinion, *supra* note 5327, at 2–3; *see* Stephanie Doster, *Kenner Election Squabble Is Pricey: Taxpayers Footing Bill for $103,000*, New Orleans Times Picayune, Apr. 10, 2004, at 1 (reporting that the member of the council who became acting mayor "banded together" with three other council members to oust the president so that he would become acting mayor).

5330. *Landry* Complaint, *supra* note 5325; *Landry* Opinion, *supra* note 5327, at 4 n.3.

5331. Order, *Landry*, No. 2:04-cv-85 (E.D. La. Jan. 15, 2004), D.E. 4; *see* Minutes, *id.* (Jan. 16, 2004), D.E. 7.

law but a misapplication of it.[5332] Judge Barbier dismissed the case on January 23.[5333]

Objections to Primary Procedures

Jones v. Alabama (Richard W. Vollmer, Jr., S.D. Ala. 1:00-cv-442)

> On May 11, 2000, a county-commission candidate filed a federal pro se complaint challenging election procedures for a June 6 primary election. On June 1, the candidate moved for a temporary restraining order against the holding of the election. Service of the motion was not confirmed until late at night on Friday, June 2, the response was not docketed until Monday, and the judge was out sick on Monday and Tuesday, so the motion could not be considered until the election was over. In 2001, the judge granted the defendants' motion to dismiss the case. The court of appeals affirmed the dismissal.
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> *Topics:* Enjoining elections; primary election; pro se party.

On May 11, 2000, "the sole Republican candidate for a place on the Mobile County Commission in the June 2000 primary" filed a pro se federal complaint in the Southern District of Alabama raising constitutional challenges to various election procedures.[5334] The court assigned the case to Judge Richard W. Vollmer, Jr.[5335] On June 1, the plaintiff sought a temporary restraining order against holding the June 6 primary election.[5336]

Judge Vollmer denied the plaintiff a temporary restraining order on June 13.[5337] Service of the motion on the defendants was not confirmed until the defendants filed their response at 10:32 p.m. on Friday, June 2.[5338] The response was docketed on Monday, but Judge Vollmer was out sick on Monday and Tuesday, so he could not consider the motion until the election was over.[5339]

5332. *Landry* Opinion, *supra* note 5327; *see* Stephanie Doster, *Ruling Today on Date of Kenner Election*, New Orleans Times Picayune, Jan. 29, 2004, at 1 (reporting also on parallel state court litigation).

5333. Judgment, *Landry*, No. 2:04-cv-85 (E.D. La. Jan. 23, 2004), D.E. 11.

5334. Opinion, Jones v. Alabama, No. 1:00-cv-442 (S.D. Ala. Mar. 6, 2001), D.E. 83 [hereinafter S.D. Ala. *Jones* Opinion], 2001 WL 303533; Docket Sheet, *id.* (May 11, 2000) [hereinafter *Jones* Docket Sheet].

5335. *Jones* Docket Sheet, *supra* note 5334.

Judge Vollmer died on March 20, 2003. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

5336. *Jones* Docket Sheet, *supra* note 5334.

5337. Order, *Jones*, No. 1:00-cv-442 (S.D. Ala. June 13, 2000), D.E. 27.

5338. *Id.* at 3.

5339. *Id.*

On March 6, 2001, Judge Vollmer granted the defendants' motion to dismiss the action.[5340] The court of appeals affirmed the dismissal on December 20.[5341]

5340. S.D. Ala. *Jones* Opinion, *supra* note 5334.

5341. Opinion, Jones v. Siegleman, No. 01-11583 (11th Cir. Dec. 20, 2001), 31 F. App'x 200 (table), *filed as* Judgment, *Jones*, No. 1:00-cv-442 (S.D. Ala. Jan. 23, 2002), D.E. 90.

11. Absentee and Early Voting

Absentee voting began during the Civil War as a controversial accommodation for voters away at war.[5342] Over the decades, excuses for absentee voting expanded to include being away for reasons other than military service and disability.[5343] No-excuse absentee voting even more fully recognizes the importance of voter participation.[5344] If an excuse is still required, then the validity of excuses can be litigated.[5345] Any aspect of absentee-voting procedures can present an opportunity for litigation, especially if it is thought to have an impact on election results.[5346]

There is no general right to vote absentee,[5347] but a court of appeals found that it was improper to have absentee voting for some offices but not others.[5348] Third-party participation in absentee voting has statutory restrictions, often written to accommodate disabilities, and these also can be litigated.[5349]

5342. *See* Alexander Keyssar, The Right to Vote 104 (2000). "[A]bsentee voting was rare before 1860; only Oregon, in 1857, made it possible for men who were temporarily away from home to vote. . . . After the [Civil War], more and more states made it possible for absent soldiers to vote, particularly if they were stationed within their home state." *Id.* at 150.

5343. "[B]y 1940, all states except Kentucky, Maryland, Mississippi, New Jersey, and Pennsylvania had some general provision for absentee voting. In New Jersey and Maryland, absentee voting was permitted only for those in military service." *Id.* at 440 n.9.

5344. *See generally* Daniel P. Tokaji & Ruth Colker, *Absentee Voting by People with Disabilities: Promoting Access and Integrity*, 38 McGeorge L. Rev. 1015, 1019–22 (2007).

5345. *See, e.g.*, "Public List of Absentee Voters," *infra* page 889 (litigation over access to a list of absentee voters to be used for excuse challenges).

5346. *See, e.g.*, "Unsuccessful Challenges to Procedures for Accepting Absentee Ballots in Georgia's 2021 Senatorial Runoff Election," *infra* page 715.

5347. *See, e.g.*, "Right to Vote Absentee," *infra* page 861.

5348. Price v. N.Y. State Bd. of Elections, 540 F.3d 101 (2d Cir. 2008), *rev'g* Opinion, Price v. Albany Cty. Bd. of Elections, No. 1:06-cv-1083 (N.D.N.Y. Oct. 22, 2007), D.E. 32, 2007 WL 3104327, *as reported in* "Excluding an Office from Absentee Ballots," *infra* page 879.

5349. *See, e.g.*, "No Constitutional Right to Distribute Absentee-Ballot Applications," *infra* page 746 (unsuccessful challenge to legal proscriptions on persons other than election officials providing voters with absentee-ballot applications); "Absentee Ballots Delivered by Third Parties," *infra* page 902 (litigation over 937 cast absentee ballots delivered to election authorities by third parties); "Political Party's Mailing Absentee Ballot Appli-

Election officials must now have absentee ballots ready at least forty-five days before a federal election to accommodate overseas voters.[5350]

As votes are counted, there may be litigation over the deadline for receipt of cast absentee ballots.[5351] In a Georgia case, absentee ballots were sent out late because of a state-court injunction and a hurricane.[5352] The parties consented to an injunction requiring the counting of ballots postmarked by election day.[5353]

Sometimes litigation arising from the late sending of absentee ballots to voters occurs before election day.[5354] In addition to an extension of the deadline for receiving cast ballots, possible remedies include paying for express mail and email or fax voting.[5355] If a runoff election was scheduled too close to the first election for absentee ballots to be sent out in time, then until a jurisdiction brought its election schedule into compliance with the federal forty-five-day requirement for overseas voters, a court might have ordered instant-runoff procedures—the use of ranked voting—in the first election.[5356] Of the runoff candidates, the candidate with a voter's highest rank in the first election gets the voter's vote in the runoff election.

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cations," *infra* page 913 (settled case about a political party's sending out absentee ballot applications).

5350. Uniformed and Overseas Citizens Absentee Voting Act of 1986, Pub. L. No. 99-410, 100 Stat. 924, *as amended*, 52 U.S.C. §§ 20301–20311; *see* "Chapter 10: Election Dates," *supra* page 665; *see also* "Ordering the Use of the Federal Write-In Absentee Ballot in Texas," *infra* page 907.

5351. *See, e.g.*, "Multiple Suits After an Election to Relax the Standards for Counting and Recounting Votes," *infra* page 812; "A Consent Decree on Overseas Voting in Federal Elections Trumps State Law," *infra* page 909.

5352. *See* "Extending the Deadline to Receive Absentee Ballots for Multiple Reasons," *infra* page 821.

5353. Consent Order, Democratic Party of Ga. v. Burkes, No. 1:18-cv-212 (M.D. Ga. Nov. 9, 2018), D.E. 5.

5354. *See, e.g.*, "Extension for Overseas Voters in Wisconsin," *infra* page 845; "Mailing Nevada's Overseas Ballots on Time," *infra* page 856; "Late Absentee Ballots in Florida," *infra* page 885.

5355. *See, e.g.*, Doe v. Walker, 746 F. Supp. 2d 667 (D. Md. 2010), *as reported in* "Timely Overseas Ballots for State Elections in Maryland," *infra* page 859; *see also* "Overseas Absentee Ballot Consent Decree in the Virgin Islands," *infra* page 847; "Late Overseas Ballots in Michigan," *infra* page 848; "Mailing Overseas Absentee Ballots on Time in Georgia in 2012," *infra* page 850; "Prompt Delivery of Absentee Ballots by Guam," *infra* page 857; "Military Absentee Ballots 2008," *infra* page 863; "Mailing Overseas Absentee Ballots on Time in Georgia in 2004," *infra* page 893; "Military Absentee Ballots 2004," *infra* page 895.

5356. *See, e.g.*, Opinion at 2, 6, United States v. Alabama, No. 2:12-cv-179 (M.D. Ala. July 26, 2013), D.E. 71, *as reported in* "Timely Overseas Ballots in Alabama," *infra* page

Unsuccessful was an action alleging an equal-protection violation because larger counties with urban populations were more generous than other counties in facilitating absentee voting, such as by paying return postage.[5357] Other actions complaining of different procedures in different counties also were unsuccessful.[5358] A challenge to barriers to absentee voting can also be unsuccessful if the plaintiff voters are actually able to cast counted ballots.[5359]

In 2008, election officials for seven Illinois counties sought federal relief from election deadlines because a special election to fill a congressional vacancy was going to be held only thirty-two days after the primary election.[5360] The judge extended deadlines for receipt of cast overseas ballots and authorized the use of blank absentee ballots for the second election.[5361]

A lawsuit that alleged unfairness to count overseas ballots received within ten days of the election but count domestic ballots only if received by election day was unsuccessful.[5362] The judge determined that the extension for overseas voters was designed to elevate their opportunity to vote to be comparable with that of domestic voters.[5363] In another case, a judge denied a request to change the election law to allow absentee ballots to be counted if mailed by election day instead of received the day before, finding the request too late and the relief requested too disruptive.[5364]

Absentee ballots, like in-person ballots, do not disclose how each voter voted, but absentee ballots are typically transmitted with the voter's signature.[5365] Federal courts have determined that it is not proper to reject an

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5357. Order, Vanzant v. Brunner, No. 1:10-cv-596 (S.D. Ohio Sept. 27, 2010), D.E. 10, *as reported in* "County Differences in Providing Absentee Ballots," *infra* page 861.

5358. *See* "No Relief from a State Supreme Court's Ruling on Counting Absentee Ballots Missing Information on Their Outer Envelopes," *infra* page 718;"No Relief from Different Counties Using Different Methods to Cure Absentee-Ballot Errors," *infra* page 720.

5359. *See, e.g.*, "Accusations of Voter Fraud," *infra* page 865.

5360. *See* "Accommodating Overseas Voters in a Special Election," *infra* page 875.

5361. Order, DuPage Cty. Bd. of Election Comm'rs v. Ill. State Bd. of Elections, No. 1:08-cv-232 (N.D. Ill. Jan. 18, 2008), D.E. 32.

5362. *See* "Multiple Suits After an Election to Relax the Standards for Counting and Recounting Votes," *infra* page 812.

5363. Opinion at 7, VoteVets Action Fund v. Detzner, No. 4:18-cv-524 (N.D. Fla. Nov. 16, 2018), D.E. 56.

5364. Opinion, O'Neil v. Hosemann, No. 3:18-cv-815 (S.D. Miss. Nov. 27, 2018), D.E. 19, 2018 WL 6188292, *as reported in* "Onerous Absentee-Ballot Procedures in Mississippi," *infra* page 811.

5365. *See, e.g.*, "Keeping Early Ballots Secret," *infra* page 823 (unsuccessful procedurally defective pro se complaint that the absentee ballot was in an envelope with the voter's

absentee ballot based on a signature that does not appear to match voting records for the voter without an opportunity for the voter to resolve the discrepancy.[5366] Recognition of the many reasons why two signatures by the same person might not match and a general lack of expertise in signature matching among election officials are important factors.

Early voting—in-person voting before election day—is now a common alternative to in-person voting on election day.[5367] Litigation can arise over locations of early voting sites[5368] and number of early voting days.[5369]

In Ohio in 2008, federal cases were filed in both the Northern District and the Southern District to determine whether a voter could register and vote early on the same day if early voting began before the registration period ended.[5370] Ohio's supreme court and both federal judges ruled that they could.[5371]

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name on it).

5366. *E.g.*, League of Women Voters of S.C. v. Andino, 497 F. Supp. 3d 59, 78 (D.S.C. 2020), *as reported in* "Enjoining Signature Matching Not Provided by State Law," *infra* page 725; Democratic Exec. Comm. of Fla. v. Detzner, 347 F. Supp. 3d 1017 (N.D. Fla. 2018), *as reported in* "Multiple Suits After an Election to Relax the Standards for Counting and Recounting Votes," *infra* page 812; Martin v. Kemp, 341 F. Supp. 3d 1326 (N.D. Ga. 2018), *as reported in* "Record Mismatches on Absentee Ballots," *infra* page 824; Opinion, Fla. Democratic Party v. Detzner, No. 4:16-cv-607 (N.D. Fla. Oct. 16, 2016), D.E. 34, 2016 WL 6090943, *as reported in* "An Opportunity to Cure Absentee-Ballot Signatures That Do Not Match Voter-Registration Records," *infra* page 831; Opinion, Zessar v. Helander, No. 1:05-cv-1917 (N.D. Ill. Mar. 13, 2006), D.E. 87, 2006 WL 642646, *as reported in* "Rejecting Absentee Ballots Without Notice and an Opportunity to Be Heard," *infra* page 883. *But see* Opinion, Fugazi v. Padilla, No. 2:20-cv-970 (E.D. Cal. May 22, 2020), D.E. 27, 2020 WL 2615742 (denying relief because although a notice to absentee voters with missing or mismatched signatures was confusing and the registrar's office was closed, the office was responding to clarification inquiries by telephone), *as reported in* "Opportunity to Cure Missing and Mismatched Absentee-Ballot Signatures in California," *infra* page 780.

5367. *See, e.g.*, "No Early-Voting Site for the Pascua Yaqui Tribe," *infra* page 727; "Filing a Complaint Results in Settled Relief Providing a Voting Location on an Indian Reservation," *infra* page 729; "Equal Provision of Early Voting in Cook County," *infra* page 881; *see also* "Keeping Early Ballots Secret," *infra* page 823.

5368. *See, e.g.*, "Early Voting on Indian Reservations," *infra* page 846; "Early-Voting Locations in Lake County," *infra* page 867; "Early-Voting Locations in Duval County," *infra* page 891; "Early-Voting Locations in Volusia County," *infra* page 892; "Preclearance Required for Reduction in Polling Locations," *infra* page 905.

5369. *See, e.g.*, "Adding a Weekend Day to Early Voting," *infra* page 878.

5370. *See* "Same-Day Registration and Absentee Voting," *infra* page 871.

5371. Opinion, Project Vote v. Madison Cty. Bd. of Elections, No. 1:08-cv-2266 (N.D. Ohio Sept. 29, 2008), D.E. 25, 2008 WL 4445176; Opinion, Ohio Republican Party v. Brunner, No. 2:08-cv-913 (S.D. Ohio Sept. 26, 2008), D.E. 27, 2008 WL 4445193; Ohio *ex*

Litigation can arise when one court's remedy creates the possibility of an action on another issue. For example, a state court tightened absentee-voting procedures because of evidence of irregularities, but this created a question about whether the tightened procedures would sufficiently accommodate blind voters.[5372] A federal judge issued an injunction protecting disability accommodations for blind voters,[5373] and the state court issued a clarifying order stating that its decision should not prevent election authorities from complying with federal law.[5374]

Another state court ordered a replacement candidate for a state office after absentee voting had begun, and the state court ordered that ballots cast with the wrong candidate on them be nullified. The U.S. Department of Justice sought an order that the votes for federal office on the otherwise nullified ballots be counted.[5375] Although the federal judge denied preliminary relief, he ultimately ruled in favor of the Justice Department.[5376]

A voter is not permitted to vote absentee and then also vote in person on election day. A voter who requests an absentee ballot but does not receive one should, however, be permitted to cast a provisional ballot on election day.[5377]

In litigation over whether absentee ballots should be counted even if they were sent to voters who did not request them, district judges ruled that they should be.[5378]

A case involving a disabled voter arose from election officials' refusal to hand-deliver to a hospitalized voter an absentee ballot when the re-

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rel. Colvin v. Brunner, 896 N.E.2d 979, 982 (Ohio 2008).

5372. *See* "Talking Voting Machines for Blind Absentee Voters," *infra* page 834.

5373. Opinion at 6, Gray v. St. Louis City Bd. of Election Comm'rs, No. 4:16-cv-1548 (E.D. Mo. Sept. 30, 2016), D.E. 9.

5374. Franks v. Hubbard, 498 S.W.3d 862, 873 n.12 (Mo. Ct. App. 2016).

5375. *See* "Counting Federal Overseas Votes on Ballots with State-Election Errors," *infra* page 837.

5376. Opinion, United States v. West Virginia, No. 2:14-cv-27456 (S.D. W. Va. Dec. 22, 2014), D.E. 22, 2014 WL 7338867.

5377. *E.g.*, White v. Blackwell, 409 F. Supp. 2d 919 (N.D. Ohio 2006), *as reported in* "Casting a Provisional Ballot Because the Absentee Ballot Never Arrived," *infra* page 887.

5378. Hoblock v. Albany Cty. Bd. of Elections, 487 F. Supp. 2d 90 (N.D.N.Y. 2006) (in a do-over election, election officials sent absentee ballots to voters who requested them in the first election but not in the substitute election), *as reported in* "Court Supervision Over Absentee-Ballot Procedures," *infra* page 898; Bush v. Hillsborough Cty. Canvassing Bd., 123 F. Supp. 2d 1305 (N.D. Fla. 2000) (election officials had no record that the absentee ballots had been requested, but the ballots included a signed statement that they had been), *as reported in* "Counting Federal Write-In Ballots Even If Election Officials Did Not Receive Absentee-Ballot Applications," *infra* page 911.

quested ballot did not arrive by mail on time.[5379] The court ordered accommodation.[5380] Another judge also ordered election officials to either visit a homebound voter to cure a defective absentee ballot or permit a relative or attorney to courier the defective ballot to the voter for a cure.[5381] The judge presiding over a different case did not order relief for a hospitalized voter because the ballot application did not include contact information for the voter or the voter's family that would have facilitated delivery of the ballot.[5382]

In 2020, a judge ordered a county jail to facilitate absentee voting by voters detained there.[5383] Earlier litigation with initially mixed results challenged unequal accommodation of voters hospitalized on election day and voters detained in jail on election day.[5384] One judge concluded that because the two forms of incapacitation placed different burdens on election officials there was no equal-protection violation.[5385] Another judge ruled in favor of the plaintiffs, who were prisoner-rights organizations.[5386] A divided court of appeals, however, initially determined that the organizations did not have standing to assert the rights of detained voters.[5387] A few years later, a third judge granted relief to two individual detained plaintiffs,[5388] but the court of appeals finally determined that it was not unconstitutional to treat hospitalized voters and detained voters differently.[5389]

When an election is close, many elements become ripe for litigation.[5390] Absentee ballots reversed a candidate's lead from four votes ahead to four

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5379. *See* "Accommodating a Disabled Voter," *infra* page 840.

5380. Opinion, Mooneyhan v. Husted, No. 3:12-cv-379 (S.D. Ohio Nov. 16, 2012), D.E. 12, 2012 WL 5834232.

5381. Opinion, Ray v. Franklin Cty. Bd. of Elections, No. 2:08-cv-1086 (S.D. Ohio Nov. 17, 2008), D.E. 11, 2008 WL 4966759, *as reported in* "Post-Election Verification of a Disabled Voter's Absentee Ballot," *infra* page 862.

5382. Opinion, Ramsden v. Husted, No. 4:16-cv-641 (Mar. 16, 2016), D.E. 11, *as reported in* "A Defective Absentee-Ballot Application by a Hospitalized Voter," *infra* page 836.

5383. Minute Order, Cannavan v. County of Ventura, No. 2:20-cv-10012 (C.D. Cal. Nov. 1, 2020), D.E. 21, 2020 WL 639163, *as reported in* "County Jail Ordered to Provide Inmates with Absentee Ballots," *infra* page 721.

5384. *See* "Last-Minute Absentee Voting by Last-Minute Prisoners," *infra* page 841.

5385. Opinion at 32–34, Fair Elections Ohio v. Husted, No. 1:12-cv-797 (S.D. Ohio Nov. 1, 2012), D.E. 30.

5386. Fair Elections Ohio v. Husted, 47 F. Supp. 3d 607 (S.D. Ohio 2014).

5387. Fair Elections Ohio v. Husted, 770 F.3d 456 (6th Cir. 2014).

5388. Injunction, Mays v. Husted, No. 2:18-cv-1376 (S.D. Ohio Nov. 6, 2018), D.E. 12.

5389. Mays v. LaRose, 951 F.3d 775 (6th Cir. 2020).

5390. *See, e.g.*, "No Relief from a State Supreme Court's Ruling on Counting Absentee

votes behind, and the candidate unsuccessfully sought to nullify the absentee ballots—first in state court and then in federal court—because their mailing envelopes had been discarded, so mailing dates could not be verified.[5391]

As a result of the Covid-19 pandemic in 2020, courts were sometimes asked to impose on election officials strategies to facilitate voting in light of public-health concerns.[5392] On the other hand, some suits challenged pandemic accommodations.[5393]

Federal litigation in five states challenged the adequacy of voting options for blind voters.[5394] Contemporaneous degradations in postal service

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Ballots Missing Information on Their Outer Envelopes," *infra* page 718.

5391. *See* "Pro Se Suit to Nullify All Absentee Ballots," *infra* page 877.

5392. *See, e.g.*, "Suit to Enjoin Election Officials to Keep Counting Absentee Ballots After the Polls Closed Dismissed Because That Was What They Were Going to Do," *infra* page 722; "Number of Absentee-Ballot Drop-Off Locations Per County in Texas," *page* 730; "Different Rules for Excuse-Based Absentee Voting and Pandemic-Related Mail Voting," *infra* page 741; "Whether Counties Could Establish More Than One Absentee-Ballot Drop Box," *infra* page 750; "Relaxing Rules on Absentee and Early Voting for Senior Citizens in Puerto Rico During an Infectious Pandemic," *infra* page 753; "A Consent Decree Waiving the Witness Requirement for Voting by Mail in Rhode Island During an Infectious Pandemic," *infra* page 769; "No Constitutional Right to Greater Publicization of Early Voting for a Special Congressional Election," *infra* page 774; "Nullification of an Absentee-Ballot Witness Requirement During a Global Infectious Pandemic," *infra* page 791; "Standing to Seek an Absentee-Ballot Extension During a Pandemic," *infra* page 796; "Election Modifications in Wisconsin Because of a Pandemic," *infra* page 797; "No Ordered Modification of Absentee-Ballot Procedures on the Night Before an Election," *infra* page 808; "No Constitutional Right to Additional Early-Voting Locations," *infra* page 810.

5393. *See, e.g.*, "No Federal Injunction Against Extension of Absentee-Ballot Receipt Deadline in North Carolina," *infra* page 735 (changes to absentee-voting procedures after absentee voting had begun); "Whether Absentee Ballots in Minnesota Mailed by Election Day but Received Later Should be Counted," *infra* page 739 (allowing additional time for receipt of cast absentee ballots); "Unsuccessful Vote-Dilution Challenge to Automatic Mailing of Absentee Ballots in Vermont," *infra* page 745 (mailing absentee ballots to all registered voters); "Challenging Absentee-Ballot Procedures in Detroit During an Infectious Pandemic," *infra* page 765 (mailing unsolicited absentee-ballot applications); "No Immediate Relief from Expanded Absentee-Voting Opportunities During an Infectious Pandemic Because of a Delay in Bringing the Case," *infra* page 777 (unsuccessful challenge to broad absentee-voting rights); "Whether Voting by Mail During a Pandemic Dilutes Legitimate Votes," *infra* page 789 (speculative claim that voting by mail would dilute legitimate votes).

5394. *See* "Electronic At-Home Absentee Voting for Blind Voters," *infra* page 781.

at a time of greater reliance on voting by mail provided additional litigation motivations.[5395]

A lawsuit brought in the Eastern District of New York against seven states alleged that international pandemic-related degradations in postal services affected ballots passing through New York's John F. Kennedy airport.[5396] The district judge determined that the alleged injuries to voters and the defendants' connections to New York were too speculative for relief.[5397]

A lawsuit brought in the Southern District of New York challenged a postmark requirement for pandemic voting by mail, because prepaid mail is not always postmarked.[5398] The district judge granted the plaintiffs some relief.[5399]

A district judge in the District of Idaho provided relief when a website used for requesting absentee ballots was overwhelmed because the election was to be conducted entirely by absentee ballot.[5400] In the District of Colorado, a judge enjoined inaccurate notices about voting by mail that were sent by the postal service.[5401]

5395. *See, e.g.*, "No Relief from a State Supreme Court's Extension of the Deadline for Receipt of Cast Ballots Because the Action Was Brought Too Close to the Election," *infra* page 723; "Allegations of Politically Motivated Degradations of Postal Services," *infra* page 755.

5396. *See* "Denied Complaint for Electronic Overseas Voting During a Global Pandemic," *infra* page 732.

5397. Transcript at 36–49, Harley v. Kosinski, No. 1:20-cv-4664 (E.D.N.Y. Oct. 13, 2020, filed Apr. 9, 2021), D.E. 55.

5398. *See* "Modifying the Postmark Requirement for Mailed Ballots in New York," *infra* page 772.

5399. Gallagher v. N.Y. State Bd. of Elections, 477 F. Supp. 3d 19, 27 (S.D.N.Y. 2020).

5400. Order, Nicholas Jones for Congress v. Idaho Sec'y of State, No. 1:20-cv-242 (D. Idaho May 23, 2020), D.E. 9, *as reported in* "Relief from an Absentee-Ballot Application Deadline Because of an Overwhelmed Website," *infra* page 776.

Relief from overwhelmed voter-registration websites also has been provided. Order, New Va. Majority Educ. Fund v. Va. Dep't of Elections, No. 1:16-cv-1319 (E.D. Va. Oct. 20, 2016), D.E. 10, *as reported in* "Extending Voter Registration Because of a Website Crash," *supra* page 37. *But see* Namphy v. DeSantis, 493 F. Supp. 3d 1130 (N.D. Fla. 2020) (relief denied because the state voluntarily extended the deadline), *as reported in* "No Remedy for the Malfunction of a Voter-Registration Website Because the State Provided a Small Remedy," *supra* page 18.

5401. Colorado v. DeJoy, 487 F. Supp. 3d 1061 (D. Colo. 2020), *as reported in* "Enjoining Misleading Postal Information About Absentee Ballots in Colorado," *infra* page 743.

District judges in the Northern District of Georgia[5402] and the Northern District of Florida[5403] determined that it was not unconstitutional to require a voter to pay postage for optional voting by mail.

Unsuccessful Challenges to Procedures for Accepting Absentee Ballots in Georgia's 2021 Senatorial Runoff Election

Twelfth Congressional District Republican Committee v. Raffensperger (J. Randal Hall, S.D. Ga. 1:20-cv-180) and Georgia Republican Party v. Raffensperger (Eleanor L. Ross, N.D. Ga. 1:20-cv-5018)

> Federal judges in both the Southern District of Georgia and the Northern District of Georgia declined immediate relief from Georgia's procedures for accepting absentee ballots in a 2021 runoff senatorial election.
>
> *Topics:* Absentee ballots; signature matching; laches; intervention; Covid-19.

Federal court challenges to Georgia's procedures for accepting absentee ballots in a January 5, 2021, runoff election for the U.S. Senate were unsuccessful in both the Southern District of Georgia and the Northern District of Georgia.

Southern District Case

A federal complaint filed in the Southern District on Wednesday, December 9, 2020—about four weeks before a runoff senatorial election—challenged Georgia's procedures for accepting absentee ballots.[5404] With their complaint, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction.[5405]

5402. Black Voters Matter Fund v. Raffensperger, 478 F. Supp. 3d 1278, 1314 (N.D. Ga. 2020), *as reported in* "Whether Requiring Postage for a Mailed Ballot Is an Unconstitutional Poll Tax," *infra* page 794.

5403. Nielsen v. DeSantis, 469 F. Supp. 3d 1261, 1268 (N.D. Fla. 2020), *as reported in* "No Ordered Modification of Absentee-Ballot Procedures on the Night Before an Election," *infra* page 808.

5404. Complaint, 12th Cong. Dist. Republican Comm. v. Raffensperger, No. 1:20-cv-180 (S.D. Ga. Dec. 9, 2020), D.E. 1.

"At issue are the rules for receipt and processing of absentee ballots including the use of drop boxes and Plaintiffs seek to halt the use of those rules in the now ongoing United States Senate run-off elections." Transcript at 4, *id.* (Dec. 17, 2020, filed Jan. 1, 2021), D.E. 49 [hereinafter *12th Cong. Dist. Republican Comm.* Transcript].

5405. Motion, *id.* (Dec. 9, 2020), D.E. 2.

The plaintiffs were affiliated with the Republican Party, and the state's Democratic Party sought intervention as a defendant on Friday, December 12.[5406] Judge J. Randal Hall granted intervention on Monday.[5407]

Also on Monday, Judge Hall set the case for a videoconference hearing on Thursday, December 17.[5408] Information on public telephone access to the hearing was posted in the docket sheet.[5409] On December 16, Judge Hall granted intervention as defendants to two organizations and a voter.[5410]

He began the hearing with an acknowledgment of the Covid-19 pandemic and an admonition against recording the proceeding: "Due to the continuing surge of the Corona Virus we are conducting this hearing today by video with nationwide audio streaming. . . . [F]ederal court rules strictly prohibit recording by anyone whether you're participating by video conference or audio stream . . . any part of this hearing today."[5411]

Judge Hall ended the hearing by denying the plaintiffs immediate relief.[5412] First, the plaintiffs did not have standing to pursue the case:

> [T]he individual voters' claims represent nothing more than a general grievance, not particularized in any fashion. As to the claims by the committee and the two voters asserting First Amendment claims, the Court finds that those claims are simply based upon speculation, highly speculative—highly speculative issues in some cases—many cases—involving potential actions of conduct of independent actors. The Court has noted that spending money or directed resources based on some fear of a speculative harm simply does not establish the concrete injury required for standing.[5413]

5406. Intervention Motion, *id.* (Dec. 11, 2020), D.E. 10.

5407. Intervention Order, *id.* (Dec. 14, 2020), D.E. 14.

5408. Order, *id.* (Dec. 14, 2020), D.E. 17; *see* Minutes, *id.* (Dec. 17, 2020), D.E. 46; *see also* Sandy Hodson & Susan McCord, *Suit Challenges Ballot Procedures*, Augusta Chron., Dec. 17, 2020, at A1.

5409. Docket Sheet, *12th Cong. Dist. Republican Comm.*, No. 1:20-cv-180 (S.D. Ga. Dec. 9, 2020) (D.E. 18).

5410. Intervention Order, *id.* (Dec. 16, 2020), D.E. 38; *see* Intervention Motion, *id.* (Dec. 15, 2020), D.E. 31.

5411. *12th Cong. Dist. Republican Comm.* Transcript, *supra* note 5404, at 3–4.

5412. Order, *12th Cong. Dist. Republican Comm.*, No. 1:20-cv-180 (S.D. Ga. Dec. 17, 2020), D.E. 47; *12th Cong. Dist. Republican Comm.* Transcript, *supra* note 5404, at 35–36; *see* Susan McCord, *Absentee Ballot Lawsuit Dismissed*, Augusta Chron., Dec. 18, 2020, at A1; David Wickert, *Judges Dismiss Suits Related to Ga. Absentee Ballot Rules*, Atlanta J.-Const., Dec. 18, 2020, at 5A.

5413. *12th Cong. Dist. Republican Comm.* Transcript, *supra* note 5404, at 35.

Second, a delay in bringing the challenge to absentee voting, which had already begun, weighed against injunctive relief.[5414]

A notice of appeal was filed ten days after the election,[5415] and a voluntary dismissal was filed about two months later.[5416]

Northern District Case

The Republican Party and its candidates for U.S. Senate in the runoff election filed a federal complaint on December 10, 2020, in the Northern District against state election officials, also challenging the adequacy of procedures in Georgia for validating absentee ballots.[5417] According to the plaintiffs, "many counties in Georgia in the November 3, 2020 general election accepted virtually all absentee ballot signatures, rejecting impossibly low numbers of mismatched signatures, and even failing to find any missing signatures."[5418] With their complaint, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction.[5419]

On the next day, Judge Eleanor L. Ross set the case for hearing on December 21.[5420] On December 14, Judge Ross granted a December 11 motion by the Democratic Party to intervene as a defendant in the case.[5421] Also on Monday, December 14, Judge Ross rescheduled the hearing from the following Monday to the intervening Thursday, and she rescheduled the hearing from in person to via videoconference, at the parties' request.[5422]

At the hearing, Judge Ross dismissed the case for lack of standing.[5423]

5414. *Id.* at 35–36.

5415. Notice of Appeal, *12th Cong. Dist. Republican Comm.*, No. 1:20-cv-180 (S.D. Ga. Jan. 15, 2021), D.E. 50.

5416. Motion, 12th Cong. Dist. Republican Comm. v. Secretary, No. 21-10183 (11th Cir. Mar. 17, 2021); *see* Order, *id.* (Mar. 31, 2021), 2021 WL 1567735 (dismissing the appeal).

5417. Complaint, Ga. Republican Party v. Raffensperger, No. 1:20-cv-5018 (N.D. Ga. Dec. 10, 2020), D.E. 1.

5418. *Id.* at 4.

5419. Motion, *id.* (Dec. 10, 2020), D.E. 2.

5420. Order, *id.* (Dec. 11, 2020), D.E. 11.

5421. Intervention Order, *id.* (Dec. 14, 2020), D.E. 15; Intervention Motion, *id.* (Dec. 11, 2020), D.E. 12.

5422. Order, *id.* (Dec. 14, 2020), D.E. 17; *see* Order, *id.* (Dec. 15, 2020), D.E. 23 (rescheduling the hearing from 9:30 a.m. to 3:00 p.m., at the parties' request).

5423. Minutes, *id.* (Dec. 17, 2020), D.E. 46; Opinion at 3, Ga. Republican Party v. Sec'y of State, No. 20-14741 (11th Cir. Dec. 20, 2020) [hereinafter 11th Cir. *Ga. Republican Party* Opinion]; *see* Wickert, *supra* note 5412.

On Sunday, December 20, the court of appeals declined to stay Judge Ross's dismissal.[5424] Responsibility for validating absentee ballots lay with local election officials, not state election officials.[5425] The court of appeals accepted a voluntary dismissal of the appeal on January 4, 2021.[5426]

No Relief from a State Supreme Court's Ruling on Counting Absentee Ballots Missing Information on Their Outer Envelopes

Ziccarelli v. Allegheny County Board of Elections (J. Nicholas Ranjan, W.D. Pa. 2:20-cv-1831)

> A candidate in a close election complained that a state supreme court's allowing a county to count absentee ballots without handwritten names and addresses on the ballots' outer envelopes when other counties might not do that violated equal protection. The district judge ruled that the action was barred by the *Rooker-Feldman* doctrine, which states that among federal courts only the Supreme Court has appellate jurisdiction over state-court rulings.
>
> *Topics:* Absentee ballots; equal protection; matters for state courts; intervention.

A candidate for Pennsylvania's senate filed a federal complaint in the Western District of Pennsylvania on November 25, 2020, the day before Thanksgiving Day, against Pennsylvania and Allegheny County election officials seeking to enjoin the counting of mailed ballots apparently permitted by a November 23 decision by Pennsylvania's supreme court:[5427]

> These appeals present the question of whether the Election Code requires a county board of elections to disqualify mail-in or absentee ballots submitted by qualified electors who signed the declaration on their ballot's outer envelope but did not handwrite their name, their address, and/or a date, where no fraud or irregularity has been alleged. Pursuant to our long-standing jurisprudence, central to the disposition of these appeals is whether the information is made mandatory by the Election Code or whether the inclusion of the information is directory, i.e., a directive from the Legislature that should be followed but the failure to provide the information does not result in invalidation of the ballot.

5424. 11th Cir. *Ga. Republican Party* Opinion, *supra* note 5423; *see* Mark Niesse, *Appeals Court Rejects Ballot Signature Lawsuit*, Atlanta J.-Const., Dec. 22, 2020, at 7A.

5425. 11th Cir. *Ga. Republican Party* Opinion, *supra* note 5423, at 5–6.

5426. Order, *Ga. Republican Party*, No. 20-14741 (11th Cir. Jan. 4, 2021).

5427. Complaint, Ziccarelli v. Allegheny Cty. Bd. of Elections, No. 2:20-cv-1831 (W.D. Pa. Nov. 25, 2020), D.E. 1.

> . . .
>
> . . . [W]e conclude that the Election Code does not require boards of elections to disqualify mail-in or absentee ballots submitted by qualified electors who signed the declaration on their ballot's outer envelope but did not handwrite their name, their address, and/or date, where no fraud or irregularity has been alleged.[5428]

With her complaint, the plaintiff filed a motion for a temporary restraining order and a preliminary injunction.[5429]

Judge J. Nicholas Ranjan heard the motion telephonically on the day that it was filed.[5430] He denied the candidate immediate relief.[5431] In response to the argument that Allegheny County should not count ballots that Westmoreland County would not count, Judge Ranjan opined that a better remedy would be to require Westmoreland County to count ballots that Allegheny County would.[5432] But Westmoreland County election officials were not parties in the case.

Counsel for the Pennsylvania Democratic Party, an intervenor in the case, asked if the hearing transcript could be available before the following week's meeting of Westmoreland's board of elections, and the court reporter promised the transcript by Friday.[5433]

The candidate filed an amended complaint on December 1.[5434] Nine days later, Judge Ranjan ordered her to file a status report stating her intentions for proceeding with the case.[5435] After considering status reports

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5428. *In re* Canvass of Absentee and Mail-In Ballots of Nov. 3, 2020 General Election, 241 A.3d 1058, 1061–62 (Pa. 2020).

5429. Motion, *Ziccarelli*, No. 2:20-cv-1831 (W.D. Pa. Nov. 25, 2020), D.E. 2.

5430. Transcript, *id.* (Nov. 25, 2020, filed Nov. 26, 2020), D.E. 15 [hereinafter *Ziccarelli* Transcript]; Minutes, *id.* (Nov. 25, 2020), D.E. 8 [hereinafter *Ziccarelli* Minutes].

5431. *Ziccarelli* Transcript, *supra* note 5430, at 28; *Ziccarelli* Minutes, *supra* note 5430; Docket Sheet, *Ziccarelli*, No. 2:20-cv-1831 (W.D. Pa. Nov. 25, 2020) [hereinafter *Ziccarelli* Docket Sheet] (order, D.E. 11).

5432. *Ziccarelli* Transcript, *supra* note 5430, at 29.

5433. *Id.* at 32; *see id.* at 31 (recording an order by Judge Ranjan that an order for the transcript be split by the parties and intervenors as a record of the decision for possible appeal); *see also id.* at 5 (granting intervention); *Ziccarelli* Docket Sheet, *supra* note 5431 (order granting intervention, D.E. 10).

5434. Amended Complaint, *Ziccarelli*, No. 2:20-cv-1831 (W.D. Pa. Dec. 1, 2020), D.E. 29.

5435. *Ziccarelli* Docket Sheet, *supra* note 5431 (D.E. 38).

by all parties,[5436] Judge Ranjan ordered cross-motions for summary judgment with briefing completed by January 8, 2021.[5437]

On January 12, Judge Ranjan granted the defendants summary judgment.[5438] Among the reasons for Judge Ranjan's ruling was the *Rooker-Feldman* doctrine that among federal courts only the Supreme Court has appellate jurisdiction over state-court rulings.[5439]

The state senate was unwilling to seat the plaintiff's victorious challenger until Judge Ranjan ruled.[5440]

No Relief from Different Counties Using Different Methods to Cure Absentee-Ballot Errors

Barnette v. Lawrence (Timothy J. Savage, E.D. Pa. 2:20-cv-5477)

> An election-day complaint challenged unequal procedures in two counties for curing absentee-ballot errors. Following a hearing, the plaintiffs withdrew their motion for a temporary restraining order, and the judge denied the motion.
>
> *Topics:* Absentee ballots; equal protection; intervention; matters for state courts; class action.

On the day of the November 3, 2020, general election, a congressional candidate and a voter filed a class-action federal complaint in the Eastern District of Pennsylvania on behalf of voters in Montgomery County and Berks County against Montgomery County election officials alleging different election procedures in the two counties.[5441] With their complaint, the plaintiffs filed a motion for a temporary restraining order.[5442]

5436. Status Reports, *Ziccarelli*, No. 2:20-cv-1831 (W.D. Pa. Dec. 11 and 12, 2020), D.E. 39 to 42.

5437. Scheduling Order, *id.* (Dec. 14, 2020), D.E. 43; *see id.* at 1 (noting that a ruling in the plaintiff's favor would result in her winning the election).

5438. Opinion, *id.* (Jan. 12, 2021), D.E. 72, 2021 WL 101683.

5439. *Id.* at 11–14; *see* D.C. Ct. of Appeals v. Feldman, 460 U.S. 462 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923).

5440. *See* Sarah Anne Hughes, *Democrat Will Be Sworn In to Senate*, Phila. Inquirer, Jan. 13, 2021, at B1; *see also* Scott Calvert, *State Lawmakers Block Democrat from Seat*, Wall St. J., Jan. 6, 2021, at A4 ("Republican leaders of the Pennsylvania Senate refused to seat a Democrat whose win was certified by state election officials, prompting Democratic senators to walk out on the first day of the legislative session.").

5441. Complaint, Barnette v. Lawrence, No. 2:20-cv-5477 (E.D. Pa. Nov. 3, 2020), D.E. 1; *see* Jeremy Roebuck, Chris Palmer & Julie Shaw, *Pa. Legal Challenges Remain Sparse*, Phila. Inquirer, Nov. 4, 2020, at A9 ("On Tuesday, GOP lawyers filed suit in state and federal courts contesting efforts by some Pennsylvania counties to allow voters an opportunity to correct mistakes in their mail ballots, such as missing signatures.").

5442. Temporary-Restraining-Order Motion, *Barnette*, No. 2:20-cv-5477 (E.D. Pa.

After conferring with counsel that day, Judge Timothy J. Savage set the case for an evidentiary hearing on the following morning.[5443] At the beginning of the hearing, Judge Savage granted motions to intervene as defendants by the Democratic National Committee and the Pennsylvania Democratic Party.[5444]

On the case's third day, the plaintiffs moved to withdraw their temporary-restraining-order motion in light of commonwealth-court proceedings scheduled for the following day.[5445] "[U]pon consideration of the Motion for Temporary Restraining Order, the plaintiffs having moved to withdraw the motion, and after a hearing," Judge Savage denied the plaintiffs a temporary restraining order.[5446]

The plaintiffs dismissed their case voluntarily on November 11.[5447]

County Jail Ordered to Provide Inmates with Absentee Ballots

Cannavan v. County of Ventura (Fernando M. Olguin, C.D. Cal. 2:20-cv-10012)

> A district judge ordered a county to provide its jail inmates with absentee ballots in an action filed on the Friday before a general election.
>
> *Topics:* Absentee ballots; class action.

An inmate in a county jail filed a federal class action against the county and its sheriff in the Central District of California on Friday, October 30, 2020, alleging improper denial of ballots.[5448] With his complaint, he filed an application for a temporary restraining order and motion for a preliminary injunction[5449] and an application to certify the class of at least one hundred Ventura County Jail inmates.[5450] The court assigned the case to

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Nov. 3, 2020), D.E. 10.

5443. Order, *id.* (Nov. 3, 2020), D.E. 13.

5444. Transcript at 4–5, *id.* (Nov. 4, 2020, filed Nov. 16, 2020), D.E. 43; Orders, *id.* (Nov. 6, 2020), D.E. 38, 39; Intervention Motions, *id.* (Nov. 3 and 4, 2020), D.E. 24, 28.

5445. Withdrawal Motion, *id.* (Nov. 5, 2020), D.E. 35.

5446. Order, *id.* (Nov. 6, 2020), D.E. 37 (citation omitted).

5447. Notice, *id.* (Nov. 11, 2020), D.E. 42.

5448. Complaint, Cannavan v. County of Ventura, No. 2:20-cv-10012 (C.D. Cal. Oct. 30, 2020), D.E. 1.

5449. Application and Motion, *id.* (Oct. 30, 2020), D.E. 5.

5450. Application, *id.* (Oct. 30, 2020), D.E. 6.

Judge Fernando M. Olguin,[5451] who ordered briefing on the applications complete by Sunday afternoon.[5452]

On Sunday, Judge Olguin certified the class[5453] and ordered the defendants to immediately obtain absentee ballots for all class members and deliver them by 5:00 p.m. on November 2 and deliver cast ballots to election authorities by 5:00 p.m. on election day, November 3.[5454]

An amended complaint filed on July 19, 2021,[5455] was dismissed as settled in 2022.[5456]

Suit to Enjoin Election Officials to Keep Counting Absentee Ballots After the Polls Closed Dismissed Because That Was What They Were Going to Do

Wince v. Thurston (Brian S. Miller, E.D. Ark. 4:20-cv-1274 and 4:20-cv-1278)

> A complaint removed to federal court sought an injunction requiring election officials to keep counting absentee ballots if the counting would not be finished when the polls closed. An identical removed action was consolidated with the first. During the injunction hearing, state election officials confirmed that all ballots returned on time would be counted, so the district judge dismissed the actions.
>
> *Topics:* Absentee ballots; Covid-19; case assignment; removal.

On October 23, 2020, Arkansas state election officials removed an action by two absentee voters to the federal district court for the Eastern District of Arkansas.[5457] "Like thousands of Arkansans, they are voting absentee due to health concerns related to the [global infectious] COVID-19 pandemic. . . . They ask that [the] Court enter a preliminary injunction prohibiting election officials from refusing to continue counting absentee ballots after the polls close at 7:30 p.m. on November 3, 2020."[5458]

5451. Notice, *id.* (Oct. 30, 2020), D.E. 7.

5452. Minute Order, *id.* (Oct. 30, 2020), D.E. 10.

5453. Minute Order, *id.* (Nov. 1, 2020), D.E. 20, 2020 WL 12176251.

5454. Minute Order, *id.* (Nov. 1, 2020), D.E. 21, 2020 WL 639163; *see* Megan Diskin, *County Must Give Inmates Ballots, Judge Says*, Ventura Cty. Star, Nov. 3, 2020, at A2.

5455. Amended Complaint, *Cannavan*, No. 2:20-cv-10012 (C.D. Cal. July 19, 2021), D.E. 58.

5456. Stipulation, *id.* (Sept. 2, 2022), D.E. 88; Order, *id.* (Apr. 25, 2022), D.E. 80.

5457. Notice of Removal, Wince v. Thurston, No. 4:20-cv-1274 (E.D. Ark. Oct. 23, 2020), D.E. 1 [hereinafter First *Wince* Notice of Removal].

5458. Complaint at 2, Wince v. Thurston, No. 60CV-20-5928 (Ark. Cir. Ct. Pulaski

Judge James M. Moody, Jr., asked the court to reassign the case on the day that it was removed: "Based upon my schedule and the short timeline, I will not be able to consider the preliminary injunction before November 3rd."[5459] Judge Brian S. Miller set the case for hearing on October 28.[5460]

On the day before the hearing, Judges Miller and D.P. Marshall, Jr., agreed to consolidate the case with a case removed on October 26 and assigned to Judge Marshall.[5461] According to the defendants, "After [they] removed [the] first action to [the federal] Court, Plaintiffs notified the Court that they intended to file another state-court action bringing identical state constitutional claims . . . . This morning Plaintiffs did just that."[5462]

During Judge Miller's hearing, Arkansas's board of election commissioners met and confirmed that every absentee ballot received on time would be counted, so Judge Miller denied the plaintiffs before him immediate relief.[5463]

Judge Miller dismissed the cases on November 24.[5464]

No Relief from a State Supreme Court's Extension of the Deadline for Receipt of Cast Ballots Because the Action Was Brought Too Close to the Election

Bognet v. Boockvar (Kim R. Gibson, W.D. Pa. 3:20-cv-215)

> A federal complaint challenged a decision by a state supreme court regarding a deadline accommodation for mailed ballots at a time of degraded mail service and a global infectious pandemic. The district judge decided that the case had merit, but immediate relief could not be granted only days before the election. The court of appeals affirmed her decision, and the Supreme Court ultimately ordered the case dismissed as moot.

Cty. Oct. 23, 2020), *attached to* First *Wince* Notice of Removal, *supra* note 5457; *see* Amended Complaint, *Wince*, No. 4:20-cv-1274 (E.D. Ark. Oct. 27, 2020), D.E. 9.

5459. Order, *Wince*, No. 4:20-cv-1274 (E.D. Ark. Oct. 23, 2020), D.E. 4.

5460. Order, *id.* (Oct. 26, 2020), D.E. 8; *see* Preliminary-Injunction Motion, *id.* (Oct. 27, 2020), D.E. 10.

5461. Order, *id.* (Oct. 28, 2020), D.E. 17; Order, Wince v. Thurston, No. 4:20-cv-1278 (E.D. Ark. Oct. 27, 2020), D.E. 8; *see* Motion, *id.* (Oct. 26, 2020), D.E. 5.

5462. Notice of Removal, *Wince*, No. 4:20-cv-1278 (E.D. Ark. Oct. 26, 2020), D.E. 1 [hereinafter Second *Wince* Notice of Removal]; *see* Complaint, Wince v. Thurston, No. 60CV-20-5954 (Ark. Cir. Ct. Pulaski Cty. Oct. 26, 2020), *attached to* Second *Wince* Notice of Removal, *supra*.

5463. Opinion, *Wince*, No. 4:20-cv-1274 (E.D. Ark. Oct. 29, 2020), D.E. 18, 2020 WL 6324743.

5464. Order, *id.* (Nov. 24, 2020), D.E. 22.

Topics: Absentee ballots; enjoining certification; laches; matters for state courts; Covid-19; intervention; interlocutory appeal; case assignment.

On October 22, 2020, a congressional candidate and four voters filed a federal complaint in the Western District of Pennsylvania against the secretary of the commonwealth and all sixty-seven county boards of elections challenging a September 17 decision by Pennsylvania's supreme court.[5465] The Pennsylvania court, among other things, established

> a three-day extension of the absentee and mail-in ballot received-by deadline to allow for the tabulation of ballots mailed by voters via the [United States Postal Service (USPS)] and postmarked by 8:00 p.m. on Election Day to reduce voter disenfranchisement resulting from the conflict between the Election Code and the current USPS delivery standards, given the expected number of Pennsylvanians opting to use mail-in ballots during the [global infectious Covid-19] pandemic.[5466]

The U.S. Supreme Court declined to stay the Pennsylvania decision on October 19.[5467]

With their complaint, the plaintiffs in the Western District case filed a motion for a temporary restraining order and a preliminary injunction.[5468]

Judge Kim R. Gibson set the case for a videoconference hearing on October 27.[5469] On the day before the hearing, she granted the Democratic National Committee's motion to intervene as a defendant.[5470] She denied the secretary's October 24 motion to transfer the case to Judge J. Nicholas Ranjan,[5471] who on October 10 denied relief regarding ballot drop boxes,

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5465. Complaint, Bognet v. Boockvar, No. 3:20-cv-215 (W.D. Pa. Oct. 22, 2020), D.E. 1; Bognet v. Sec'y Commonwealth of Pa., 980 F.3d 336, 345 (3d Cir. 2020); *see* Angela Coulombis & Marie Albiges, *Barrett Could Be the Key if Pa. Battle Back in Court*, Phila. Inquirer, Oct. 23, 2020, at A3.

5466. Pa. Democratic Party v. Boockvar, 662 Pa. 39, 238 A.3d 345, 371 (2020), *cert. denied*, 593 U.S. ___, 141 S. Ct. 732 (2021); *see Bognet*, 980 F.3d at 344–45 ("the Pennsylvania Supreme Court concluded that [the postal service's] existing delivery standards could not meet the timeline built into the Election Code and the circumstances beyond voters' control should not lead to their disenfranchisement").

5467. Scarnati v. Boockvar, 592 U.S. ___, 141 S. Ct. 644 (2020) (stay application by the president pro tempore and the majority leader of Pennsylvania's senate); Republican Party of Pa. v. Boockvar, 592 U.S. ___, 141 S. Ct. 643 (2020) (stay application by the Republican Party of Pennsylvania, an intervenor in the state case); *see Bognet*, 980 F.3d at 345; *see also* Stephen Vladeck, The Shadow Docket 215–16.

5468. Motion, *Bognet*, No. 3:20-cv-215 (W.D. Pa. Oct. 22, 2020), D.E. 5.

5469. Docket Sheet, *id.* (Oct. 22, 2020); *see* Minutes, *id.* (Oct. 28, 2020), D.E. 76.

5470. Order, *id.* (Oct. 26, 2020), D.E. 36; *see* Motion, *id.* (Oct. 24, 2020), D.E. 23.

5471. Order, *id.* (Oct. 26, 2020), D.E. 51; *see* Motion, *id.* (Oct. 24, 2020), D.E. 256.

mail-in ballot signatures, and restrictions on poll watchers,[5472] and who on October 23 denied a temporary restraining order regarding the exclusion of poll watchers from some election locations.[5473]

Although Judge Gibson determined that the complaint had merit, she denied immediate relief on October 28, "less than one week prior to the [November 3] election date."[5474]

> The Court finds that Plaintiffs have established a likelihood of success on their claim that the counting of ballots received after Election Day but before 5:00 p.m. on November 6, 2020, without a postmark or with an illegible postmark creates a preferred class of voters and violates their rights under the Equal Protection Clause. . . . [However,] the Court determines that it is required to deny Plaintiffs' motion for injunctive relief because Plaintiffs raised their claim on the eve of the election, despite the likelihood of success on the merits of their Equal Protection Claim.[5475]

The court of appeals affirmed her decision on November 13,[5476] but the Supreme Court vacated the affirmance on April 19, 2021, finding the case to be moot.[5477] Judge Gibson dismissed the case on July 19.[5478]

Enjoining Signature Matching Not Provided by State Law

Shernoff v. Andino (Richard Mark Gergel, D.S.C. 2:20-cv-3654)

> An emergency action seeking an injunction against disqualification of absentee ballots if the ballot signatures did not match signatures in other records without an opportunity to resolve mismatches turned out to be unnecessary because the district court provided the requested relief in another pending case.
>
> *Topics:* Signature matching; absentee ballots; Covid-19; intervention.

5472. Donald J. Trump for President, Inc. v. Boockvar, 493 F. Supp. 3d 331 (W.D. Pa. 2020).

5473. Transcript at 8, Parnell v. Allegheny Cty. Bd. of Elections, No. 2:20-cv-1570 (W.D. Pa. Oct. 23, 2020, filed Oct. 26, 2020), D.E. 55, *as reported in* "Poll Watchers and Substitute Ballots," *infra* page 1171.

5474. Opinion at 8, *Bognet*, No. 3:20-cv-215 (W.D. Pa. Oct. 28, 2020), D.E. 77 [hereinafter W.D. Pa. *Bognet* Opinion], 2020 WL 6323121; Bognet v. Sec'y Commonwealth of Pa., 980 F.3d 336, 346 (3d Cir. 2020) ("The District Court commendably accommodated Plaintiffs' request for an expedited hearing, then expeditiously issued a thoughtful memorandum order on October 28 . . . .").

5475. W.D. Pa. *Bognet* Opinion, *supra* note 5474, at 7–8.

5476. *Bognet*, 980 F.3d 336.

5477. Bognet v. Degraffenreid, 593 U.S. ___, 141 S. Ct. 2508 (2021); *see* Jonathan Lai, *Last Pa. Election Challenge Is Tossed*, Phila. Inquirer, Apr. 20, 2021, at B1.

5478. Order, *Bognet*, No. 3:20-cv-215 (W.D. Pa. July 19, 2021), D.E. 116.

A federal complaint filed on October 18, 2020, in the District of South Carolina by a voter and the Democratic Party's senatorial committee sought injunctive relief requiring South Carolina election officials to provide absentee voters with notices and opportunities to cure defects in their absentee ballots, including possible mismatches between ballot signatures and signatures in other records.[5479] With their complaint, the plaintiffs filed a motion for a preliminary injunction.[5480]

On the following day, the plaintiffs moved to consolidate hearing of their motion with a pending preliminary-injunction hearing set for October 21 in a case filed on October 2.[5481]

Judge Richard Mark Gergel issued a preliminary injunction in the other case on October 27, enjoining "the State and any of its affiliate county boards from utilizing signature matching procedures to disqualify otherwise validly submitted absentee ballots unless affected voters are provided timely notice of the disqualified ballot and a timely procedure to contest that determination before a neutral tribunal."[5482]

On the same day, Judge Gergel denied the October 18 plaintiffs immediate relief because it would be duplicative to the injunction already issued.[5483]

Informing his decision was a survey of county boards of elections by the executive director of South Carolina's election commission:

> In response to that survey, nine county boards responded that they were using or planning to use signature matching to reject otherwise valid absentee ballots; five county boards declined to respond; one county board stated that it tried to use signature matching but could not keep pace with the number of ballots received; and one county board indicated only that it would [follow South Carolina law]. Thirty county boards responded that they did not use signature matching to disqualify absentee ballots. . . . [The executive director then] instructed county boards to cease signature matching because the practice was not permitted by South Carolina law.[5484]

5479. Complaint, Shernoff v. Andino, No. 2:20-cv-3654 (D.S.C. Oct. 18, 2020), D.E. 1; *see* Amended Complaint, *id.* (Oct. 20, 2020), D.E. 24.

5480. Preliminary-Injunction Motion, *id.* (Oct. 18, 2020), D.E. 4.

5481. Motion, *id.* (Oct. 19, 2020), D.E. 15; *see* Docket Sheet, League of Women Voters of S.C. v. Andino, No. 2:20-cv-3537 (Oct. 2, 2020), D.E. 1.

5482. League of Women Voters of S.C. v. Andino, 497 F. Supp. 3d 59, 78 (D.S.C. 2020).

5483. Order, *Shernoff*, No. 2:20-cv-3654 (D.S.C. Oct. 27, 2020), D.E. 31.

5484. League of Women Voters of S.C. v. Andino, 849 F. App'x 39, 42 (4th Cir. 2021); *see League of Women Voters of S.C.*, 497 F. Supp. 3d at 67–68.

Pursuant to an agreement of the parties, the court of appeals issued a partial stay of Judge Gergel's injunction on October 29; it left in place the injunction against signature matching and stayed the possibility of signature matching with notice and an opportunity to resolve mismatches.[5485] The appellate court remanded the case on March 11, 2021, for a determination of mootness.[5486] It was dismissed voluntarily on April 23.[5487]

The October 18 case was dismissed voluntarily on December 17, 2020.[5488]

No Early-Voting Site for the Pascua Yaqui Tribe

Pascua Yaqui Tribe v. Rodriguez (James A. Soto, D. Ariz. 4:20-cv-432)

> A suit to establish an early-voting location on an Indian reservation was unsuccessful. On the one hand, the suit was brought too close to the election. On the other hand, the plaintiff tribe did not show a sufficient barrier to voting for tribal members on the reservation.
>
> *Topics:* Early voting; poll locations; laches; Covid-19.

A federal complaint filed in the District of Arizona on October 12, 2020, challenged a decision to close the only in-person early-voting site on an Indian reservation.[5489] The complaint alleged that "[t]he need for increased access to in-person early voting on the Pascua Yaqui Reservation is paramount particularly in light of the devastating impact of the COVID-19 pandemic on tribal communities and the fact that mail voting is not an available or adequate substitute for many Native voters."[5490]

On the next day, the tribe filed a motion for a preliminary injunction and a motion for expedited consideration, seeking an injunction ruling by October 20.[5491] Judge James A. Soto agreed to hear the injunction motion on October 19.[5492]

5485. Order, League of Women Voters of S.C. v. Andino, No. 20-2167 (4th Cir. Oct. 29, 2020), D.E. 24, 2020 WL 6395498; *League of Women Voters of S.C. v. Andino*, 849 F. App'x at 42.

5486. *League of Women Voters of S.C. v. Andino*, 849 F. App'x 39.

5487. Stipulation, League of Women Voters of S.C. v. Andino, No. 2:20-cv-3537 (D.S.C. Apr. 23, 2021), D.E. 97.

5488. Notice, *Shernoff*, No. 2:20-cv-3654 (D.S.C. Dec. 17, 2020), D.E. 37.

5489. Complaint, Pascua Yaqui Tribe v. Rodriguez, No. 4:20-cv-432 (D. Ariz. Oct. 12, 2020), D.E. 1.

5490. *Id.* at 2.

5491. Motion for Expedited Consideration, *id.* (Oct. 13, 2020), D.E. 5; Preliminary-Injunction Motion, *id.* (Oct. 13, 2020), D.E. 4, 13.

5492. Order, *id.* (Oct. 13, 2020), D.E. 10; *see* Order, *id.* (Oct. 16, 2020), D.E. 30; *see also* Howard Fischer, *Yaqui Voters Seek Location on Tribal Land Where They Can Drop Off or*

On October 15, the parties filed a joint request for an October 16 status conference to determine whether the hearing could be conducted remotely.[5493] Judge Soto agreed: "Although the parties and counsel are welcome to appear in-person for the status conference the Court presumes that pertinent counsel and parties will appear telephonically in light of the truncated notice, deadlines and filings in this case."[5494] Judge Soto provided telephonic contact information in the order.[5495]

The two-day hearing began at 1:13 p.m. on October 19 and concluded at 6:00 p.m. on October 20.[5496] On October 22, Judge Soto denied the tribe immediate relief.[5497] "As a threshold matter, although Plaintiff's emergency motion was filed on October 13, 2020, Plaintiff had notice that there would not be an in-person early-voting site on the reservation in July of 2018."[5498] Moreover, Judge Soto found "no evidence that any Tribal member on the Reservation [would] be denied the ability to vote in the General Election without a site."[5499] Among other opportunities, there was to be a polling place on the reservation on election day.[5500]

On July 7, 2021, Judge Soto determined that in light of intervening circumstances and legal developments he would dismiss the complaint without prejudice to an amended complaint.[5501] He granted a stipulated dismissal on August 13.[5502]

Cast Early Ballots, Ariz. Daily Star, Oct. 17, 2020, at B1.

5493. Joint Motion, *Pascua Yaqui Tribe*, No. 4:20-cv-432 (D. Ariz. Oct. 15, 2020), D.E. 15.

5494. Order, *id.* (Oct. 15, 2020), D.E. 19 [hereinafter Oct. 15, 2020, *Pascua Yaqui Tribe* Order]; *see* Minutes, *id.* (Oct. 16, 2020), D.E. 29.

5495. Oct. 15, 2020, *Pascua Yaqui Tribe* Order, *supra* note 5494.

5496. Minutes, *Pascua Yaqui Tribe*, No. 4:20-cv-432 (D. Ariz. Oct. 19 and 20, 2020), D.E. 37, 38.

5497. Opinion, *id.* (Oct. 22, 2020), D.E. 43 [hereinafter *Pascua Yaqui Tribe* Opinion], 2020 WL 6203523; *see* Howard Fischer, *Judge Denies Pascua Yaqui Tribe's Request for an Early-Voting Site*, Ariz. Daily Star, Oct. 23, 2020, at B1; Shondlin Silversmith, *Judge Denies Pascua Yaqui Tribe Voter Lawsuit*, Ariz. Republic, Oct. 24, 2020, at A10.

5498. *Pascua Yaqui Tribe* Opinion, *supra* note 5497, at 5.

5499. *Id.* at 8.

5500. *Id.* at 9.

5501. Order, *Pascua Yaqui Tribe*, No. 4:20-cv-432 (D. Ariz. July 7, 2021), D.E. 44.

5502. Order, *id.* (Aug. 13, 2021), D.E. 46; *see* Stipulation, *id.* (Aug. 12, 2021), D.E. 45.

Filing a Complaint Results in Settled Relief Providing a Voting Location on an Indian Reservation

Blackfeet Nation v. Stapleton (Dana L. Christensen, D. Mont. 4:20-cv-95)

On the Friday night before a Columbus Day weekend, an American Indian tribe filed a federal complaint alleging that it was improper for a county not to provide a voting location on its reservation. The case was assigned to a judge on Tuesday, who set the case for hearing about a week later, but the case settled on Wednesday.

Topics: Poll locations; early voting; absentee ballots; Covid-19.

At 7:20 p.m. on Friday, October 9, 2020, an American Indian tribe filed a federal complaint in the District of Montana against election officials for Montana and its Pondera County seeking relief from "Defendants' refusal, despite timely requests, to establish a site that provides in-person voter registration, in-person early voting, and Election Day voting (hereinafter 'satellite office') on the Blackfeet Indian Reservation."[5503] Among the alleged challenges for reservation voters during the global Covid-19 infectious pandemic were the need to travel scores of miles to vote in person and the difficulty voting by mail from home for want of residential mail delivery.[5504]

Receiving the case on Tuesday, after the Columbus Day holiday weekend, Judge Dana L. Christensen set the case for hearing on October 22.[5505] On Wednesday, the tribe filed a notice of voluntary dismissal, attaching a settlement agreement specifying that the county would provide a voting location on the reservation.[5506] Judge Christensen dismissed the action on the following day.[5507]

5503. Complaint at 2, Blackfeet Nation v. Stapleton, No. 4:20-cv-95 (D. Mont. Oct. 9, 2020), D.E. 1 [hereinafter *Blackfeet Nation* Complaint]; Hearing Order at 1, *id.* (Oct. 14, 2020), D.E. 8 [hereinafter *Blackfeet Nation* Hearing Order].

5504. *Blackfeet Nation* Complaint, *supra* note 5503, at 2–3.

5505. *Blackfeet Nation* Hearing Order, *supra* note 5503, at 2 (mentioning a strategic advantage created by the defendants' not yet appearing in the case).

5506. Voluntary Dismissal, *Blackfeet Nation*, No. 4:20-cv-95 (D. Mont. Oct. 14, 2020), D.E. 9.

5507. Order, *id.* (Oct. 15, 2020), D.E. 10.

Number of Absentee-Ballot Drop-Off Locations Per County in Texas

Texas LULAC v. Abbott (1:20-cv-1006), Straty v. Abbott (1:20-cv-1015), and Texas State Conference of NAACP Branches v. Abbott (1:20-cv-1024) (Robert Pitman, W.D. Tex.)

> Because of the global infectious Covid-19 pandemic in 2020, Texas's governor expanded the time period when voters could drop off absentee ballots. A subsequent order limited the number of drop-off locations to one per county. A district judge issued a preliminary injunction against the second order, but the court of appeals viewed it as part of the first order and therefore part of an expansion of voting opportunities.
>
> *Topics:* Absentee ballots; early voting; Covid-19; poll locations.

> On March 13, 2020, President Trump declared a national state of emergency in the face of the outbreak of Covid-19 in the United States. That same day, Governor Abbott declared a state of disaster in Texas. In April 2020, Governor Abbott issued a stay-at-home order and postponed local elections scheduled for May until November to avoid further spread of the disease. . . .
>
> . . .
>
> Because voting in person risks exposing voters to Covid-19, many more voters who qualify to vote absentee have chosen, or will choose, to cast an absentee ballot in the November election. However, widespread delays in the [postal service] have left voters "increasingly concerned" that their mailed ballots will not reach election officials in time to be counted.[5508]

Three organizations and two voters filed a federal complaint in the Western District of Texas against election officials for Texas and four of its counties on Thursday, October 1, 2020, alleging that the governor's limiting the number of absentee-ballot drop-off locations to one per county would cause many voters to be unable to cast timely absentee ballots.[5509]

5508. Tex. LULAC v. Abbott, 493 F. Supp. 3d 548, 561 (W.D. Tex. 2020) (citations omitted).

5509. Complaint, Tex. LULAC v. Abbott, No. 1:20-cv-1006 (W.D. Tex. Oct. 1, 2020), D.E. 1; *see Tex. LULAC*, 493 F. Supp. 3d at 560 ("On October 1, 2020, after voting had already begun, Governor Abbott changed the rules and . . . ordered county election officials to offer their absentee voters no more than one ballot return center per county."); *see also* James Barragán, *Suit Targets Drop-Off Change*, Dallas Morning News, Oct. 3, 2020, at B1; Taylor Goldenstein, *Suit Fights Order on Ballot Dropoff*, Houston Chron., Oct. 3, 2020, at A1.

On the following day, the plaintiffs filed a motion for a temporary restraining order or a preliminary injunction.[5510] On Monday, the plaintiffs filed an amended complaint[5511] and another motion for a temporary restraining order and a preliminary injunction.[5512]

Judge Robert Pitman set the case for a videoconference hearing on October 8.[5513] An amended order on October 7 included a second case in the hearing.[5514]

An October 2 complaint filed in the Western District by two organizations and a voter against Texas's governor and its secretary of state also challenged the order forbidding counties from providing voters with more than one location to return absentee ballots.[5515] On October 5, these plaintiffs also filed a motion for a temporary restraining order and a preliminary injunction.[5516] Following a telephonic conference that day,[5517] Judge Pitman consolidated the two cases on October 7.[5518]

On October 9, he issued a preliminary injunction against the prohibition against more than one drop-off location per county.[5519]

Another case was pending before Judge Pitman: an October 6 complaint filed in the Western District by the NAACP against Texas's governor and its secretary of state challenging the limit of one absentee-ballot drop-off location per county.[5520] On the following day, the plaintiffs filed a

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5510. Motion, *Tex. LULAC*, No. 1:20-cv-1006 (W.D. Tex. Oct. 2, 2020), D.E. 5.

5511. Amended Complaint, *id.* (Oct. 5, 2020), D.E. 16.

5512. Amended Motion, *id.* (Oct. 5, 2020), D.E. 20; Motion, *id.* (Oct. 5, 2020), D.E. 15.

5513. Order, *id.* (Oct. 5, 2020), D.E. 23; *see* Transcript, *id.* (Oct. 8, 2020, filed Oct. 12, 2020), D.E. 64.

5514. Order, *id.* (Oct. 7, 2020), D.E. 32.

5515. Complaint, Straty v. Abbott, No. 1:20-cv-1015 (W.D. Tex. Oct. 2, 2020), D.E. 1.

5516. Motion, *id.* (Oct. 5, 2020), D.E. 9.

5517. Docket Sheet, *id.* (Oct. 1, 2020) (D.E. 20).

5518. Order, *id.* (Oct. 6, 2020), D.E. 21; Tex. LULAC v. Abbott, 493 F. Supp. 3d 548, 557–58 (W.D. Tex. 2020).

5519. *Tex. LULAC*, 493 F. Supp. 3d at 584–85; *see* James Barragán, *Judge Blocks Abbott on Mail-Ballot Sites*, Dallas Morning News, Oct. 10, 2020, at A1; Taylor Goldenstein, *County Can Reopen 11 Ballot Drop Sites*, Houston Chron., Oct. 10, 2020, at A3; Brent Kendall & Alexa Corse, *Voting-Rule Disputes Bring Flurry of Rulings*, Wall St. J., Oct. 12, 2020, at A3.

5520. Complaint, Tex. State Conference of NAACP Branches v. Abbott, No. 1:20-cv-1024 (W.D. Tex. Oct. 6, 2020), D.E. 1 (noting in the caption that the case was related to the other two cases before Judge Pitman).

motion for a temporary restraining order and a preliminary injunction.[5521] Judge Pitman set the case for a telephonic conference on October 15.[5522]

The court of appeals issued an administrative stay of Judge Pitman's injunction on Saturday, October 10,[5523] and stayed the injunction pending appeal two days after that—on Columbus Day.[5524] The appellate court viewed the restriction of one location per county as part of the governor's expansion of when absentee ballots could be delivered: "Properly understood, . . . the October proclamation is part of an *expansion* of absentee voting in Texas, not a *restriction* of it."[5525]

Judge Pitman accepted the NAACP's voluntary dismissal of its case on October 16.[5526]

On February 22, 2021, the court of appeals vacated Judge Pitman's injunction and ordered the cases before him dismissed as moot.[5527]

Denied Complaint for Electronic Overseas Voting During a Global Pandemic

Harley v. Kosinski (Brian M. Cogan, E.D.N.Y. 1:20-cv-4664)

> An action against election officials in seven states sought electronic voting for overseas voters during the global Covid-19 infectious pandemic. The district judge denied the plaintiffs immediate relief, and the plaintiffs dismissed their case.
>
> *Topics:* Covid-19; Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA); absentee ballots; class action.

A September 30, 2020, complaint against election officials in seven states filed in the Eastern District of New York alleged that the states were not doing enough to ensure enfranchisement of overseas voters during the global Covid-19 infectious pandemic.[5528] The ten plaintiffs, "individually, and on behalf of all others similarly situated," sought electronic acceptance

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5521. Motion, *id.* (Oct. 7, 2020), D.E. 6.

5522. Order, *id.* (Oct. 14, 2020), D.E. 16.

5523. Order, Tex. LULAC v. Hughs, No. 20-50867 (5th Cir. Oct. 10, 2020), D.E. 19; *see* Kendall & Corse, *supra* note 5519.

5524. Tex. LULAC v. Hughs, 978 F.3d 136 (5th Cir. 2020).

5525. *Id.* at 140.

5526. Order, *Tex. State Conference of NAACP Branches*, No. 1:20-cv-1024 (W.D. Tex. Oct. 16, 2020), D.E. 23; *see* Notice, *id.* (Oct. 16, 2020), D.E. 22.

5527. Order, *Tex. LULAC*, No. 20-50867 (5th Cir. Feb. 22, 2021), D.E. 146.

5528. Complaint, Harley v. Kosinski, No. 1:20-cv-4664 (E.D.N.Y. Sept. 30, 2020), D.E. 1 [hereinafter *Harley* Complaint]. *See generally* Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. §§ 20301–20311; Robert Timothy Reagan, Overseas Voting: The Uniformed and Overseas Citizens Absentee Voting Act (Federal Judicial Center 2016).

of overseas ballots.[5529] They alleged, "At present there is simply no mail service in many countries, while mail is extraordinarily slow returning from others."[5530] The plaintiffs alleged the district a proper venue because "election officials in each State at issue here send thousands of ballots through John F. Kennedy International Airport ('JFK') to voters abroad, and thousands of ballots return through JFK."[5531]

Judge Brian M. Cogan set the case for oral argument by videoconference on October 13, adopting the plaintiffs' suggested deadline of October 5 for a preliminary-injunction motion and posting contact information for the proceeding on the public docket.[5532] Judge Cogan also ordered the plaintiffs to show cause why they should not bring separate cases against election officials in each state.[5533] The plaintiffs responded on October 2, "While the laws of seven different States are technically at issue, those laws all produce a single result: voters abroad cannot return a ballot except through physical mail—and amid the pandemic, that often means they cannot return a ballot at all."[5534]

An in-person hearing was out of the question.[5535] Many of the attorneys would have had to self-quarantine when they arrived in New York, because of the pandemic.[5536] Judge Cogan found video hearings preferable to audio-only proceedings when arguments were likely to be pointed, so the judge could read the attorneys' facial expressions and the attorneys could read the judge's.[5537] Members of the public could listen in, and everyone was reminded not to record the hearing.[5538]

5529. *Harley* Complaint, *supra* note 5528, at 1, 28.

5530. *Id.* at 2.

5531. *Id.* at 4.

5532. Docket Sheet, *Harley*, No. 1:20-cv-4664 (E.D.N.Y. Sept. 30, 2020) [hereinafter *Harley* Docket Sheet]; *see* Preliminary-Injunction Motion, *id.* (Oct. 5, 2020), D.E. 13; Letter Motion, *id.* (Oct. 1, 2020), D.E. 8.

Tim Reagan interviewed Judge Cogan for this report by telephone on October 30, 2020.

5533. *Harley* Docket Sheet, *supra* note 5532.

5534. Letter, *Harley*, No. 1:20-cv-4664 (E.D.N.Y. Oct. 2, 2020), D.E. 12.

5535. Interview with Judge Brian M. Cogan, Oct. 30, 2020.

5536. *Id.*

5537. *Id.*

5538. *Id.*

> I also want to mention that under the rules of this court, it is strictly forbidden to make any recording of this argument. That goes for the people who are participating as lawyers for the parties. It also goes for the public who may be listening in on this. There are severe consequences for video or audio recording of this proceeding. If you want a copy of the

Election officials for Kentucky and Georgia election officials argued that Kentucky's absentee ballots' possibly passing through JFK was speculative and incidental.[5539] Ohio's secretary of state and Wisconsin's election commissioners argued lack of personal jurisdiction as they were not the ones who sent out absentee ballots even if the ballots did pass through JFK.[5540] Texas's secretary of state argued that even if she did send absentee ballots through JFK, that would be insufficient contact with New York for personal jurisdiction.[5541] Pennsylvania's election officials referred the court to Wisconsin's personal-jurisdiction argument.[5542] New York's election officials argued that the two plaintiffs who were New York voters did not have standing to bring the suit because they received their absentee ballots.[5543]

At the hearing, following a pause, Judge Cogan denied the plaintiffs immediate relief.[5544] Allegations that the ballots traveled through the New York airport were both speculative and insufficient to provide the court with personal jurisdiction over the out-of-state defendants.[5545] Claims that overseas New York voters' ballots would not be counted also were speculative.[5546]

The plaintiffs voluntarily dismissed their action.[5547]

> transcript, that's certainly something that can be purchased by you so don't hesitate to contact the court.

Transcript at 6, *Harley*, No. 1:20-cv-4664 (E.D.N.Y. Oct. 13, 2020, filed Apr. 9, 2021), D.E. 55 [hereinafter *Harley* Transcript] (remarks by Judge Cogan).

5539. Georgia Brief at 10–11, *Harley*, No. 1:20-cv-4664 (E.D.N.Y. Oct. 9, 2020), D.E. 47; Kentucky Brief at 4–5, *id.* (Oct. 9, 2020), D.E. 36.

5540. Wisconsin Brief at 8, *id.* (Oct. 9, 2020), D.E. 37; Ohio Brief at 1, *id.* (Oct. 9, 2020), D.E. 31.

5541. Texas Brief at 2–3, *id.* (Oct. 9, 2020), D.E. 32.

5542. Pennsylvania Brief at 5, *id.* (Oct. 9, 2020), D.E. 48.

5543. New York Brief at 2, *id.* (Oct. 9, 2020), D.E. 38.

5544. *Harley* Transcript, *supra* note 5538, at 36–49.

At the hearing, the plaintiffs' attorney asked the court reporter to identify the attorney in the transcript with the honorific "Mx." *Id.* at 3.

5545. *Id.* at 38–42.

5546. *Id.* at 44.

5547. *Harley* Docket Sheet, *supra* note 5532.

No Federal Injunction Against Extension of Absentee-Ballot Receipt Deadline in North Carolina

Moore v. Circosta (4:20-cv-182 and 5:20-cv-507) (James C. Dever III) and Wise v. North Carolina State Board of Elections (Richard E. Myers II and James C. Dever III, 5:20-cv-505) (E.D.N.C.) and Moore v. Circosta (1:20-cv-911) and Wise v. North Carolina State Board of Elections (1:20-cv-912) (William L. Osteen, Jr., M.D.N.C.)

> Two federal actions filed in the Eastern District of North Carolina challenged modifications to election rules that accommodated a state-court settlement and the dangers of a global infectious Covid-19 pandemic. A district judge granted a temporary restraining order and transferred the cases to the Middle District where related litigation was pending. The Middle District judge denied the plaintiffs additional relief, and the Eastern District order expired. The court of appeals and the Supreme Court denied the plaintiffs injunctive relief.
>
> *Topics:* Absentee ballots; Covid-19; equal protection; matters for state courts; case assignment; intervention.

Federal litigation that began in the Eastern District of North Carolina was transferred to the Middle District as related to litigation pending there. An Eastern District judge issued a temporary restraining order against modifications to election procedures accommodating the global infectious Covid-19 pandemic. The order expired, and the Middle District judge declined additional immediate relief, as did the court of appeals and the Supreme Court.

Judge Dever's First Case

Senior members of the two chambers of North Carolina's legislature and three voters filed a federal complaint in the Eastern District of North Carolina on Saturday, September 26, 2020, against officials of North Carolina's board of elections alleging that policies established by the board for 2020 congressional elections usurped the legislature's authority.[5548] With their complaint, the plaintiffs filed a motion for a temporary restraining order.[5549]

Judge James C. Dever III set the case for a video status conference on Monday.[5550] That same day, the court transferred the case from the dis-

5548. Complaint, Moore v. Circosta, No. 4:20-cv-182 (E.D.N.C. Sept. 26, 2020), D.E. 1; Moore v. Circosta, 494 F. Supp. 3d 289, 298, 304 (M.D.N.C. 2020).

5549. Temporary-Restraining-Order Motion, *Moore*, No. 4:20-cv-182 (E.D.N.C. Sept. 26, 2020), D.E. 8.

5550. Order, *id.* (Sept. 28, 2020), D.E. 17; Transcript, Moore v. Circosta, No. 5:20-cv-

trict's Eastern Division to its Western Division, retaining the same judge but giving the case a new case number.[5551]

Judge Dever, however, denied a defense request to transfer the case to the Middle District, where a pending case sought modifications to North Carolina's plans for the November general election to accommodate the global infectious Covid-19 pandemic.[5552] Judge William L. Osteen, Jr., gave the plaintiffs in that case preliminary injunctive relief on August 4.[5553]

Judge Dever's Second Case

On September 28, the defendants in Judge Dever's case filed a notice that the case was related to another case filed in the Eastern District on September 26 against North Carolina election officials,[5554] "an action to vindicate properly enacted election laws and procedures against an improper and ultra vires backroom deal publicly announced earlier this week."[5555] With their complaint, the plaintiffs in that case filed a motion for a temporary restraining order.[5556]

On September 28, Judge Richard E. Myers II ordered a response within two days to a defense motion to transfer the case to the Middle District.[5557] On September 29, the court transferred the case to Judge Dever.[5558]

Temporary Restraining Order

Judge Dever heard the cases together on October 2.[5559] He issued a temporary restraining order against state election officials on October 3, enjoin-

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507 (E.D.N.C. Sept. 28, 2020, filed Oct. 11, 2020), D.E. 49.

5551. Order, *Moore*, No. 4:20-cv-182 (E.D.N.C. Sept. 28, 2020), D.E. 18; *see* Docket Sheet, *Moore*, No. 5:20-cv-507 (E.D.N.C. Sept. 26, 2020).

5552. Opinion, *Moore*, No. 5:20-cv-507 (E.D.N.C. Sept. 30, 2020), D.E. 26, 2020 WL 6591307; *see* Motion, *Moore*, No. 4:20-cv-182 (E.D.N.C. Sept. 28, 2020), D.E. 14; Second Amended Complaint, Democracy N.C. v. N.C. State Bd. of Elections, No. 1:20-cv-457 (M.D.N.C. June 18, 2020), D.E. 30; Amended Complaint, *id.* (June 5, 2020), D.E. 8; Complaint, *id.* (May 22, 2020), D.E. 1.

5553. Democracy N.C. v. N.C. State Bd. of Elections, 476 F. Supp. 3d 158 (M.D.N.C. 2020); Democracy N.C. v. N.C. State Bd. of Elections, 590 F. Supp. 3d 850, 863 n.3 (M.D.N.C. 2022).

5554. Notice of Related Case, *Moore*, No. 4:20-cv-182 (E.D.N.C. Sept. 28, 2020), D.E. 16.

5555. Complaint at 2, Wise v. N.C. State Bd. of Elections, No. 5:20-cv-505 (E.D.N.C. Sept. 26, 2020), D.E. 1; Moore v. Circosta, 494 F. Supp. 3d 289, 304 (M.D.N.C. 2020); *see* Notice of Related Case, *Wise*, No. 5:20-cv-505 (E.D.N.C. Sept. 28, 2020), D.E. 8.

5556. Temporary-Restraining-Order Motion, *Wise*, No. 5:20-cv-505 (E.D.N.C. Sept. 26, 2020), D.E. 3.

5557. Order, *id.* (Sept. 28, 2020), D.E. 11; *see* Motion, *id.* (Sept. 28, 2020), D.E. 6.

5558. Docket Sheet, *id.* (Sept. 26, 2020).

5559. Transcript, *id.* (Oct. 2, 2020, filed Oct. 3, 2020), D.E. 26.

ing them from Covid-inspired changes to absentee-voting procedures after absentee voting had begun.[5560] He also agreed to transfer the cases to Judge Osteen.[5561]

Judge Osteen

On October 5, Judge Osteen held a telephonic conference and ordered briefing in the two cases completed by the following afternoon.[5562] On October 8, Judge Osteen heard oral arguments[5563] and granted motions to intervene as defendants to the North Carolina Alliance for Retired Americans and seven persons.[5564] But on October 13, Judge Osteen denied motions to intervene by organizations and persons whose "interests in upholding North Carolina's voting laws will be adequately represented by Defendants."[5565]

Judge Osteen denied the plaintiffs preliminary injunctive relief on October 14; although the complaints had merit, the balance of equities weighed heavily against a preliminary injunction.[5566]

> [T]his court finds Plaintiffs have established a likelihood of success on their Equal Protection challenges with respect to the State Board of Elections' procedures for curing ballots without a witness signature and for the deadline extension for receipt of ballots. . . . [B]ut injunctive relief should be denied at this late date, even in the face of what appear to be clear violations.[5567]

5560. Opinion, Moore v. Circosta, No. 5:20-cv-507 (E.D.N.C. Oct. 3, 2020), D.E. 47 [hereinafter E.D.N.C. *Wise* Temporary-Restraining-Order Opinion], 2020 WL 5880129; Wise v. Circosta, 978 F.3d 93, 97 (4th Cir. 2020); *Moore*, 494 F. Supp. 3d at 304; *see Judge Halts New N.C. Absentee Witness Rule*, Winston-Salem J., Oct. 4, 2020, at A12.

5561. E.D.N.C. *Wise* Temporary-Restraining-Order Opinion, *supra* note 5560, at 16–19; *Wise*, 978 F.3d at 97 n.4; *Moore*, 494 F. Supp. 3d at 304; *see* Docket Sheet, Wise v. N.C. State Bd. of Elections, No. 1:20-cv-912 (M.D.N.C. Oct. 5, 2020); Docket Sheet, Moore v. Circosta, No. 1:20-cv-911 (M.D.N.C. Oct. 5, 2020).

5562. Order, *Moore*, No. 1:20-cv-911 (M.D.N.C. Oct. 5, 2020), D.E. 51; *Moore*, 494 F. Supp. 3d at 304–05.

5563. Transcript, *Moore*, No. 1:20-cv-911 (M.D.N.C. Oct. 8, 2020, filed Oct. 12, 2020), D.E. 70; *Moore*, 494 F. Supp. 3d at 305.

5564. Opinion, *Moore*, No. 1:20-cv-911 (M.D.N.C. Oct. 8, 2020), D.E. 67, 2020 WL 6597291; *Moore*, 494 F. Supp. 3d at 298, 304; *see* Motion, *Wise*, No. 5:20-cv-505 (E.D.N.C. Oct. 2, 2020), D.E. 21; Motion, *Moore*, No. 5:20-cv-507 (E.D.N.C. Sept. 30, 2020), D.E. 27.

5565. Opinion at 7, *Moore*, No. 1:20-cv-911 (M.D.N.C. Oct. 13, 2020), D.E. 72, 2020 WL 6165353; *see* Motion, *id.* (Oct. 5, 2020), D.E. 38; Motion, *Moore*, No. 5:20-cv-507 (E.D.N.C. Oct. 1, 2020), D.E. 35.

5566. *Moore*, 494 F. Supp. 3d 289.

5567. *Id.* at 297–98.

On October 15, Judge Osteen decided that pending appeal, Judge Dever's temporary restraining order would remain in effect until the end of the following day, and Judge Osteen's October 14 decision would be stayed until then.[5568]

The court of appeals decided on October 19 to hear motions to enjoin Judge Osteen's decision en banc.[5569] On the following day, the court denied the plaintiffs an injunction by a vote of twelve to three:[5570]

> Our prudent decision today declines to enjoin the North Carolina State Board of Elections's extension of its deadline for the receipt of absentee ballots for the ongoing general election.
>
> . . . *All ballots must still be mailed on or before Election Day.* The change is simply an extension from three to nine days after Election Day for a timely ballot to be received and counted. That is all.
>
> . . .
>
> . . . *[E]veryone* must cast their ballot on or before Election Day, and the ballot will be counted for *everyone* as long as it is received within nine days after Election Day. . . .
>
> . . .
>
> . . . The extension simply makes it easier for more people to vote absentee in the middle of a global pandemic that has killed over 200,000 Americans. How this implicates the Equal Protection Clause—a key provision of the Reconstruction Amendments that protects individuals' right to *equal protection* under the law—is beyond our understanding.[5571]

The Supreme Court denied injunctive relief on October 28.[5572]

The plaintiffs voluntarily dismissed their district-court cases on January 7, 2021.[5573]

5568. Order, *Moore*, No. 1:20-cv-911 (M.D.N.C. Oct. 15, 2020), D.E. 78.

5569. Order, Wise v. Circosta, No. 20-2104 (4th Cir. Oct. 19, 2020), D.E. 17.

5570. Wise v. Circosta, 978 F.3d 93 (4th Cir. 2020); *see* Ann E. Marimow, *North Carolina's Mail-In Ballot Deadline Extension Upheld in Federal Court*, Wash. Post, Oct. 22, 2020, at A13.

5571. *Wise*, 978 F.3d at 96, 100.

5572. Wise v. Circosta, 592 U.S. ___, 141 S. Ct. 46 (2020); *see* Robert Barnes, *Democrats Gain Two Supreme Court Victories on Ballot Deadline Extensions*, Wash. Post, Oct. 29, 2020, at A9; Jess Bravin & Brent Kendall, *Court Won't Block Ballots in North Carolina, Pennsylvania*, Wall St. J., Oct. 29, 2020, at A6; Adam Liptak, *Supreme Court Lets 2 Key States Extend Deadlines on Mail Ballots*, N.Y. Times, Oct. 29, 2020, at A1; Mark Sherman & Jonathan Drew, *Supreme Court Leaves N.C. Absentee Ballot Deadline as Is*, Winston-Salem J., Oct. 29, 2020, at A5.

5573. Notice, Wise v. N.C. State Bd. of Elections, No. 1:20-cv-912 (M.D.N.C. Jan. 7, 2021), D.E. 73; Notice, *Moore*, No. 1:20-cv-911 (M.D.N.C. Jan. 7, 2021), D.E. 90.

Whether Absentee Ballots in Minnesota Mailed by Election Day but Received Later Should be Counted

Carson v. Simon (Nancy E. Brasel, D. Minn. 0:20-cv-2030)

> To accommodate increased voting by mail and poorer than normal mail service because of a global infectious pandemic, a consent decree in state court allowed for the counting of ballots received up to a week after election day if postmarked by election day. A federal complaint filed seven weeks later challenged the state-court consent decree. The district judge found that the plaintiffs did not have standing to bring the case. The court of appeals, five days before election day, disagreed and moreover decided that the plaintiffs were entitled to relief.
>
> *Topics:* Absentee ballots; Covid-19; interlocutory appeal; intervention; matters for state courts.

Two prospective presidential electors in the November 3, 2020, general election filed a federal complaint in the District of Minnesota on September 22, 2020, against Minnesota's secretary of state, challenging a state-court consent decree accommodating increased voting by mail at a time of poor postal service and social distancing—made necessary by a global Covid-19 infectious pandemic—and allowing the counting of absentee ballots received up to a week after election day if postmarked by election day.[5574] Two days later, the plaintiffs filed a motion for a preliminary injunction.[5575]

Judge Nancy E. Brasel set the case for a videoconference hearing on October 2, posting contact information on the docket sheet.[5576] On September 28, Judge Brasel granted an unopposed motion by state-court plaintiffs to intervene.[5577]

5574. Complaint, Carson v. Simon, No. 0:20-cv-2030 (D. Minn. Sept. 22, 2020), D.E. 1; Carson v. Simon, 494 F. Supp. 3d 589, 596–97, 600 (D. Minn. 2020); *see* Jessie Van Berkel, *GOP Sues Over Ballot-Acceptance Date*, Minneapolis Star Trib., Sept. 24, 2020, at 1B; *see also* Jessie Van Berkel, *Absentee Voting Deals Get GOP Critics*, Minneapolis Star Trib., June 18, 2020, at 1B.

5575. Preliminary-Injunction Motion, *Carson*, No. 0:20-cv-2030 (D. Minn. Sept. 24, 2020), D.E. 12.

5576. Docket Sheet, *id.* (Sept. 22, 2020) (D.E. 19); *see* Transcript, *id.* (Oct. 2, 2020, filed Oct. 6, 2020), D.E. 48; Minutes, *id.* (Oct. 2, 2020), D.E. 45; Notice, *id.* (Sept. 25, 2020), D.E. 18.

5577. Order, *id.* (Sept. 28, 2020), D.E. 33; *see* Intervention Brief, *id.* (Sept. 25, 2020), D.E. 22; Intervention Motion, *id.* (Sept. 25, 2020), D.E. 20.

Judge Brasel denied immediate relief on Sunday, October 11.[5578] Noting that the federal case was filed seven weeks after entry of the consent decree, Judge Brasel concluded that because the plaintiffs' claims of vote dilution from counting too many ballots were speculative and not specific to them, they lacked standing to bring the suit.[5579]

On October 29, however, the court of appeals determined, by a vote of two to one, that as candidates the plaintiffs did have standing to ensure accurate vote tallies.[5580] Although Judge Brasel did not reach the merits of the claims, the court of appeals decided that the case presented a purely legal question, and it decided that the secretary had no power to override the legislature by consenting to the decree.[5581] The court of appeals acknowledged that a change in election rules only five days before the election, while absentee ballots were being mailed, was disfavored, but it was necessary in this case to protect the constitutional role of Minnesota's legislature.[5582]

Judge Brasel therefore issued an order drafted by the court of appeals requiring election officials to segregate absentee ballots received after election day, so that a determination about whether they would be counted could be made later.[5583]

On November 5, two days after the election, Judge Brasel denied an election-day motion by the intervening state-court plaintiffs to certify to Minnesota's supreme court a question of whether the federal-court plaintiffs were in privity with state-court parties bound by agreements supporting the consent decree.[5584]

Judge Brasel issued a stipulated dismissal of the case on December 9.[5585]

5578. *Carson*, 494 F. Supp. 3d 589 (amending an opinion filed on October 11, one day earlier); *see* Opinion, *Carson*, No. 0:20-cv-2030 (D. Minn. Oct. 16, 2020), D.E. 71, 2020 WL 6117687 (denying an injunction pending appeal); *see also* Stephen Montemayor, *Ballot Counting Deadline Upheld*, Minneapolis Star Trib., Oct. 13, 2020, at 1B.

5579. *Carson*, 494 F. Supp. 3d 589.

5580. Carson v. Simon, 978 F.3d 1051, 1058 (8th Cir. 2020); *see* Stephen Montemayor, *Court Puts Late Ballots on Hold*, Minneapolis Star Trib., Oct. 30, 2020, at 1A.

5581. *Carson*, 978 F.3d at 1059–60.

5582. *Id.* at 1062.

5583. Order, *Carson*, No. 0:20-cv-2030 (D. Minn. Oct. 30, 2020), D.E. 72; *Carson*, 978 F.3d at 1062–63.

5584. Order, *Carson*, No. 0:20-cv-2030 (D. Minn. Nov. 5, 2020), D.E. 86; Certification Motion Brief, *id.* (Nov. 3, 2020), D.E. 80.

5585. Order, *id.* (Dec. 9, 2020), D.E. 89; *see* Stipulation, *id.* (Dec. 9, 2020), D.E. 88.

Different Rules for Excuse-Based Absentee Voting and Pandemic-Related Mail Voting

Organization for Black Struggle v. Ashcroft (Brian C. Wimes, W.D. Mo. 2:20-cv-4184)

> A district judge determined that it was not proper to require voters who were voting by mail because of social distancing made necessary by an infectious pandemic to mail in their ballots while allowing voters voting absentee because of another excuse to hand-deliver their ballots. The judge did not enjoin rejection of mailed-in ballots with errors even without notice and opportunities to cure the errors. The court of appeals stayed the district judge's injunction, finding reasonable a decision not to expand opportunities for hand-delivering ballots before election day during a pandemic.
>
> *Topics:* Early voting; absentee ballots; equal protection; Covid-19; interlocutory appeal; class action.

At a time when opportunities to vote by mail in Missouri were expanded because of social distancing made necessary by the global Covid-19 infectious pandemic, five organizations filed a federal complaint on Thursday, September 17, 2020, in the Western District of Missouri against state and county election officials challenging (1) electronic acceptance of excuse-based absentee-ballot requests but not pandemic-related mail-ballot requests, (2) rejection of ballots for immaterial technicalities, and (3) lack of mandatory opportunities to cure technical defects.[5586] With their complaint, the plaintiffs filed a motion to certify a class of 116 local election authorities.[5587] Two days later, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction.[5588]

On Monday, Judge Brian C. Wimes set the case for a telephonic status conference on the following Thursday, providing contact information to counsel by email.[5589]

Judge Wimes granted the plaintiffs some relief on October 9.[5590]

5586. Complaint, Org. for Black Struggle v. Ashcroft, No. 2:20-cv-4184 (W.D. Mo. Sept. 17, 2020), D.E. 1; Org. for Black Struggle v. Ashcroft, 493 F. Supp. 3d 790, 795 (W.D. Mo. 2020); *see* Kurt Erikson, *With Early Voting Underway, Missouri Facing a Trio of Lawsuits Over Mail-In Ballots*, St. Louis Post-Dispatch, Sept. 24, 2020, at A6.

5587. Class-Certification Motion, *Org. for Black Struggle*, No. 2:20-cv-4184 (W.D. Mo. Sept. 17, 2020), D.E. 5.

5588. Injunction Motion, *id.* (Sept. 19, 2020), D.E. 23; *see* Org. for Black Struggle v. Ashcroft, 978 F.3d 603, 605 (8th Cir. 2020).

5589. Docket Sheet, *Org. for Black Struggle*, No. 2:20-cv-4184 (W.D. Mo. Sept. 17, 2020) [hereinafter W.D. Mo. *Org. for Black Struggle* Docket Sheet] (D.E. 26).

> The Court recognizes Plaintiffs' argument is somewhat counter-intuitive. Plaintiffs are seeking the opportunity for remote voters, who were hoping to avoid exposure to the coronavirus by voting remotely, to go to the polling places those voters were trying to avoid. However, allowing all remote voters to deliver his or her completed ballot in person to the [local election authority (LEA)] provides for all remote voters, and not just those eligible to vote absentee, to avoid the potential risk of coronavirus that they might otherwise not be able to avoid at their polling place on election day.
>
> In sum, considered alone, requiring a remote voter to put a ballot in a mailbox does not sound like a particularly arduous or severe burden. However, Defendants have presented no reasonable justification for different treatment of remote voters. On this basis, because the right to vote is at issue and the risk is total disenfranchisement even if the voter does everything right, and because the Defendants already have a scheme in place to accommodate remote ballots, the Court finds Plaintiffs likely to succeed on the merits of Count I as it relates to the manner in which remote ballots can be returned to the election authority.[5591]

But Judge Wimes denied relief from requirements that mailed ballots be submitted without errors, because voters do not have a constitutionally protected right to vote by mail.[5592]

Because of the nearness of the November 3 election, he required Missouri's election officials to accept remote ballots in person but not remote-ballot applications.[5593]

He stayed his injunction pending appellate review,[5594] and the court of appeals stayed the injunction on October 23 by a vote of two to one.[5595] The majority concluded that it was reasonable for the state to grant expanded opportunities to vote by mail while limiting personal contact be-

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5590. *Org. for Black Struggle*, 493 F. Supp. 3d 790; *see* Kurt Erickson, *Federal Court Orders Change to Mail-In Voting While Missouri's High Court Affirms Law*, St. Louis Post-Dispatch, Oct. 10, 2020, at A1.

5591. *Org. for Black Struggle*, 493 F. Supp. 3d at 801–02.

5592. *Id.* at 802–05.

5593. *Id.* at 805–06.

5594. W.D. Mo. *Org. for Black Struggle* Docket Sheet, *supra* note 5589 (D.E. 68); *see Federal Judge Delays Order on Missouri's Mail-In Ballots While Ashcroft Appeals*, St. Louis Post-Dispatch, Oct. 11, 2020, at A2.

5595. Org. for Black Struggle v. Ashcroft, 978 F.3d 603 (8th Cir. 2020); *see* Kurt Erickson, *Missouri Voters Must Return Mail-In Ballots Via the Postal Service Under New Court Ruling*, St. Louis Post-Dispatch, Oct. 23, 2020, at A6.

tween voters and election officials.[5596] The court of appeals granted a joint motion to dismiss the appeal a month after the election.[5597]

On March 9, 2021, Judge Wimes dismissed an amended complaint in large part because the election was over.[5598]

Enjoining Misleading Postal Information About Absentee Ballots in Colorado

Colorado v. DeJoy (William J. Martínez, D. Colo. 1:20-cv-2768)

A federal district judge enjoined misleading mailings by the postal service about voting by mail in Colorado during a global infectious pandemic.

Topics: Absentee ballots; Covid-19; early voting.

Colorado and its secretary of state filed a federal complaint in the District of Colorado on Saturday, September 12, 2020, against the U.S. Postal Service and three senior officials alleging that a notice that the postal service intended to send to Colorado voters included false statements about voting in Colorado.[5599] With their complaint, the plaintiffs filed a motion for a temporary restraining order.[5600]

When the clerk's office informed them about the case, Judge William J. Martínez and the law clerk assigned to the case were engaged in weekend family activities.[5601] The judge and the law clerk dropped what they were

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5596. *Org. for Black Struggle*, 978 F.3d at 608.

5597. Judgment, Org. for Black Struggle v. Ashcroft, No. 20-3121 (8th Cir. Dec. 4, 2020).

5598. Judgment, Org. for Black Struggle v. Ashcroft, No. 2:20-cv-4184 (W.D. Mo. Sept. 28, 2021), D.E. 121; Opinion, *id.* (Sept. 28, 2021), D.E. 120; W.D. Mo. *Org. for Black Struggle* Docket Sheet, *supra* note 5589 (noting permission to join a dismissal motion by Greene County's clerk granted to St. Charles County and St. Louis County election officials, D.E. 116); Opinion, *Org. for Black Struggle*, No. 2:20-cv-4184 (W.D. Mo. Mar. 12, 2021), D.E. 113 (allowing Jackson County election officials to join the Greene County motion); Opinion, *id.* (Mar. 9, 2021), D.E. 112, 2021 WL 1318011 (granting a dismissal motion by Missouri's secretary of state); *see* Amended Complaint, *id.* (Dec. 9, 2020), D.E. 84.

5599. Complaint, Colorado v. DeJoy, No. 1:20-cv-2768 (D. Colo. Sept. 12, 2020), D.E. 1; Colorado v. DeJoy, 487 F. Supp. 3d 1061, 1063 (D. Colo. 2020); *see* Luke Broadwater & Kenneth P. Vogel, *Colorado Official Sues Postal Service, Saying Election Mailer Misleads Voters*, N.Y. Times, Sept. 13, 2020, at A22.

5600. Temporary-Restraining-Order Motion, *Colorado v. DeJoy*, No. 1:20-cv-2768 (D. Colo. Sept. 12, 2020), D.E. 8; *Colorado v. DeJoy*, 487 F. Supp. 3d at 1064.

5601. Interview with Judge William J. Martínez, Oct. 27, 2020.

Tim Reagan interviewed Judge Martínez for this report by telephone.

doing and met at the courthouse.[5602] Because apparently false notices were being sent out as he was working on the case, Judge Martínez concluded that relief could not wait until Monday.[5603] In nearly ten years on the bench, this was approximately the second time that Judge Martínez had issued a temporary restraining order without a hearing.[5604]

Judge Martínez granted the plaintiffs relief on the day that the complaint was filed, concluding that the notice provided patently false information jeopardizing Colorado's constitutional right to manage its election.[5605]

> The Notice provides false or misleading information about the manner of Colorado's elections by stating that voters should request their mail-in ballot (often called absentee ballot) at least 15 days before Election Day and mail their ballot at least 7 days before Election Day. In reality, [because ballots will be mailed to all registered voters,] Colorado voters do not need to request a ballot at any time. Voters who receive a ballot do not need to mail the ballot back at least 7 days before the election; they may alternatively deposit that ballot at a drop-box or may choose to vote in person up to and including on election day.[5606]

Judge Martínez set the temporary restraining order to expire at the end of the day on September 22, and he set the case for hearing on September 18.[5607] "Given that Plaintiffs also request an injunction in their prayer for relief in their Complaint, the Court will construe the Motion as seeking both a temporary restraining order and a preliminary injunction."[5608]

On Sunday, September 13, the defendants moved for immediate reconsideration:

5602. *Id.*

5603. *Id.*

5604. *Id.*; *see* Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges (noting that Judge Martínez received his commission on December 21, 2010).

5605. *Colorado v. DeJoy*, 487 F. Supp. 3d at 1064–65; *see* Sam Tabachnik, *Federal Judge Blocks USPS from Sending Mailers with Misleading Information*, Denver Post, Sept. 13, 2020, at 2B.

5606. *Colorado v. DeJoy*, 487 F. Supp. 3d at 1064 (citations, quotation marks, and quotation-alteration marks omitted).

"[N]ine states and the District of Columbia are mailing absentee ballots to every registered voter, making it unnecessary for the voters to request one. In nine other states, election officials are mailing an absentee ballot request to every registered voter." Broadwater & Vogel, *supra* note 5599.

5607. *Colorado v. DeJoy*, 487 F. Supp. 3d at 1067–68.

5608. *Id.* at 1064.

> [T]he Postal Service, upon learning of Plaintiffs' lawsuit, ceased its processing of the Colorado-bound postcards that had not yet been dispatched for delivery, but a particular set of over 200,000 postcards had already been partially processed for delivery. As to that set of postcards, the [temporary restraining order] will be extraordinarily difficult and perhaps impossible for Defendants to fully comply with at this juncture.[5609]

Concluding that the plaintiffs objected to the defendants' notice as early as September 10 and "[i]n the face of all this, Defendants steadfastly held to their previously-planned course of conduct and continued to mail the Notice to Colorado households," Judge Martínez denied the defendants reconsideration on Monday, September 14.[5610]

On the day before the scheduled hearing, the parties submitted a settlement agreement, which specified that Colorado and the postal service would cooperate on messaging about voting to Colorado voters.[5611]

A September 15 docket-sheet order specified that the hearing would be held in Judge Martínez's courtroom, which would be closed to the public because of social distancing made necessary by the global Covid-19 infectious pandemic.[5612] A telephone number was provided for the public to have audio access to the hearing.[5613]

Following a twenty-five-minute discussion of the settlement agreement, the case was terminated on the plaintiffs' voluntary dismissal.[5614]

Unsuccessful Vote-Dilution Challenge to Automatic Mailing of Absentee Ballots in Vermont

Martel v. Condos (Geoffrey W. Crawford, D. Vt. 5:20-cv-131)

> A district judge dismissed a federal complaint alleging that mailing absentee ballots to all registered voters created an unconstitutional risk of vote dilution arising from ballots cast by ineligible voters. The judge found the concern to be a general grievance that did not afford the five plaintiffs standing to pursue the claims.
>
> *Topics:* Absentee ballots; Covid-19.

5609. Reconsideration Motion, Colorado v. DeJoy, No. 1:20-cv-2768 (D. Colo. Sept. 13, 2020), D.E. 12.

5610. Opinion, *id.* (Sept. 14, 2020), D.E. 21, 2020 WL 5513567; *see* Shelly Bradbury, *Majority of Flyers Already Delivered*, Denver Post, Sept. 15, 2020, at 1A.

5611. Settlement Agreement, *Colorado*, No. 1:20-cv-2768 (D. Colo. Sept. 17, 2020), D.E. 30-1.

5612. Docket Sheet, *id.* (Sept. 12, 2020) (D.E. 22).

5613. *Id.*

5614. *Id.* (D.E. 32); Minutes, *id.* (Sept. 18, 2020), D.E. 31.

Five voters filed a federal complaint in the District of Vermont on September 4, 2020, against Vermont's secretary of state complaining that an intention to mail absentee ballots to all registered voters in Vermont in light of social distancing made necessary by the global Covid-19 infectious pandemic was unconstitutional; it would "dilute the votes cast by honest citizens" because "many castable ballots will inevitably fall in the hands of persons other than the voter to whom the mail-in ballot was directed."[5615] With their complaint, the voters filed a motion for a preliminary injunction and expedited hearing.[5616]

On September 10, Judge Geoffrey W. Crawford set the case for a videoconference hearing on September 15.[5617] On September 16, Judge Crawford dismissed the action.[5618]

> Plaintiffs' case begins and ends with the issue of standing. . . . Cases in which plaintiffs assert generalized grievances of unlawful governmental action are commonly dismissed on standing grounds. . . .
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> . . .
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> . . . If every voter suffers the same incremental dilution of the franchise caused by some third-party's fraudulent vote, then these voters have experienced a generalized injury."[5619]

No Constitutional Right to Distribute Absentee-Ballot Applications

Lichtenstein v. Hargett (Eli Richardson and Aleta A. Trauger, M.D. Tenn. 3:20-cv-736)

> A time-sensitive federal complaint challenged Tennessee's proscription on the distribution of absentee-ballot applications by persons other than election officials, noting the importance of absentee voting during a global infectious pandemic. The district court denied immediate relief.
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> *Topics:* Absentee ballots; Covid-19; case assignment; signature matching.

5615. Complaint at 3, 8, Martel v. Condos, No. 5:20-cv-131 (D. Vt. Sept. 4, 2020), D.E. 1; Martel v. Condos, 487 F. Supp. 3d 247, 248 (D. Vt. 2020).

5616. Motion, *Martel*, No. 5:20-cv-131 (D. Vt. Sept. 4, 2020), D.E. 2.

5617. Notice, *id.* (Sept. 10, 2020), D.E. 6; *see Martel*, 487 F. Supp. 3d at 248; Minutes, *Martel*, No. 5:20-cv-131 (D. Vt. Sept. 16, 2020), D.E. 15; *see also* Elizabeth Murray, *Vermont Sets Date to Mail Ballots to Voters*, Burlington Free Press, Sept. 16, 2020, at A7.

5618. *Martel*, 487 F. Supp. 3d 247.

5619. *Id.* at 251, 253 (quotation marks omitted).

Middle District of Tennessee Judge Eli Richardson determined that plaintiffs did not have a clear constitutional right to distribute absentee-ballot applications in Tennessee.

The Emergency Case

At a time of widespread interest in absentee voting because of social distancing made necessary by the global Covid-19 infectious pandemic, five organizations and one person filed a federal complaint in the Middle District of Tennessee on Friday, August 28, 2020, against Tennessee and Shelby County election officials challenging legal proscriptions on persons other than election officials providing voters with absentee-ballot applications.[5620] The plaintiffs filed a motion for a preliminary injunction on Monday.[5621] With that motion, the plaintiffs filed a motion to expedite briefing by ten days so that a reply brief would be due on September 11, noting that "the window for applying for an absentee ballot for the November election opened on August 5, 2020. Only 57 days remain before the October 27, 2020 deadline to submit applications to vote absentee."[5622]

On the following day, Judge Aleta A. Trauger agreed to the proposed briefing schedule.[5623] On the day after that, Judge Trauger reassigned the case to Judge Richardson as related to a May 1 complaint pending before him.[5624] Judge Richardson set the case for a telephonic status conference on September 11, inviting members of the public to use the public-record contact information for the conference.[5625]

The Earlier Case

In addition to relaxation of the proscription on providing voters with absentee-ballot applications, the May 1 complaint—brought by two voters and the five organizations who became plaintiffs in the August 28 case—sought expansion of eligibility to vote absentee and opportunities to cure

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5620. Complaint, Lichtenstein v. Hargett, No. 3:20-cv-736 (M.D. Tenn. Aug. 28, 2020), D.E. 1; Lichtenstein v. Hargett, ___ F. Supp. 3d ___, ___, 2021 WL 5826246 (M.D. Tenn. 2021) (pp.1–3 of opinion filed at M.D. Tenn. No. 3:20-cv-736, D.E. 56); *see* Mariah Timms, *Lawsuit Challenges Felony Charge for Sharing Absentee Voter Application*, Columbia Daily Herald, Sept. 6, 2020, at A3.

5621. Preliminary-Injunction Motion, *Lichtenstein*, No. 3:20-cv-736 (M.D. Tenn. Aug. 31, 2020), D.E. 11; *Lichtenstein*, ___ F. Supp. 3d at ___, 2021 WL 5826246 (p.3 of opinion filed at M.D. Tenn. No. 3:20-cv-736, D.E. 56).

5622. Motion to Expedite Briefing, *Lichtenstein*, No. 3:20-cv-736 (M.D. Tenn. Aug. 31, 2020), D.E. 13.

5623. Order, *id.* (Sept. 1, 2020), D.E. 15.

5624. Order, *id.* (Sept. 2, 2020), D.E. 18.

5625. Order, *id.* (Sept. 10, 2020), D.E. 26.

apparent mismatches between signatures accompanying absentee ballots and signatures on record.[5626] The case was assigned to Judge Richardson after recusal by Judge Waverly D. Crenshaw, Jr.[5627]

Judge Richardson decided on July 21 that it was too late to provide relief for an August 6 primary election but not too late for the November 3 general election.[5628] On August 11, he focused the litigation further by observing, "Plaintiffs plainly are confused to an extent about the difference between an application and a request for an application."[5629]

The court of appeals described signature verification for absentee voters:

> [The] training consists of a video prepared by the Election Division of the Oregon Secretary of State, which is supplemented by directives from the Division of Elections for the Tennessee Office of the Secretary of State. Among other things, the Division of Elections directs officials to apply a presumption in favor of the validity of the signature. The training video instructs officials that "all but the most obvious of inconsistent signatures are to be regarded as acceptable." Election officials must compare the questionable signature "with as many exemplars on file as possible." A signature should not be rejected unless three officials, including the county election administrator, determine that it is inconsistent with the signature on file.[5630]

On August 28, Judge Richardson concluded that inaccurate judgments about whether absentee voters' signatures matched signatures on file did not implicate due-process concerns because the right to vote is not a liber-

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5626. Complaint, Memphis A. Phillip Randolph Inst. v. Hargett, No. 3:20-cv-374 (M.D. Tenn. May 1, 2020), D.E. 1; Memphis A. Philip Randolph Inst. v. Hargett, 2 F.4th 548, 553 (6th Cir. 2021); Memphis A. Philip Randolph Inst. v. Hargett, 977 F.3d 566, 567 (6th Cir. 2020); Memphis A. Phillip Randolph Inst. v. Hargett, 485 F. Supp. 3d 959, 967 (M.D. Tenn. 2020); Memphis A. Phillip Randolph Inst. v. Hargett, 482 F. Supp. 3d 673, 678 (M.D. Tenn. 2020); Memphis A. Phillip Randolph Inst. v. Hargett, 478 F. Supp. 3d 699, 701–02 (M.D. Tenn. 2020); Memphis A. Phillip Randolph Inst. v. Hargett, 473 F. Supp. 3d 789, 790–91 (M.D. Tenn. 2020); Lichtenstein v. Hargett, 489 F. Supp. 3d 742, 748 (M.D. Tenn. 2020); *see* Preliminary-Injunction Motion, *Memphis A. Phillip Randolph Inst.*, No. 3:20-cv-374 (M.D. Tenn. June 12, 2020), D.E. 40; Amended Complaint, *id.* (June 12, 2020), D.E. 39; *see also* Adam Tamburin, *Groups Sue to Expand Absentee Voting Amid Covid-19 Pandemic*, Nashville Tennessean, May 5, 2020, at A2.

5627. Order, *Memphis A. Phillip Randolph Inst.*, No. 3:20-cv-374 (M.D. Tenn. May 5, 2020), D.E. 19.

5628. *Memphis A. Phillip Randolph Inst.*, 473 F. Supp. 3d 789.

5629. *Memphis A. Phillip Randolph Inst.*, 478 F. Supp. 3d 699.

5630. Memphis A. Philip Randolph Inst. v. Hargett, 978 F.3d 378, 384 (6th Cir. 2020).

ty interest.[5631] But Judge Richardson did grant plaintiffs relief on September 9 from a requirement that voters who register by mail or online vote in person the first time they vote after registering.[5632] The court of appeals declined to stay this injunction because the defendants did not seek a stay until a month later.[5633]

By a vote of two to one, the court of appeals agreed on October 15 that the plaintiffs should be denied relief from Tennessee's signature-matching procedures.[5634] "The parties are . . . in general agreement as to the number of ballots that have been reported rejected for inconsistent signatures in the 2016 and 2018 national elections—around 0.03% and 0.09% respectively . . . ."[5635] As such, "the plaintiffs have clearly not demonstrated that they face an actual, concrete, particularized, and imminent threat of harm."[5636] So the injunction denial was affirmed for lack of standing.[5637]

In 2021, by the same vote of two to one, the court of appeals vacated the preliminary injunction that Judge Richardson did grant, the one that allowed first-time voters to vote by mail.[5638] Writing for the court, Judge Julia Smith Gibbons concluded that the need for the injunction had passed because the Covid-19 pandemic was a once-in-a-century crisis.[5639] Judge Chad A. Readler concluded as well that the enjoined requirement easily passed constitutional muster.[5640] Judge Karen Nelson Moore would have affirmed the injunction.[5641]

5631. *Memphis A. Phillip Randolph Inst.*, 482 F. Supp. 3d at 678.

5632. Memphis A. Phillip Randolph Inst. v. Hargett, 485 F. Supp. 3d 959 (M.D. Tenn. 2020); Memphis A. Philip Randolph Inst. v. Hargett, 2 F.4th 548, 554 (6th Cir. 2021); Memphis A. Philip Randolph Inst. v. Hargett, 977 F.3d 566, 567–68 (6th Cir. 2020); *see* Opinion, *Memphis A. Phillip Randolph Inst.*, No. 3:20-cv-374 (M.D. Tenn. Sept. 28, 2020), D.E. 103 (denying reconsideration).

5633. *Memphis A. Philip Randolph Inst.*, 977 F.3d 566; *Memphis A. Philip Randolph Inst.*, 2 F.4th at 554.

5634. *Memphis A. Philip Randolph Inst.*, 978 F.3d 378.

5635. *Id.* at 384.

5636. *Id.* at 387.

5637. *Id.* at 385–89.

5638. *Memphis A. Philip Randolph Inst.*, 2 F.4th 548.

5639. *Id.* at 560.

5640. *Id.* at 561 (Judge Readler, concurring).

5641. *Id.* at 564 (Judge Moore, dissenting: "Haphazardly wielding the law and the facts, today's majority misapplies our mootness jurisprudence and vacates a lawful preliminary injunction.").

Because the preliminary injunction remained in effect until the 2021 decision by the court of appeals, the plaintiffs were entitled to $99,222.13 in attorney fees.[5642]

Relief Denied in the Emergency Case

In the August 28, 2020, case, Judge Richardson denied the plaintiffs immediate relief on September 23, 2020.[5643] They did not have a constitutional right to distribute absentee-ballot applications.[5644] Judge Richardson dismissed the complaint on December 7, 2021.[5645]

By a vote of two to one, the court of appeals affirmed the dismissal, deciding that distributing a government form is conduct and not speech.[5646]

Whether Counties Could Establish More Than One Absentee-Ballot Drop Box

A. Philip Randolph Institute of Ohio v. LaRose (Dan Aaron Polster, N.D. Ohio 1:20-cv-1908)

> Because of social distancing made necessary by a global infectious pandemic, absentee voting was expected to be high. Because of the postal service's recent reputation for poor service, many voters wanted to hand-deliver their absentee ballots. Ohio's secretary of state allowed county election officials to establish one drop box per county, regardless of each county's geographic or population size. A federal district judge issued an injunction allowing county election officials to set up more drop boxes, but the court of appeals stayed the injunction.

5642. Opinion, Memphis A. Phillip Randolph Inst. v. Hargett, No. 3:20-cv-374 (M.D. Tenn. Feb. 25, 2022), D.E. 169, 2022 WL 576554, *adopting* Report and Recommendation, *id.* (Jan. 10, 2022), D.E. 166, 2022 WL 95236, *aff'd*, Opinion, No. 22-5207 (6th Cir. Jan. 26, 2023) ("Because the defendants failed to raise their only argument on appeal in their objections to the magistrate judge's report, they have forfeited that argument for our consideration now.").

5643. Lichtenstein v. Hargett, 489 F. Supp. 3d 742; Lichtenstein v. Hargett, ___ F. Supp. 3d ___, ___, 2021 WL 5826246 (M.D. Tenn. 2021) (p.4 of opinion filed at M.D. Tenn. No. 3:20-cv-736, D.E. 56); *see* Mariah Timms, *Federal Judge Denies Push to Block Tennessee Ballot Law*, Memphis Com. Appeal, Sept. 27, 2020, at A7.

5644. *Lichtenstein*, 489 F. Supp. 3d 742.

5645. *Lichtenstein*, ___ F. Supp. 3d ___, 2021 WL 5826246 (opinion filed at M.D. Tenn. No. 3:20-cv-736, D.E. 56).

5646. Lichtenstein v. Hargett, 83 F.4th 575 (6th Cir. 2023); *see id.* at 612 (Circuit Judge Helene White, dissenting: "I conclude that Tennessee's law restricts core political speech").

Topics: Early voting; absentee ballots; Covid-19; equal protection; matters for state courts; interlocutory appeal; intervention.

A Wednesday, August 26, 2020, federal complaint filed in the Northern District of Ohio challenged a decision by Ohio's secretary of state to allow only one drop box per county for absentee-ballot applications and absentee ballots at a time of widespread absentee voting because of social distancing made necessary by the global Covid-19 infectious pandemic and uncertainty about whether the postal service could handle the volume.[5647]

Judge Dan Aaron Polster set the case for a telephone conference on Monday.[5648] On the following Friday, the plaintiffs filed a motion for a preliminary injunction[5649] and a motion to expedite briefing, with the reply brief due on September 15.[5650] Judge Polster set the case for another telephone conference on Tuesday, September 8.[5651]

On September 9, Judge Polster set the case for an injunction hearing on September 23, consolidating consideration of a preliminary injunction and a permanent injunction because of the urgency of a final decision and making the reply brief due on September 21.[5652] He held an additional telephone conference in the interim.[5653]

On September 15, he granted a September 10 motion to intervene as defendants by the Republican Party and its presidential nominee.[5654]

5647. Complaint, A. Philip Randolph Inst. of Ohio v. LaRose, No. 1:20-cv-1908 (N.D. Ohio Aug. 26, 2020), D.E. 1; A. Philip Randolph Inst. of Ohio v. LaRose, 493 F. Supp. 3d 596, 600 (N.D. Ohio 2020).

5648. Docket Sheet, *A. Philip Randolph Inst. of Ohio*, No. 1:20-cv-1908 (N.D. Ohio Aug. 26, 2020) [hereinafter *A. Philip Randolph Inst. of Ohio* Docket Sheet] (notice, Aug. 31, 2020); *see* Transcript, *id.* (Aug. 31, 2020, filed Sept. 4, 2020), D.E. 12.

5649. Preliminary-Injunction Motion, *id.* (Sept. 4, 2020), D.E. 13.

5650. Motion to Expedite Briefing, *id.* (Sept. 4, 2020), D.E. 14.

5651. *A. Philip Randolph Inst. of Ohio* Docket Sheet, *supra* note 5648 (notice, Sept. 8, 2020); *see* Transcript, *A. Philip Randolph Inst. of Ohio*, No. 1:20-cv-1908 (N.D. Ohio Sept. 8, 2020, filed Sept. 15, 2020), D.E. 29.

5652. *A. Philip Randolph Inst. of Ohio* Docket Sheet, *supra* note 5648 (minute order, Sept. 9, 2020).

5653. Transcript, *A. Philip Randolph Inst. of Ohio*, No. 1:20-cv-1908 (N.D. Ohio Sept. 17, 2020, filed Sept. 21, 2020), D.E. 42; *A. Philip Randolph Inst. of Ohio* Docket Sheet, *supra* note 5648 (minutes, Sept. 21, 2020).

5654. Opinion, *A. Philip Randolph Inst. of Ohio*, No. 1:20-cv-1908 (N.D. Ohio Sept. 15, 2020), D.E. 27, 2020 WL 5524842; Intervention Motion, *id.* (Sept. 10, 2020), D.E. 18; *see* John Caniglia, *Trump Campaign Fights Multiple Drop Boxes*, Cleveland Plain Dealer, Sept. 17, 2020, at A5.

The hearing lasted from 9:20 a.m. to 9:30 p.m. on September 23 and for two additional hours on September 24.[5655] On the next day, Judge Polster decided to hold a ruling in abeyance pending state-court proceedings.[5656]

Because the secretary issued a directive on October 5 that appeared to authorize county boards of elections to receive ballots at locations other than board offices, Judge Polster dismissed the action as moot on October 6.[5657] Persuaded, however, that the secretary had not directed what Judge Polster understood him to have directed, Judge Polster reopened the case and granted the plaintiffs a preliminary injunction two days later.[5658] "The Secretary is enjoined from enforcing that portion of [his directive] that prohibits a county board of elections from installing a secure drop box at a location other than the board of elections office . . . ."[5659]

The court of appeals stayed the injunction on October 9.[5660] First, one drop box per county constituted fair uniformity.[5661] Second, "Ohio offers many ways to vote. Given all of those options—including on-site drop boxes, casting a vote by mail, and voting in-person weeks before election day—the absence of off-site drop boxes does not impose a material harm."[5662]

The parties filed a notice of stipulated dismissal, dissolving the preliminary injunction, on October 23.[5663] Appeals also were voluntarily dismissed.[5664]

5655. Transcripts, *A. Philip Randolph Inst. of Ohio*, No. 1:20-cv-1908 (N.D. Ohio Sept. 23 and 24, 2020, filed Oct. 1, 2020), D.E. 83, 84; Opinion, *id.* (Sept. 25, 2020), D.E. 77 [hereinafter Sept. 25, 2020, *A. Philip Randolph Inst. of Ohio* Opinion], 2020 WL 6600102.

5656. Sept. 25, 2020, *A. Philip Randolph Inst. of Ohio* Opinion, *supra* note 5655; A. Philip Randolph Inst. of Ohio v. LaRose, 493 F. Supp. 3d 596, 600–01 (N.D. Ohio 2020).

5657. *A. Philip Randolph Inst. of Ohio*, 493 F. Supp. 3d at 601–02; *see* Andrew J. Tobias, *Judge Dismisses Drop Box Lawsuit*, Cleveland Plain Dealer, Oct. 7, 2020, at A1.

5658. *A. Philip Randolph Inst. of Ohio*, 493 F. Supp. 3d at 602–16; *see* Jessie Balmert, *Ohio Must Allow Multiple Drop Boxes*, Cincinnati Enquirer, Oct. 11, 2020, at A8; Andrew J. Tobias, *Judge Strikes Down LaRose's Drop Box Limit*, Cleveland Plain Dealer, Oct. 9, 2020, at A1.

5659. *A. Philip Randolph Inst. of Ohio*, 493 F. Supp. 3d at 601–02; *see* Andrew J. Tobias, *Judge Dismisses Drop Box Lawsuit*, Cleveland Plain Dealer, Oct. 7, 2020, at A1.

5659. *A. Philip Randolph Inst. of Ohio*, 493 F. Supp. 3d at 616.

5660. A. Philip Randolph Inst. of Ohio v. LaRose, 831 F. App'x 188 (6th Cir. 2020); *see* Brent Kendall & Alexa Corse, *Voting-Rule Disputes Bring Flurry of Rulings*, Wall St. J., Oct. 12, 2020, at A3.

5661. *A. Philip Randolph Inst. of Ohio*, 831 F. App'x at 192.

5662. *Id.*

5663. Notice, A. Philip Randolph Inst. of Ohio v. LaRose, No. 1:20-cv-1908 (N.D.

Relaxing Rules on Absentee and Early Voting for Senior Citizens in Puerto Rico During an Infectious Pandemic

Ocasio v. Comisión Estatal de Elecciones (Pedro A. Delgado-Hernández, D.P.R. 3:20-cv-1432)

During the global Covid-19 infectious pandemic, two senior voters sought a court order relaxing absentee and early-voting eligibility for senior voters generally. The district judge granted them first a preliminary injunction and then a permanent injunction.

Topics: Early voting; Covid-19.

An August 20, 2020, federal complaint filed in the District of Puerto Rico sought expansion of absentee and early voting for senior citizens over sixty years old in light of social distancing made necessary by the global Covid-19 infectious pandemic.[5665] The plaintiffs—two voters over sixty years old—filed with their complaint a motion for a temporary restraining order and a preliminary injunction.[5666]

On the following day, Judge Pedro A. Delgado-Hernández denied the voters a temporary restraining order, but he ordered the defendants—the Comisión Estatal de Elecciones and its president—to respond to the preliminary-injunction motion within ten days.[5667] Receiving no response when due, Judge Delgado-Hernández ordered on September 1 that the defendants show cause why the court should not grant the plaintiffs relief.[5668] The defendants moved on Friday, September 4, for an extension of time until September 11 to respond to the motion, noting that the defendants' attorney had not received the case—as a result of representation granted

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Ohio Oct. 23, 2020), D.E. 96; *see* John Caniglia, *Voter Groups End Fight for More Drop Boxes*, Cleveland Plain Dealer, Oct. 23, 2020, at A13.

5664. Order, A. Philip Randolph Inst. of Ohio v. LaRose, No. 20-4063 (6th Cir. Oct. 28, 2020), D.E. 36.

5665. Complaint, Ocasio v. Comisión Estatal de Elecciones, No. 3:20-cv-1432 (D.P.R. Aug. 20, 2020), D.E. 1; Ocasio v. Comisión Estatal de Elecciones, 486 F. Supp. 3d 478, 481 (D.P.R. 2020).

5666. Motion, *Ocasio*, No. 3:20-cv-1432 (D.P.R. Aug. 20, 2020), D.E. 2; *Ocasio*, 486 F. Supp. 3d at 481.

5667. Order, *Ocasio*, No. 3:20-cv-1432 (D.P.R. Aug. 21, 2020), D.E. 5; *Ocasio*, 486 F. Supp. 3d at 481.

5668. Docket Sheet, *Ocasio*, No. 3:20-cv-1432 (D.P.R. Aug. 20, 2020) [hereinafter *Ocasio* Docket Sheet] (D.E. 20); *Ocasio*, 486 F. Supp. 3d at 481.

by Puerto Rico's justice department—until September 2.[5669] Judge Delgado-Hernández granted the extension.[5670]

The plaintiffs moved on September 4 for reconsideration of the extension: "without reconsideration, Plaintiffs—and all other eligible senior citizens—will have less than three days to register for *voto adelantado* ('early voting') by the deadline on September 14, 2020."[5671] Judge Delgado-Hernández ordered a response to this motion by noon on Tuesday, September 8.[5672]

On September 8, Judge Delgado-Hernández set the case for a September 9 status conference and ordered that the September 11 response to the injunction motion also include an answer to the complaint.[5673] Following discussion at the September 9 telephone conference, Judge Delgado-Hernández set the case for another conference on the afternoon of September 11.[5674] The parties agreed that an evidentiary hearing was not necessary.[5675]

Judge Delgado-Hernández issued a docket-sheet order on September 11, granting the plaintiffs relief and "extend[ing] until September 24, 2020, the deadline for [senior] voters to apply for early voting. This measure shall be accompanied by an increase in media orientation during this intervening period. A written Opinion and Order will follow in 3 days."[5676] He concluded, "Senior citizens should not be forced to choose between risking their health and perhaps their lives by exposing themselves to COVID-19 or disenfranchisement."[5677]

On September 17, he ordered the parties to inform him by noon on the following day whether the defendants' media campaign complied with his order and to show cause why he should not convert the preliminary in-

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5669. Extension Motion, *Ocasio*, No. 3:20-cv-1432 (D.P.R. Sept. 4, 2020), D.E. 24; *Ocasio*, 486 F. Supp. 3d at 481.

5670. *Ocasio* Docket Sheet, *supra* note 5668 (D.E. 25); *Ocasio*, 486 F. Supp. 3d at 481.

5671. Reconsideration Motion, *Ocasio*, No. 3:20-cv-1432 (D.P.R. Sept. 4, 2020), D.E. 26; *Ocasio*, 486 F. Supp. 3d at 481.

5672. *Ocasio* Docket Sheet, *supra* note 5668 (D.E. 27); *Ocasio*, 486 F. Supp. 3d at 481.

5673. *Ocasio* Docket Sheet, *supra* note 5668 (D.E. 29); *Ocasio*, 486 F. Supp. 3d at 481.

5674. Minutes, *Ocasio*, No. 3:20-cv-1432 (D.P.R. Sept. 9, 2020), D.E. 33; *Ocasio*, 486 F. Supp. 3d at 481.

5675. *Ocasio*, 486 F. Supp. 3d at 482.

5676. *Ocasio* Docket Sheet, *supra* note 5668 (D.E. 38); *see* Minutes, *Ocasio*, No. 3:20-cv-1432 (D.P.R. Sept. 14, 2020), D.E. 41.

5677. *Ocasio*, 486 F. Supp. 3d at 484.

junction to a permanent injunction.[5678] He issued a permanent injunction on September 23.[5679]

A motion for attorney fees remains pending.[5680]

Allegations of Politically Motivated Degradations of Postal Services

Jones v. United States Postal Service (Victor Marrero, S.D.N.Y. 1:20-cv-6516); National Urban League v. DeJoy (George L. Russell III, D. Md. 1:20-cv-2391); Washington v. Trump (Stanley A. Bastian, E.D. Wash. 1:20-cv-3127); Pennsylvania v. DeJoy (Gerald Austin McHugh, E.D. Pa. 2:20-cv-4096); and Richardson v. Trump (1:20-cv-2262), NAACP v. United States Postal Service (1:20-cv-2295), New York v. Trump (1:20-cv-2340), and Vote Forward v. DeJoy (1:20-cv-2405) (Emmet G. Sullivan, D.D.C.)

> Lawsuits filed in five districts alleged that operation changes by the postal service during a global infectious pandemic would interfere with alternatives to risky in-person voting. Four district judges issued preliminary injunctions. The lawsuits were largely resolved following the inauguration of a new presidential administration.
>
> *Topics:* Absentee ballots; early voting; Covid-19; case assignment; enforcing orders; class action.

Federal complaints filed in late August 2020 alleged that recent changes in postal-service policy were seriously degrading mail service and endangering mail-in voting, made necessary by a global infectious pandemic. District judges in four districts issued preliminary injunctions.

Southern District of New York

On Monday, August 17, 2020, fifteen plaintiffs, including candidates and voters, filed a federal class-action complaint in the Southern District of New York against the postal service, the postmaster general, and the President, alleging that "President Donald J. Trump and his newly appointed Postmaster General Louis DeJoy have set about to ensure [the postal service] cannot reliably deliver election mail."[5681] With their complaint, the plaintiffs filed a notice that the case was related to a July 17 case in which

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5678. Order, *Ocasio*, No. 3:20-cv-1432 (D.P.R. Sept. 17, 2020), D.E. 44; *see* Compliance Notice, *id.* (Sept. 18, 2020), D.E. 45.

5679. Order, *id.* (Sept. 23, 2020), D.E. 49.

5680. Reply Brief, *id.* (Dec. 2, 2020), D.E. 56; *see* Motion, *id.* (Nov. 2, 2020), D.E. 51.

5681. Complaint at 2, Jones v. U.S. Postal Serv., No. 1:20-cv-6516 (S.D.N.Y. Aug. 17, 2020), D.E. 1; Jones v. U.S. Postal Serv., 488 F. Supp. 3d 103, 109, 112–13 (S.D.N.Y. 2020); *see* Amended Complaint, *Jones*, No. 1:20-cv-6516 (S.D.N.Y. Sept. 9, 2020), D.E. 36.

Judge Analisa Torres issued an injunction on August 3 concerning postmarks for absentee ballots.[5682] Judge Torres declined assignment of the case, and the court assigned it to Judge Victor Marrero.[5683]

On August 19, the plaintiffs requested a preliminary-injunction hearing on September 3 or soon thereafter.[5684] In the event, Judge Marrero and the parties agreed to a completion of briefing by September 9,[5685] and Judge Marrero set the case for hearing on September 16: "Due to the ongoing COVID-19 pandemic, the hearing will take place by teleconference using [posted contact information]."[5686]

On September 15, Judge Marrero declined to compel the postmaster general to testify at the hearing, because of the availability of his recent congressional testimony.[5687] Finding that the defendants "have not provided trusted assurance and comfort that citizens will be able to cast ballots with full confidence that their votes would be timely collected and counted," Judge Marrero issued a preliminary injunction on September 21.[5688]

> [B]y not later than noon on September 25, 2020 the parties shall settle an Order providing Plaintiffs appropriate relief consistent with this opinion and notify the Court of such settlement. In the event the parties fail to file such notice by that date [a list of twenty-two specific terms designed to improve mail service] shall take effect without further action by this Court . . . .[5689]

5682. Notice, *Jones*, No. 1:20-cv-6516 (S.D.N.Y. Aug. 17, 2020), D.E. 3; Gallagher v. N.Y. State Bd. of Elections, 477 F. Supp. 3d 19, 27 (S.D.N.Y. 2020) (deciding which absentee ballots without postmarks would be counted); *see* Gallagher v. N.Y. State Bd. of Elections, 496 F. Supp. 3d 842, 845 (S.D.N.Y. 2020) (declining to extend the injunction to cover the general election); *see also* "Modifying the Postmark Requirement for Mailed Ballots in New York," *infra* page 772.

5683. Docket Sheet, *Jones*, No. 1:20-cv-6516 (S.D.N.Y. Aug. 17, 2020).

5684. Letter, *id.* (Aug. 19, 2020), D.E. 10.

5685. Endorsed Letter, *id.* (Aug. 25, 2020), D.E. 15; Endorsed Letter, *id.* (Sept. 9, 2020), D.E. 35; *see* Preliminary-Injunction Motion, *id.* (Sept. 2, 2020), D.E. 19.

5686. Order, *id.* (Aug. 9, 2020, filed Aug. 10, 2020), D.E. 37; *see* Transcript, *id.* (Sept. 16, 2020, filed Sept. 22, 2020), D.E. 51.

5687. Order, *id.* (Sept. 15, 2020), D.E. 43, 2020 WL 5525748.

5688. Jones v. U.S. Postal Serv., 488 F. Supp. 3d 103, 109, 112, 141–43 (S.D.N.Y. 2020); *see* Luke Broadwater, *Court Says Mail Votes Get Priority in Delivery*, N.Y. Times, Sept. 22, 2020, at A15; Spencer S. Hsu, *Third Federal Judge Bars Cuts to Postal Service Deliveries Before Election*, Wash. Post, Sept. 28, 2020, at A6.

5689. *Jones*, 488 F. Supp. 3d at 141.

Judge Marrero approved a settled injunction on September 25[5690] and issued orders clarifying obligations respecting overtime pay from September 29 to October 9.[5691]

District of Maryland

One day after the New York complaint was filed, three organizations filed a federal complaint in the District of Maryland, alleging, "Defendants Louis DeJoy (the United States Postmaster General) and the United States Postal Service have made sweeping changes to the Postal Service's policies and procedures with the purpose and intent to sabotage mail-in voting in the upcoming 2020 national elections."[5692]

Eight days later, the plaintiffs filed a motion to conduct limited expedited discovery,[5693] and on the following day, they filed a motion for expedited consideration of that motion.[5694] On the next day, Judge George L. Russell III ordered briefing on the discovery motion to be completed by September 2,[5695] on which day he granted expedited discovery.[5696]

The plaintiffs filed a motion on September 25 for a preliminary injunction.[5697]

Eastern District of Washington

On the same day that the Maryland complaint was filed, fourteen states—Colorado, Connecticut, Illinois, Maryland, Michigan, Minnesota, Nevada, New Mexico, Oregon, Rhode Island, Vermont, Virginia, Washington, and Wisconsin—filed a federal complaint in the Eastern District of Washington against the President, the postmaster general, and the postal service, seeking remedies for alleged degradation of mail service at a time when the states would be relying on it among other accommodations in the operation of elections because of the Covid-19 pandemic.[5698] Three days later,

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5690. Settled Injunction, *Jones*, No. 1:20-cv-6516 (S.D.N.Y. Sept. 25, 2020), D.E. 57.

5691. Opinion, *id.* (Oct. 9, 2020), D.E. 82; Opinion, *id.* (Oct. 8, 2020), D.E. 81, 2020 WL 5983112; Opinion, *id.* (Sept. 29, 2020), D.E. 66, 2020 WL 6554904; *see* Order, *id.* (Sept. 25, 2020), D.E. 56 ("the parties had agreed to all terms of a proposed order with the exception of one, concerning the appropriate relief with respect to overtime").

5692. Complaint at 1, Nat'l Urban League v. DeJoy, No. 1:20-cv-2391 (D. Md. Aug. 18, 2020), D.E. 1.

5693. Motion, *id.* (Aug. 26, 2020), D.E. 22.

5694. Motion, *id.* (Aug. 27, 2020), D.E. 23.

5695. Order, *id.* (Aug. 28, 2020), D.E. 24.

5696. Order, *id.* (Sept. 3, 2020), D.E. 31, 2020 WL 8413573.

5697. Preliminary-Injunction Motion, *id.* (Sept. 25, 2020), D.E. 49.

5698. Complaint, Washington v. Trump, No. 1:20-cv-3127 (E.D. Wash. Aug. 18, 2020), D.E. 1.

the plaintiffs filed a motion for expedited discovery[5699] and a motion to expedite consideration of that motion.[5700]

On August 24, Judge Stanley A. Bastian granted the second motion and set the case for a videoconference hearing on August 27.[5701] Because of the Covid-19 pandemic, the Yakima courthouse was closed to the public; Judge Bastian's order provided a public telephone-access number for the hearing.[5702]

He said that he expected the next hearing to include an in-person option:

> Thank you for joining me this afternoon, and I appreciate the fact that you were willing to do this by video and telephone link. . . .
>
> I think the next hearing we have, I will make arrangements to be in the courtroom. And, of course, anybody who is appearing on that next motion or the next hearing is welcome to be in the courtroom with me, but given the pandemic, I hesitate to require anybody to expose themselves to infection by traveling. So it's completely up to you, and we will make video and telephone attendance possible then as well.[5703]

Judge Bastian granted expedited discovery and set the case for another hearing on September 17.[5704] At that hearing, one day after the hearing before Judge Morrero in New York, attorneys for Washington appeared in person, attorneys for other states appeared by telephone, and the attorney for the government appeared by video.[5705] Judge Bastian also considered amicus briefs[5706] filed by the U.S. House of Representatives,[5707] a group of

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5699. Motion, *id.* (Aug. 21, 2020), D.E. 14.

5700. Motion, *id.* (Aug. 21, 2020), D.E. 16.

5701. Order, *id.* (Aug. 24, 2020), D.E. 23.

5702. *Id.*; E.D. Wash. Gen. Order 20-101-9 (Aug. 21, 2020); *see* Joseph O'Sullivan, *Judge Orders Postal Service to Detail Election-Related Changes*, Seattle Times, Aug. 28, 2020, at A1.

5703. Transcript at 4, *Washington v. Trump*, No. 1:20-cv-3127 (E.D. Wash. Aug. 27, 2020, filed Sept. 4, 2020), D.E. 51.

5704. Order, *id.* (Aug. 27, 2020), D.E. 38, 2020 WL 7220828 ("Plaintiffs indicate they plan on filing a preliminary injunction or seek a writ of mandamus shortly."); Minutes, *id.* (Aug. 27, 2020), D.E. 37; Order, *id.* (Sept. 1, 2020), D.E. 48.

5705. Transcript at 2–3, *id.* (Sept. 17, 2020, filed Sept. 24, 2020), D.E. 85; Minutes, *id.* (Sept. 17, 2020), D.E. 82.

5706. Washington v. Trump, 487 F. Supp. 3d 977, 979 (E.D. Wash. 2020).

5707. Amicus Brief, *Washington v. Trump*, No. 1:20-cv-3127 (E.D. Wash. Sept. 11, 2020), D.E. 57.

local and tribal governments,[5708] and an organization dedicated to reducing gun violence.[5709]

On the day of the hearing, Judge Bastian issued a preliminary injunction.[5710]

> [T]he fact that fourteen States, members of the United States House of Representatives, members of the United States Senate, and various local and tribal governments have asked this Court to intervene to prevent the Postal Service and others from disenfranchising citizens from participating in federal, state, and local elections suggest that the Postal Service's actions are not the result of any legitimate business concerns. . . .
>
> In addition, these parties have demonstrated that the recent changes implemented by [Postmaster General Louis] DeJoy and the Postal Service have the unintended but very serious consequences of interfering with other essential government functions such as collecting fees and taxes, sending pension payments, and enforcing local ordinances, as well as interfering with the provision of critical health care services such as prescription refills, [contact] tracing, sexually-transmitted infection testing and opioid overdose prevention.[5711]

The injunction ordered the postal service to discontinue recent changes in operation that degraded mail service.[5712]

Eastern District of Pennsylvania

Six other states—California, Delaware, Maine, Massachusetts, North Carolina, and Pennsylvania—and the District of Columbia filed their own action against the postmaster general and the postal service in the Eastern District of Pennsylvania on August 21, 2020, alleging "unlawful actions designed to undermine the effective operation of the United States Postal Service . . . and impede the efforts of the Plaintiff States to conduct free and fair elections in the manner Plaintiff States have chosen."[5713] The

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5708. Amicus Brief, *id.* (Sept. 16, 2020), D.E. 63, 78.

5709. Amicus Brief, *id.* (Sept. 11, 2020), D.E. 66.

5710. *Washington v. Trump*, 487 F. Supp. 3d 977; *see* Preliminary-Injunction Motion, *Washington v. Trump*, No. 1:20-cv-3127 (E.D. Wash. Sept. 9, 2020), D.E. 54; *see also* Hsu, *supra* note 5688; Joseph O'Sullivan, *Federal Judge: USPS Must Halt Changes That Slow Mail*, Seattle Times, Sept. 18, 2020, at A5; *Ruling Blocks Postal Changes*, L.A. Times, Sept. 18, 2020, at A1; Elise Viebeck & Jacob Bogage, *Judge Blocks USPS Changes That Could Slow Ballots*, Wash. Post, Sept. 18, 2020, at A1.

5711. *Washington v. Trump*, 487 F. Supp. 3d at 983.

5712. *Id.* at 984–85; *see* Clarification Order, *Washington v. Trump*, No. 1:20-cv-3127 (E.D. Wash. Oct. 2, 2020), D.E. 90, 2020 WL 6588502.

5713. Complaint at 1, Pennsylvania v. DeJoy, No. 2:20-cv-4096 (E.D. Pa. Aug. 21, 2020), D.E. 1; *see* Pennsylvania v. DeJoy, 490 F. Supp. 3d 833, 843–44 (E.D. Pa. 2020).

plaintiffs filed a motion for expedited discovery one week later,[5714] and they filed a motion for a preliminary injunction five days after that.[5715]

Finding that "the litigation in other districts does not address all the issues raised by this case," Judge Gerald Austin McHugh granted expedited discovery on September 4.[5716] On September 11, he set the case for an in-person preliminary-injunction hearing on September 22,[5717] later rescheduling it for September 24.[5718]

Judge McHugh issued a preliminary injunction on September 28, eleven days after Judge Bastian's and three days after Judge Marrero's, essentially adopting Judge Marrero's decision.[5719]

On September 24, the court had reassigned to Judge McHugh as a related case a voter's August 19 class action seeking an order to count absentee ballots received late because of "mail delivery delays or disruptions."[5720] This case was resolved by stipulation on November 25.[5721]

District of Columbia

On the same day that the complaint in New York was filed, four voters filed a federal complaint in the district court for the District of Columbia against the President, the postmaster general, and the postal service for "making false statements about widespread mail-in voter fraud when such fraud is virtually non-existent (Trump) and by significantly slowing down mail delivery of flat mail like absentee and mail-in ballots (Trump and DeJoy)."[5722]

5714. Motion, *Pennsylvania v. DeJoy*, No. 2:20-cv-4096 (E.D. Pa. Aug. 28, 2020), D.E. 14.

5715. Preliminary-Injunction Motion, *id.* (Sept. 2, 2020), D.E. 18.

5716. Order, *id.* (Sept. 4, 2020), D.E. 22; *see* Order, *id.* (Aug. 31, 2020), D.E. 16 (granting expedited consideration of the discovery motion); Motion, *id.* (Aug. 28, 2020), D.E. 15 (unopposed motion for expedited consideration of the motion for expedited discovery).

5717. Order, *id.* (Sept. 11, 2020), D.E. 35; *see* Motion, *id.* (Sept. 2, 2020), D.E. 19 (unopposed motion for expedited consideration of the preliminary-injunction motion).

5718. Order, *id.* (Sept. 21, 2020), D.E. 57; *see* Transcript, *id.* (Sept. 24, 2020, filed Sept. 30, 2020), D.E. 64.

5719. Pennsylvania v. DeJoy, 490 F. Supp. 3d 833, 893 (E.D. Pa. 2020); Order, *Pennsylvania v. DeJoy*, No. 2:20-cv-4096 (E.D. Pa. Sept. 28, 2020), D.E. 63; *see* Order, *id.* (Oct. 9, 2020), D.E. 70, 2020 WL 6580463 (clarifying the injunction); *see also* Erin Cox, *Pa. Federal Judge Joins Chorus of Courts Barring USPS from Delivery Cuts*, Wash. Post, Sept. 29, 2020, at A18; Ellie Rushing, *Postal Changes Blocked*, Phila. Inquirer, Sept. 29, 2020, at B1.

5720. Reassignment Notice, Johnakin v. U.S. Postal Serv., No. 2:20-cv-4055 (E.D. Pa. Sept. 24, 2020), D.E. 13; Complaint at 9, *id.* (Aug. 19, 2020), D.E. 1; *see* Preliminary-Injunction Motion, *id.* (Sept. 18, 2020), D.E. 5.

5721. Order, *id.* (Nov. 25, 2020), D.E. 21; Stipulation, *id.* (Nov. 25, 2020), D.E. 20.

5722. Complaint at 2, Richardson v. Trump, No. 1:20-cv-2262 (D.D.C. Aug. 17, 2020,

On the following day, Judge Emmet G. Sullivan issued an order to show cause why the plaintiffs should not be held in contempt for redacting their addresses from the complaint and for seeking preliminary injunctive relief in the complaint without also seeking such relief by separate motion.[5723] Two days later, the plaintiffs filed an application for a preliminary injunction.[5724] In response to the show-cause order, the plaintiffs stated that they wished to withhold from public disclosure "information that could cause Plaintiffs to suffer physical harm or harassment."[5725] On August 27, 2020, the case's eleventh day, Judge Sullivan granted the plaintiffs limited redaction privileges.[5726] Also on that day, the plaintiffs filed a motion for expedited discovery.[5727]

On September 1, Judge Sullivan directed the parties to show cause why the case should not be consolidated as related to three other cases pending in the district court.[5728]

The first of the other cases was filed on August 20 by the NAACP against the postal service and the postmaster general.[5729] The complaint alleged that "the Postal Service made clear that ballots sent by marketing mail would not be accorded first-class mail treatment, and thus take longer to deliver, even though the Postal Service had previously trained its employees to give first-class treatment to ballots and other election-related materials sent as marketing mail."[5730] The NAACP filed a motion for a preliminary injunction on September 1.[5731]

The second other case was filed by three states—Hawaii, New Jersey, and New York—and two cities—New York and San Francisco—on August 25 against the President, the postmaster general, and the postal service.[5732]

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refiled Aug. 18, 2020), D.E. 4-1; Richardson v. Trump, 496 F. Supp. 3d 165, 171, 176 (D.D.C. 2020).

5723. Docket Sheet, *Richardson*, No. 1:20-cv-2262 (D.D.C. Aug. 17, 2020) [hereinafter *Richardson* Docket Sheet].

5724. Preliminary-Injunction Application, *id.* (Aug. 20, 2020), D.E. 14.

5725. Motion at 2, *id.* (Aug. 20, 2020), D.E. 8.

5726. *Richardson* Docket Sheet, *supra* note 5723.

5727. Motion, *Richardson*, No. 1:20-cv-2262 (D.D.C. Aug. 27, 2020), D.E. 26.

5728. *Richardson* Docket Sheet, *supra* note 5723.

5729. Complaint, NAACP v. U.S. Postal Serv., No. 1:20-cv-2295 (D.D.C. Aug. 20, 2020), D.E. 1.

5730. *Id.* at 3.

5731. Preliminary-Injunction Motion, *id.* (Sept. 1, 2020), D.E. 8.

5732. Complaint, New York v. Trump, No. 1:20-cv-2340 (D.D.C. Aug. 25, 2020), D.E. 1 [hereinafter *New York v. Trump* Complaint]; New York v. Biden, 636 F. Supp. 3d 1, 11 (D.D.C. 2022); New York v. Trump, 490 F. Supp. 3d 225, 231, 235 (D.D.C. 2020); *see* Deanna Paul, *Lawsuit Is Filed to Stop Postal-Service Changes*, Wall St. J., Aug. 26, 2020, at

"[The plaintiffs] all have plans to provide voters with safe alternatives to in-person voting in the middle of the country's unprecedented public health crisis. [Mail d]elays disrupt those plans, forcing voters to risk either disenfranchisement by voting by mail or their health by voting in person."[5733]

Four organizations and a voter filed the third other case on August 28 against the postmaster general and the postal service.[5734]

The defendants[5735] and the plaintiffs in the voter case[5736] and the states-and-cities case[5737] agreed that the four cases could be consolidated, but the NAACP[5738] and the organizations-and-voter plaintiffs[5739] stated that their preliminary-injunction motions should be resolved without consolidation.

The plaintiffs in the states-and-cities case filed a preliminary-injunction motion on September 2.[5740] On September 27, Judge Sullivan issued a preliminary injunction against the postal service's summer policy changes.[5741]

On September 8, the organizations-and-voter plaintiffs filed an amended complaint—with ten additional voters as plaintiffs[5742]—and a motion for a preliminary injunction.[5743] Six days later, they filed a motion

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5733. *New York v. Trump* Complaint, *supra* note 5732, at 3–4.

5734. Complaint, Vote Forward v. DeJoy, No. 1:20-cv-2405 (D.D.C. Aug. 28, 2020), D.E. 1; Vote Forward v. DeJoy, 540 F. Supp. 3d 15, 21 (D.D.C. 2021); Vote Forward v. DeJoy, 490 F. Supp. 3d 110, 117 (D.D.C. 2020).

5735. Response, *New York v. Trump*, No. 1:20-cv-2340 (D.D.C. Sept. 4, 2020), D.E. 17; Response, *NAACP*, No. 1:20-cv-2295 (D.D.C. Sept. 4, 2020), D.E. 13; Response, Richardson v. Trump, No. 1:20-cv-2262 (D.D.C. Sept. 4, 2020), D.E. 42.

5736. Response, *Richardson*, No. 1:20-cv-2262 (D.D.C. Sept. 2, 2020), D.E. 39.

5737. Response, *New York v. Trump*, No. 1:20-cv-2340 (D.D.C. Sept. 4, 2020), D.E. 15.

5738. Response, *NAACP*, No. 1:20-cv-2295 (D.D.C. Sept. 4, 2020), D.E. 11.

5739. Response, *Vote Forward*, No. 1:20-cv-2405 (D.D.C. Sept. 4, 2020), D.E. 11.

5740. Preliminary-Injunction Motion, *New York v. Trump*, No. 1:20-cv-2340 (D.D.C. Sept. 2, 2020), D.E. 12; New York v. Biden, 636 F. Supp. 3d 1, 11 (D.D.C. 2022); New York v. Trump, 490 F. Supp. 3d 225, 235 (D.D.C. 2020).

5741. *New York v. Trump*, 490 F. Supp. 3d 225; Order, *New York v. Trump*, No. 1:20-cv-2340 (D.D.C. Sept. 27, 2020), D.E. 51; *New York v. Biden*, 636 F. Supp. 3d at 11; *see* Opinion, *New York v. Trump*, No. 1:20-cv-2340 (D.D.C. Aug. 23, 2021), D.E. 98, 2021 WL 7908124 (clarification order); Opinion, *id.* (Apr. 3, 2021), D.E. 88, 2021 WL 7908123 (same); Opinion, *id.* (Oct. 22, 2020), D.E. 62, 2020 WL 6572675 (same); *see also* Hsu, *supra* note 5688.

5742. Amended Complaint, *Vote Forward*, No. 1:20-cv-2405 (D.D.C. Sept. 8, 2020), D.E. 15; Vote Forward v. DeJoy, 490 F. Supp. 3d 110, 117 (D.D.C. 2020).

5743. Preliminary-Injunction Motion, *Vote Forward*, No. 1:20-cv-2405 (D.D.C. Sept. 8, 2020), D.E. 16; Vote Forward v. DeJoy, 540 F. Supp. 3d 15, 18 (D.D.C. 2021); *Vote For-*

for expedited discovery.[5744] On September 28, Judge Sullivan granted them a preliminary injunction against changes made to rules governing late and extra trips by mail carriers.[5745]

The plaintiffs in the voter case filed an amended complaint on September 11.[5746] Judge Sullivan issued a preliminary injunction on October 8 against changes made to rules governing late and extra trips by mail carriers and requiring "all overtime necessary to ensure the timely delivery of Election Mail."[5747]

In the NAACP case, Judge Sullivan issued a preliminary injunction on October 10 against recent changes in transportation policies.[5748]

To supervise the injunctions and the cases, Judge Sullivan conducted additional proceedings each day from Tuesday, October 27, through Friday, November 6, including weekend days, and on Monday, November 9, in three cases: the voter case, the NAACP case, and the organizations-and-voter case.[5749]

Judge Russell

On October 29, Judge Russell denied the organizational defendants in his Maryland case a preliminary injunction:

> In light of the evidence proffered by Defendants, and in the absence of any clear explanation from Plaintiffs regarding why the current injunctions imposed on Defendants are insufficient to address the harm caused by decommissioned sorting machines, the Court cannot conclude that it

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ward, 490 F. Supp. 3d at 117.

5744. Motion, *Vote Forward*, No. 1:20-cv-2405 (D.D.C. Sept. 14, 2020), D.E. 20.

5745. *Vote Forward*, 490 F. Supp. 3d 110; Order, *Vote Forward*, No. 1:20-cv-2405 (D.D.C. Sept. 28, 2020), D.E. 31; *Vote Forward*, 540 F. Supp. 3d at 18, 21.

5746. Amended Complaint, Richardson v. Trump, No. 1:02-cv-2262 (D.D.C. Sept. 11, 2020), D.E. 49.

5747. Richardson v. Trump, 496 F. Supp. 3d 165 (D.D.C. 2020); Order, *Richardson*, No. 1:02-cv-2262 (D.D.C. Oct. 8, 2020), D.E. 64.

5748. NAACP v. U.S. Postal Serv., 496 F. Supp. 3d 1 (D.D.C. 2020); Order, NAACP v. U.S. Postal Serv., No. 1:20-cv-2295 (D.D.C. Oct. 10, 2020), D.E. 31.

5749. Transcripts, *Vote Forward*, No. 1:20-2405 (D.D.C. Oct. 28 to Nov. 6 and Nov. 9, 2020, filed Oct. 29 and Dec. 1, 2020), D.E. 44, 130 to 140; Transcript, *Richardson*, No. 1:20-cv-2262 (D.D.C. Oct. 27, 2020, filed Dec. 17, 2020), D.E. 165; Docket Sheet, *Vote Forward*, No. 1:20-cv-2405 (D.D.C. Aug. 28, 2020); Docket Sheet, *NAACP*, No. 1:10-cv-2295 (Aug. 20, 2020); *Richardson* Docket Sheet, *supra* note 5723; *see* Luke Broadwater & Hailey Fuchs, *Mail Votes: Postal Service Finishes Court-Ordered Search*, N.Y. Times, Nov. 5, 2020, at P10; Rebecca Smith, Byron Tau & Rob Barry, *Judge Orders USPS to Search for Ballots*, Wall St. J., Nov. 6, 2020, at A4; Byron Tau, *Judge's USPS Order Isn't Met in Time*, Wall St. J., Nov. 4, 2020, at A6.

> is "indisputably clear" that the absence of additional sorting machines is likely to cause irreparable harm to Plaintiffs.
>
> Finally, to the extent that Plaintiffs truly view any remaining deficiencies in [the postal service's] ability or intent to timely deliver Election Mail as perils to our democracy, they have litigated this case in a manner inconsistent with that concern. Unlike the plaintiffs in every one of the Related Actions, Plaintiffs here waited over five weeks from the time they filed their Complaint to file their Motion for Preliminary Injunction.[5750]

The plaintiffs voluntarily dismissed their action on December 15.[5751]

The New President's Administration

In early 2021, most of the remaining lawsuits were dismissed as settled by the new President's administration.[5752]

On May 18, Judge Sullivan denied the organizations-and-voter plaintiffs a new preliminary injunction in light of postal service improvements,[5753] and the case was voluntarily dismissed six days later.[5754] In the NAACP case, Judge Sullivan clarified the injunction on August 23,[5755] and the parties stipulated settlement on December 17.[5756]

Resolving summary-judgment motions in the states-and-cities case, Judge Sullivan decided on September 30, 2022, that the postal service

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5750. Opinion at 23–24, Nat'l Urban League v. DeJoy, No. 1:20-cv-2391 (D. Md. Oct. 29, 2020), D.E. 76, 2020 WL 6363959.

5751. Notice, *id.* (Dec. 15, 2020), D.E. 83.

5752. Stipulated Dismissal, Pennsylvania v. DeJoy, No. 2:20-cv-4096 (E.D. Pa. May 17, 2022), D.E. 192; Stipulated Dismissal, Jones v. U.S. Postal Serv., No. 1:20-cv-6516 (S.D.N.Y. May 13, 2021), D.E. 124; Order, Washington v. Trump, No. 1:20-cv-3127 (E.D. Wash. Feb. 17, 2021), D.E. 131; Order, NAACP v. U.S. Postal Serv., No. 20-5375 (D.C. Cir. Feb. 10, 2021), 2021 WL 672392 (appeal in the District of Columbia NAACP case); Order, Vote Forward v. DeJoy, No. 20-5353 (D.C. Cir. Feb. 10, 2021), 2021 WL 672395 (appeal in the District of Columbia organizations-and-voters case); Order, Richardson v. Biden, No. 20-5367 (D.C. Cir. Feb. 8, 2021), 2021 WL 672397 (appeal in the District of Columbia voter case); Order, Washington v. Trump, No. 20-36047 (9th Cir. Jan. 26, 2021), D.E. 15 (appeal in the Washington case); Voluntary Dismissal, *Richardson*, No. 1:20-cv-2262 (D.D.C. Jan. 21, 2021), D.E. 174; Order, Pennsylvania v. U.S. Postmaster Gen., No. 20-3419 (3d Cir. Jan. 20, 2021), D.E. 16 (appeal in the Pennsylvania case); *see* Stipulated Order, *Jones*, No. 1:20-cv-6516 (S.D.N.Y. Oct. 31, 2022), D.E. 152 (approving a payment of $79,900 for attorney fees and expenses).

5753. Vote Forward v. DeJoy, 540 F. Supp. 3d 15 (D.D.C. 2021); *see* Second Amended Complaint, *Vote Forward*, No. 1:20-cv-2405 (D.D.C. Mar. 9, 2021), D.E. 173.

5754. Voluntary Dismissal, *Vote Forward*, No. 1:20-cv-2405 (D.D.C. May 24, 2021), D.E. 184.

5755. Opinion, NAACP v. U.S. Postal Serv., No. 1:20-cv-2295 (D.D.C. Aug. 23, 2021), D.E. 163; *see* Amended Complaint, *id.* (Mar. 5, 2021), D.E. 149.

5756. Stipulation, *id.* (Dec. 17, 2021), D.E. 170.

wrongfully implemented policy changes without first seeking an advisory opinion from its postal regulatory commission, but that other claims by the plaintiffs of ultra vires actions were without merit.[5757] Judge Sullivan agreed to delay final judgment to allow for settlement talks.[5758]

Challenging Absentee-Ballot Procedures in Detroit During an Infectious Pandemic

Reed-Pratt v. Winfrey (Robert H. Cleland, E.D. Mich. 3:20-cv-12129) and Davis v. Benson (1:20-cv-915) and Johnson v. Benson (1:20-cv-948) (Paul L. Maloney, W.D. Mich.)

> During the global Covid-19 infectious pandemic, federal actions in Michigan challenged mailing out unsolicited absentee-ballot applications and counting absentee ballots received after election day. Recognizing the complexity of applying state law on the matters during the pandemic, district judges in each of Michigan's two districts stayed federal claims pending a related action in state court. The federal judges denied the plaintiffs immediate relief.
>
> *Topics:* Absentee ballots; Covid-19; matters for state courts; intervention; enforcing orders; primary election.

In the Eastern District

During the global Covid-19 infectious pandemic, a voter who voted in an August 4, 2020, primary election filed a federal complaint on August 9 in the Eastern District of Michigan against Detroit's election officials, alleging that it was illegal for the defendants to send the voter an unsolicited absentee-ballot application in June.[5759] Among the complaint's claims was one for criminal contempt, an allegation that mailing the absentee-ballot applications violated a state-court order.[5760]

Michigan's court of appeals ruled in 2007 that it was not proper for Detroit's election officials to mail out unsolicited absentee-ballot applications: "[I]t is clear that the city clerk has no powers concerning the distribution of ballot applications other than those that are expressly granted in

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5757. New York v. Biden, 636 F. Supp. 3d 1 (D.D.C. 2022); Order, New York v. Biden, No. 1:20-cv-2340 (D.D.C. Sept. 30, 2022), D.E. 106; *see* Order, *id.* (Mar. 6, 2023), D.E. 114, 2023 WL 3311788 (clarifying the injunction).

5758. Docket Sheet, *New York v. Biden*, No. 1:20-cv-2340 (D.D.C. Aug. 25, 2020) (minute order, Nov. 8, 2023); *see* Status Report, *id.* (Sept. 29, 2023), D.E. 123; Order, New York v. Biden, No. 23-5103 (June 8, 2023) (holding a precautionary appeal in abeyance).

5759. Complaint, Reed-Pratt v. Winfrey, No. 3:20-cv-12129 (E.D. Mich. Aug. 9, 2020), D.E. 1.

5760. *Id.* at 13–20.

the statute. And the power to mail unsolicited ballot applications to qualified voters is not expressly stated anywhere in this statute."[5761]

On the day after she filed her complaint, the plaintiff filed a motion for a temporary restraining order or a preliminary injunction against the mailing of unsolicited absentee-ballot applications for the November general election.[5762]

Judge Robert H. Cleland denied the plaintiff a temporary restraining order on August 11 and set the case for an August 19 videoconference hearing, posting contact information in the public record.[5763]

Learning from the defendants' briefing, however, that similar claims were pending in state court, Judge Cleland canceled the August 19 hearing on August 13 and ordered briefing by August 31 on how and whether the federal court should proceed.[5764] In response to a motion for reconsideration and an amended complaint, both filed on Friday, August 14, Judge Cleland decided on August 17 to hold a telephone conference on August 18.[5765] Following the conference, Judge Cleland maintained a briefing deadline of August 31.[5766]

On September 9, Judge Cleland decided to stay the plaintiff's federal claim and dismiss without prejudice the plaintiff's state claims.[5767] Whether Detroit election officials were authorized to mail unsolicited absentee-ballot applications during the global Covid-19 infectious pandemic was an issue that involved complex questions of state law.[5768]

An appeal was dismissed on December 7 for failure to prosecute it.[5769] On January 14, 2021, Judge Cleland ordered the plaintiff to notify the

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5761. Taylor v. Currie, 277 Mich. App. 85, 743 N.W.2d 571, 577 (2007), *review denied*, 483 Mich. 907, 762 N.W.2d 169 (2009); *see also* Taylor v. Currie, 386 F. Supp. 2d 929 (E.D. Mich. 2005) (remand to state court by Judge Robert H. Cleland of the case, which was improperly removed to federal court); Docket Sheet, Taylor v. Currie, No. 2:05-cv-73148 (E.D. Mich. Sept. 2, 2005) (improperly removed case).

5762. Motion, *Reed-Pratt*, No. 3:20-cv-12129 (E.D. Mich. Aug. 10, 2020), D.E. 2.

5763. Order, *id.* (Aug. 11, 2020), D.E. 8, 2020 WL 6580621; Notice, *id.* (Aug. 11, 2020), D.E. 9.

5764. Order, *id.* (Aug. 13, 2020), D.E. 17, 2020 WL 4700830; *see* Defendants' Brief at 5–6, *id.* (Aug. 11, 2020), D.E. 7.

5765. Opinion, *id.* (Aug. 17, 2020), D.E. 22 ("The court will initiate the call."); *see* Amended Complaint, *id.* (Aug. 14, 2020), D.E. 19; Reconsideration Motion, *id.* (Aug. 14, 2020), D.E. 18.

5766. Order, *id.* (Aug. 19, 2020), D.E. 24.

5767. Opinion, *id.* (Sept. 9, 2020), D.E. 29, 2020 WL 5491443.

5768. *Id.*

5769. Order, Reed-Pratt v. Winfrey, No. 20-1876 (6th Cir. Dec. 7, 2020), D.E. 21.

court of her intentions with the case,[5770] and the plaintiff filed a notice on January 17 that she intended to proceed.[5771]

In the Western District

Two voters, including the plaintiff in the pending state-court action, filed a federal complaint against state and Detroit election officials in the Western District of Michigan, which includes the state's capital, on September 17, 2020, challenging the mailing out of unsolicited absentee-voter applications for the upcoming November 3 general election.[5772] The court assigned the case to Judge Paul L. Maloney.[5773]

On the following day, the plaintiffs filed an emergency motion for a summary declaratory judgment against the Detroit election officials,[5774] accompanied by a motion to expedite the summary-judgment motion.[5775]

Michigan's court of appeals had ruled on September 16 that "the authority and discretion afforded the Secretary of State by the constitution and state law permit defendant to send unsolicited absent-voter ballot applications to all Michigan qualified registered voters."[5776] The ruling in 2007 did not apply, because that case involved mailings by a local election official who was also a candidate.[5777] Michigan's supreme court declined to review the appellate decision on December 28.[5778]

Noting that the state appellate decision should preclude the new federal case, the Detroit election officials moved on September 23 to dismiss the case or transfer it to the Eastern District.[5779] The plaintiffs filed an amended complaint six days later, which added a challenge to the counting of absentee ballots received after the closing of the polls,[5780] and the plaintiffs filed a motion for a temporary restraining order or preliminary injunction against Michigan's secretary of state one day after they filed the amended

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5770. Order, *Reed-Pratt*, No. 3:20-cv-12129 (E.D. Mich. Jan. 14, 2021), D.E. 33.

5771. Notice, *id.* (Jan. 17, 2021), D.E. 34; *see* Order, *id.* (Jan. 19, 2021), D.E. 35 (terminating the preliminary-injunction motion as moot and noting that the case remained stayed pending state-court litigation); Notice, *id.* (Sept. 23, 2021), D.E. 36 ("The mailing was made and the election has come and gone, leaving nothing to be enjoined.").

5772. Complaint, Davis v. Benson, No. 1:20-cv-915 (W.D. Mich. Sept. 17, 2020), D.E. 1.

5773. Docket Sheet, *id.* (Sept. 17, 2020).

5774. Motion, *id.* (Sept. 18, 2020), D.E. 5.

5775. Motion, *id.* (Sept. 18, 2020), D.E. 7.

5776. Davis v. Sec'y of State, 333 Mich. App. 588, 605, 963 N.W.2d 653, 662 (2020).

5777. *Id.* at 600–01, 963 N.W.2d at 660.

5778. Davis v. Sec'y of State, 506 Mich. 1040, 951 N.W.2d 911 (2020).

5779. Motion, *Davis*, No. 1:20-cv-915 (W.D. Mich. Sept. 23, 2020), D.E. 18.

5780. Amended Complaint, *id.* (Sept. 29, 2020), D.E. 24.

complaint.[5781] The plaintiffs also renewed their motions for an emergency summary declaratory judgment against Detroit's election officials[5782] and expedited briefing on the summary-judgment motion.[5783]

On Thursday, October 1, Judge Maloney denied the plaintiffs a temporary restraining order and set briefing on the preliminary-injunction motion to conclude on October 16.[5784]

On the previous Tuesday, three voters filed a federal complaint in the Western District to ensure that the secretary of state not allow the counting of absentee ballots received after election day.[5785] On the next day, the plaintiffs filed a motion for a preliminary injunction.[5786] Judge Maloney ordered briefing concluded by October 16.[5787]

Also on October 1, Judge Maloney set both cases for oral argument on October 20.[5788] He later moved oral argument up one day[5789] and allowed intervention as defendants in the second case by a group of two individuals and two organizations.[5790]

On October 2, Judge Maloney denied the motion for expedited briefing in the first case, because the ballots had already been mailed and the election would not moot declaratory judgment.[5791] A week later, he again denied the plaintiffs a temporary restraining order.[5792]

On the day of the hearings, Judge Maloney decided to hold the second case in abeyance pending the secretary's preparation of new guidance to local election officials concerning absentee ballots.[5793] On the next day, he denied in the first case a preliminary injunction on counting absentee ballots.[5794] Toward the end of the month, he dismissed the declaratory-

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5781. Motion, *id.* (Sept. 30, 2020), D.E. 25.

5782. Motion, *id.* (Sept. 30, 2020), D.E. 27.

5783. Motion, *id.* (Sept. 30, 2020), D.E. 29.

5784. Order, *id.* (Oct. 1, 2020), D.E. 33.

5785. Complaint, Johnson v. Benson, No. 1:20-cv-948 (W.D. Mich. Sept. 29, 2020), D.E. 1.

5786. Motion, *id.* (Sept. 30, 2020), D.E. 4.

5787. Order, *id.* (Oct. 1, 2020), D.E. 6.

5788. Order, *id.* (Oct. 1, 2020), D.E. 7.

5789. Order, *id.* (Oct. 6, 2020), D.E. 15; Order, *Davis*, No. 1:20-cv-915 (W.D. Mich. Oct. 6, 2020), D.E. 36; *see* Minutes, *Johnson*, No. 1:20-cv-948 (W.D. Mich. Oct. 19, 2020), D.E. 38; Minutes, *Davis*, No. 1:20-cv-915 (W.D. Mich. Oct. 19, 2020), D.E. 56.

5790. Order, *Johnson*, No. 1:20-cv-948 (W.D. Mich. Oct. 6, 2020), D.E. 13; *see* Motion, *id.* (Oct. 2, 2020), D.E. 9.

5791. Order, *id.* (Oct. 2, 2020), D.E. 35.

5792. Order, *Davis*, No. 1:20-cv-915 (W.D. Mich. Oct. 9, 2020), D.E. 45.

5793. Order, *Johnson*, No. 1:20-cv-948 (W.D. Mich. Oct. 19, 2020), D.E. 37.

5794. Opinion, *Davis*, No. 1:20-cv-915 (W.D. Mich. Oct. 20, 2020), D.E. 59.

judgment claim in the first case.[5795] The parties in the second case stipulated dismissal on November 23.[5796] On September 22 of the following year, Judge Maloney dismissed the first case.[5797]

Final Resolution

The parties in the Eastern District case stipulated an October 5, 2021, dismissal.[5798]

A Consent Decree Waiving the Witness Requirement for Voting by Mail in Rhode Island During an Infectious Pandemic

Common Cause Rhode Island v. Gorbea (Mary S. McElroy, D.R.I. 1:20-cv-318)

> For the June 2020 presidential primary election in Rhode Island, the governor suspended the state's requirement that mail-in ballots be witnessed by a notary or by two other witnesses. A district judge approved a consent decree applying the witness-requirement suspension to elections in Rhode Island in September and November. The court of appeals and the Supreme Court denied a major political party's motion to stay the consent decree.
>
> *Topics:* Absentee ballots; Covid-19; intervention; interlocutory appeal; laches; primary election.

Two organizations and three voters filed a federal complaint in the District of Rhode Island on Thursday, July 23, 2020, seeking court nullification of Rhode Island's requirement that mail-in ballots be witnessed by either a notary or two other witnesses—in light of social distancing made necessary by the global Covid-19 infectious pandemic—for primary elections in September and the general election in November.[5799] The plaintiffs observed that Rhode Island's governor suspended the witness requirement

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5795. Opinion, *id.* (Oct. 30, 2020), D.E. 68.

5796. Stipulated Dismissal, *Johnson*, No. 1:20-cv-948 (W.D. Mich. Nov. 23, 2020), D.E. 48.

5797. Opinion, *Davis*, No. 1:20-cv-915 (W.D. Mich. Sept. 22, 2021), D.E. 83; Opinion, *id.* (Sept. 22, 2021), D.E. 68.

5798. Stipulated Order, Reed-Pratt v. Winfrey, No. 3:20-cv-12129 (E.D. Mich. Oct. 5, 2021), D.E. 37.

5799. Complaint, Common Cause of R.I. v. Gorbea, No. 1:20-cv-318 (D.R.I. July 23, 2020), D.E. 1 [hereinafter *Common Cause of R.I.* Complaint]; *see* Katherine Gregg, *R.I. Voter-Rights Groups Challenge Witness Requirements for Mail Ballots*, Providence J., July 24, 2020, at A2.

for Rhode Island's June presidential primary election.[5800] With their complaint, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction.[5801]

Judge Mary S. McElroy set the case for a videoconference on Friday morning, sending connection information to the attorneys by email.[5802]

> [At the conference,] the parties informed the Court that they would seek to craft a consent decree, due to the defendants' sharing of the plaintiffs' concerns and general agreement with the plaintiffs' request, thus possibly obviating the need to proceed with the plaintiffs' motion for a preliminary injunction. The parties agreed to discuss a consent decree over the weekend and the Court scheduled a hearing on the plaintiffs' motion for Monday, July 27, in the event the negotiations failed.[5803]

At about midnight on Sunday, a major political party moved to intervene in the case as a defendant.[5804] Noting that it understood that the parties would be submitting a consent order to Judge McElroy, the political party requested a fairness hearing.[5805] On Monday, Judge McElroy scheduled a fairness hearing for Tuesday.[5806]

At the Tuesday hearing, Judge McElroy approved a consent judgment suspending the witness requirement for the remaining 2020 elections, and she denied the intervention motion.[5807] Judge McElroy found that "the set-

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5800. *Common Cause of R.I.* Complaint, *supra* note 5799.

5801. Motion, *Common Cause of R.I.*, No. 1:20-cv-318 (D.R.I. July 23, 2020), D.E. 5.

5802. Docket Sheet, *id.* (July 23, 2020) [hereinafter D.R.I. *Common Cause of R.I.* Docket Sheet].

For this report, Tim Reagan interviewed Judge McElroy and her law clerk Kevin Rolando by telephone on September 4, 2020.

5803. Opinion at 6–7, *Common Cause of R.I.*, No. 1:20-cv-318 (D.R.I. July 30, 2020), D.E. 25 [hereinafter D.R.I. *Common Cause of R.I.* Opinion], 2020 WL 4365608; D.R.I. *Common Cause of R.I.* Docket Sheet, *supra* note 5802 (noting that again connection information would be sent to the attorneys by email).

5804. Intervention Motion, *Common Cause of R.I.*, No. 1:20-cv-318 (D.R.I. July 26, 2020), D.E. 10; D.R.I. *Common Cause of R.I.* Opinion, *supra* note 5803, at 7; *see* Katherine Gregg, *National GOP Joins R.I. Fight Over Mail Ballots*, Providence J., July 28, 2020, at A1.

5805. Fairness Motion, *Common Cause of R.I.*, No. 1:20-cv-318 (D.R.I. July 26, 2020, filed July 27, 2020), D.E. 12.

5806. D.R.I. *Common Cause of R.I.* Docket Sheet, *supra* note 5802.

5807. *Id.*; D.R.I. *Common Cause of R.I.* Opinion, *supra* note 5803 ("finding that the proposed intervenors had not timely sought to intervene"); Consent Judgment, *Common Cause of R.I.*, No. 1:20-cv-318 (D.R.I. July 30, 2020), D.E. 26, 2020 WL 4460914; Common Cause R.I. v. Gorbea, 970 F.3d 11, 13 (1st Cir. 2020); *see* Katherine Gregg, *Judge Files Ruling on Mail-Ballot Requirements, National GOP Appeals*, Providence J., July 31, 2020, at A2.

tlement is fair, reasonable, and adequate to protect the interests of all of the voters of Rhode Island, and including the proposed intervenors and the Plaintiffs in this case."[5808] Having allowed the political party to file papers and participate in the hearing, Judge McElroy decided that intervention was not justified because of its potential for delaying the case.[5809]

Because of Covid-19, the court of appeals heard the political party's appeal on August 6 by videoconference.[5810] On August 7, the court of appeals declined to stay the consent judgment.[5811] The court of appeals concluded, "The burden imposed by [the witness] requirements in the midst of a pandemic is significant. . . . Taking an unusual and in fact unnecessary chance with your life is a heavy burden to bear simply to vote."[5812]

On August 13, over three dissents, the Supreme Court also denied the political party a stay of the consent judgment.[5813] "The status quo is one in which the challenged requirement has not been in effect, given the rules used in Rhode Island's last election, and many Rhode Island voters may well hold that belief."[5814]

On August 24, 2021, the plaintiffs informed the court that the matter had concluded because there was no pending controversy for the court to resolve.[5815]

5808. Transcript at 86–87, *Common Cause of R.I.*, No. 1:20-cv-318 (D.R.I. July 28, 2020, filed Aug. 11, 2020), D.E. 38.

5809. *Id.* at 88–90.

5810. Order, Common Cause of R.I. v. R.I. Republican Party, No. 20-1753 (1st Cir. Aug. 4, 2020).

5811. *Common Cause R.I.*, 970 F.3d 11; *see* Paul Edward Parker, *Court Won't Restore Witness Requirement on Mail Ballots*, Providence J., Aug. 9, 2020, at A11.

5812. *Common Cause R.I.*, 970 F.3d at 14–15.

5813. Republican Nat'l Comm. v. Common Cause R.I., 591 U.S. ___, 141 S. Ct. 206 (2020); *see* Patrick Anderson, *High Court Backs R.I. Mail-Ballot Rule Change*, Providence J., Aug. 14, 2020, at A1; Amanda Milkovits & Edward Fitzpatrick, *In R.I., Voters Can Use Mail-In Ballots with No Witnesses*, Boston Globe, Aug. 14, 2020, at B2.

5814. *Republican Nat'l Comm.*, 591 U.S. ___, 141 S. Ct. 206; *see* Robert Barnes, *Court Denies GOP, Allows R.I. Pandemic-Related Relief on Mail-In Ballots*, Wash. Post, Aug. 14, 2020, at A10 (reporting that this was the Supreme Court's first time allowing pandemic-related voter relief); Adam Liptak, *Rhode Island Can Facilitate Mail Voting, Justices Rule*, N.Y. Times, Aug. 14, 2020, at A20 (reporting that it was unusual for the Supreme Court to provide an explanation when it acted on an emergency application).

5815. Status Report, Common Cause of R.I. v. Gorbea, No. 1:20-cv-318 (D.R.I. Aug. 24, 2021), D.E. 41; *see* Order, *id.* (Aug. 3, 2021), D.E. 40 (ordering a report on the status of the case); *see also* Order, *Common Cause of R.I.*, No. 20-1753 (1st Cir. Aug. 17, 2020) (approving voluntary dismissal of the appeal).

Reflecting on the case-management challenges in this case because of Covid-19, Judge McElroy observed that meeting the challenges in previous cases helped.[5816]

Modifying the Postmark Requirement for Mailed Ballots in New York

Gallagher v. New York State Board of Elections (Analisa Torres, S.D.N.Y. 1:20-cv-5504)

> New York's allowance for voting by mail during the global Covid-19 infectious pandemic of 2020 had a postmark requirement, but prepaid mail was not always postmarked, so a district judge ordered that ballots received by the day after the election would be counted without a postmark and ballots received by the following day would be counted unless they had a postmark after election day.
>
> *Topics:* Absentee ballots; Covid-19; intervention; primary election; class action.

Fifteen voters, including two candidates, filed a federal class-action complaint in the Southern District of New York on Friday, July 17, 2020, alleging that New York's enacted provisions for voting by mail in light of the global Covid-19 infectious pandemic, including a requirement that postage be prepaid by election authorities, would require postmarks for mailed ballots to be counted, but the post office would not postmark prepaid mail.[5817] With their complaint, the plaintiffs filed a motion for a preliminary injunction.[5818]

Noting "the counting of absentee ballots currently under way from the June 23, 2020 New York State Democratic primary," the plaintiffs also filed a letter request for an accelerated schedule and "permission to—given the pandemic—serve Defendants by reliable electronic means."[5819] Judge Edgardo Ramos granted the letter motion that day, noting, "If oral argument or a hearing is appropriate, it will be scheduled when a judge is assigned to the case."[5820] Briefing was to be completed on July 23.[5821]

5816. Interview with Judge Mary S. McElroy and her law clerk Kevin Rolando, Sept. 4, 2020; *see* Acosta v. Restrepo, 470 F. Supp. 3d 161 (D.R.I. 2020) (concerning ballot-petition signatures); Yanes v. Martin, 464 F. Supp. 3d 467 (D.R.I. 2020) (concerning immigration detention).

5817. Complaint, Gallagher v. N.Y. State Bd. of Elections, No. 1:20-cv-5504 (S.D.N.Y. July 17, 2020), D.E. 1.

5818. Preliminary-Injunction Motion, *id.* (July 17, 2020), D.E. 3.

5819. Letter Motion, *id.* (July 17, 2020), D.E. 5.

5820. Endorsed Order, *id.* (July 17, 2020), D.E. 6.

On Monday, the court assigned the case to Judge Analisa Torres.[5822] On Thursday, she allowed two additional candidates to intervene in the case.[5823] On Sunday, July 26, she set the case for a videoconference hearing on July 29, allowing members of the public to attend by telephone.[5824] Because time was of the essence, Judge Torres provided detailed information in advance of the hearing about factual questions that would help her resolve the injunction motion.[5825]

The evidentiary hearing lasted two days.[5826] Each day began with an admonition against recording the proceeding.[5827] At the beginning of the first day, Judge Torres declined a request from one of the attorneys to address standing immediately: "We will not be addressing standing issues at this hearing. This is a purely fact-based hearing. Of course, Counsel, when the hearing is over, I will hear legal arguments, but not beforehand."[5828]

If not for Covid-19, the hearing would have been conducted in person.[5829] Before the hearing, Judge Torres consulted with two colleagues who had already presided over bench trials by video.[5830] Among the most helpful advice was how important it was for attorneys to test their and their witnesses' equipment in advance.[5831]

One disadvantage of the videoconferencing platform used was a delay between when someone started to speak and when their video showed up on the screen, which meant that short answers were never seen.[5832]

On August 3, Judge Torres ordered New York's election officials

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5821. Endorsed Order, *id.* (July 22, 2020), D.E. 15.

5822. Docket Sheet, *id.* (July 17, 2020).

Tim Reagan interviewed Judge Torres for this report by telephone on September 1, 2020.

5823. Opinion, *Gallagher*, No. 1:20-cv-5504 (S.D.N.Y. July 23, 2020), D.E. 20, 2020 WL 4261172; *see* Intervenors' Complaint, *id.* (July 25, 2020), D.E. 40.

5824. Hearing-Agenda Order, *id.* (July 26, 2020), D.E. 48 [hereinafter *Gallagher* Hearing Agenda Order]; *see* Order, *id.* (July 27, 2020), D.E. 52 (noting that the court would use Skype for Business for the videoconference).

5825. *Gallagher* Hearing-Agenda Order, *supra* note 5824; Interview with Judge Analisa Torres, Sept. 1, 2020.

5826. Gallagher v. N.Y. State Bd. of Elections, 477 F. Supp. 3d 19, 27 (S.D.N.Y. 2020).

5827. Transcript at 225, *Gallagher*, No. 1:20-cv-5504 (S.D.N.Y. July 30, 2020, filed Aug. 3, 2020), D.E. 88; Transcript at 3, *id.* (July 29, 2020), filed Aug. 3, 2020), D.E. 86 [hereinafter July 29, 2020, *Gallagher* Transcript].

5828. July 29, 2020, *Gallagher* Transcript, *supra* note 5827, at 9.

5829. Interview with Judge Analisa Torres, Sept. 1, 2020.

5830. *Id.*

5831. *Id.*

5832. *Id.*

> to count all otherwise valid absentee ballots cast in the June 23 Primary which were (1) received by June 24, 2020, without regard to whether such ballots are postmarked by June 23, 2020 and (2) received by June 25, 2020, so long as such ballots are not postmarked later than June 23, 2020.[5833]

On October 23, reviewing an amended complaint, Judge Torres declined to extend her injunction to cover the November 3 general election, finding that the plaintiffs' concerns, despite legislative changes to voting by mail made since the primary election, were speculative.[5834] Judge Torres signed a stipulated settlement on September 9, 2021.[5835]

Before becoming a federal judge, Judge Torres spent thirteen years as a state judge, and she found her familiarity with New York's election laws and procedures very helpful in presiding over this case.[5836]

No Constitutional Right to Greater Publicization of Early Voting for a Special Congressional Election

McMurray v. Mohr (Lawrence J. Vilardo, W.D.N.Y. 1:20-cv-689)

A district judge denied immediate relief to plaintiffs who sought an injunction requiring county election officials to publicize more widely early-voting opportunities for a special congressional election.

Topics: Early voting; Covid-19; interlocutory appeal.

> To date, less than a week before early voting is scheduled to start, the Erie County Board of Elections, and its Commissioners, have not even listed the dates, times and places of early voting on the Board's website, much less engaged in other methods of informing the voters of how to exercise their rights, an exercise made all the more difficult this year by the Coronavirus pandemic.[5837]

5833. Gallagher v. N.Y. State Bd. of Elections, 477 F. Supp. 3d 19, 27 (S.D.N.Y. 2020); *see* Gallagher v. N.Y. State Bd. of Elections, 496 F. Supp. 3d 842, 845 (S.D.N.Y. 2020); *see also* Katie Honan, *Judge's Ruling Spurs Calls for Improved Voting Procedures*, Wall St. J., Aug. 5, 2020, at 10A.

5834. *Gallagher*, 477 F. Supp. 3d 842; *see* Amended Complaint, Gallagher v. N.Y. State Bd. of Elections, No. 1:20-cv-5504 (S.D.N.Y. Sept. 11, 2020), D.E. 109.

5835. Stipulated Settlement, *Gallagher*, No. 1:20-cv-5504 (S.D.N.Y. Sept. 9, 2021), D.E. 149.

5836. Interview with Judge Analisa Torres, Sept. 1, 2020; *see* Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

5837. Complaint at 2, McMurray v. Mohr, No. 1:20-cv-689 (W.D.N.Y. June 9, 2020), D.E. 1 [hereinafter *McMurray* Complaint] (referring to the global infectious pandemic of Covid-19, the coronavirus disease that began in late 2019); *see* Opinion at 3, *id.* (June 11, 2020), D.E. 15 [hereinafter *McMurray* Opinion] ("Early voting is scheduled to begin on

So alleged a major-party nominee for a special congressional election and two other voters in a federal complaint filed on June 9, 2020, in the Western District of New York against election officials of Erie County, the county that includes Buffalo.[5838] The complaint sought a temporary restraining order, a preliminary injunction, and expedited hearings,[5839] which the plaintiffs also sought by separate motion.[5840]

Judge Lawrence J. Vilardo set the case for a remote hearing on the day that it was filed.[5841] The public docket sheet included instructions for public access.[5842] At the hearing, Judge Vilardo instructed everyone on the line to not broadcast or record the hearing.[5843] He also ordered briefing completed by 12:01 p.m. on June 11.[5844]

The plaintiffs' motion brief was more than four hours late, and their reply brief was filed an hour after their two-and-a-half-hour extension.[5845] Judge Vilardo declined to consider a legal theory raised for the first time in the reply brief.[5846]

Judge Vilardo ruled on Thursday, June 11, allowing the plaintiffs an additional day during the week to file an appeal.[5847] He denied the plaintiffs immediate relief.[5848]

> . . . [E]arly voting is an *expansion* of the right to vote; there is no constitutional right to vote prior to the election. Therefore, the plaintiffs are unlikely to prove that in failing to further publicize early voting, the defendants have burdened—let alone unduly burdened—their right to participate in the June 23rd elections.[5849]

Saturday, June 13, 2020.").

5838. *McMurray* Complaint, *supra* note 5837; *see* Amended Complaint, *McMurray*, No. 1:20-cv-689 (W.D.N.Y. June 11, 2020), D.E. 12.

5839. *McMurray* Complaint, *supra* note 5837, at 9.

5840. Motion, *McMurray*, No. 1:20-cv-689 (W.D.N.Y. June 9, 2020), D.E. 3.

5841. Docket Sheet, *id.* (June 9, 2020) [hereinafter *McMurray* Docket Sheet]; *see id.* (D.E. 9).

5842. *Id.*

Tim Reagan interviewed Judge Vilardo for this report by telephone on October 28, 2020.

5843. Interview with Judge Lawrence J. Vilardo, Oct. 28, 2020.

5844. *McMurray* Docket Sheet, *supra* note 5841 (D.E. 7).

5845. *McMurray* Opinion, *supra* note 5837, at 1–2.

5846. *Id.* at 2.

5847. Interview with Judge Lawrence J. Vilardo, Oct. 28, 2020; *see* Notice of Interlocutory Appeal, *McMurray*, No. 1:20-cv-689 (W.D.N.Y. June 12, 2020), D.E. 17.

5848. *McMurray* Opinion, *supra* note 5837.

5849. *Id.* at 9 (citation and quotation marks omitted).

The county election officials, moreover, had added information about early voting to their website after the complaint was filed.[5850]

The plaintiff candidate was defeated in the special election, and he would be on the ballot again in November's general election.[5851]

The court of appeals dismissed an interlocutory appeal as moot on October 6.[5852] The parties stipulated dismissal of the district-court case on November 13.[5853]

Relief from an Absentee-Ballot Application Deadline Because of an Overwhelmed Website

Nicholas Jones for Congress v. Idaho Secretary of State (B. Lynn Winmill, D. Idaho 1:20-cv-242)

> During the 2020 Covid-19 global infectious pandemic, a federal district judge extended the absentee-ballot application deadline by one week because the secretary of state's application website was overwhelmed.
>
> *Topics:* Absentee ballots; Covid-19; attorney fees; primary election.

On May 19, 2020—the deadline for requesting absentee ballots for a primary election in Idaho that was conducted exclusively by absentee ballot because of the global Covid-19 infectious pandemic—a congressional campaign filed in the U.S. District Court for the District of Idaho a motion for a temporary restraining order and emergency injunctive relief seeking a one-week extension of the deadline as a remedy for the failure of the secretary of state's website to keep up with demand.[5854] On the following day, the campaign filed an amended motion adding as plaintiffs two voters who were unable to request absentee ballots because of the website's failures.[5855]

On the case's third day, the court set the case for a video hearing before Judge B. Lynn Winmill at 4:00 p.m. on Friday, May 22, the case's fourth

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5850. *Id.* at 9–10.

5851. *See* Jerry Zemski, *Jacobs to Be Sworn In as Newest Congressman Today*, Buffalo News, July 21, 2020, at B15.

5852. Order, McMurray v. Mohr, No. 20-1818 (2d Cir. Oct. 6, 2020), D.E. 49.

5853. Stipulation, McMurray v. Mohr, No. 1:20-cv-689 (W.D.N.Y. Nov. 13, 2020), D.E. 33; *McMurray* Docket Sheet, *supra* note 5841 (dismissal order, D.E. 34).

5854. Motion, Nicholas Jones for Congress v. Idaho Sec'y of State, No. 1:20-cv-242 (D. Idaho May 19, 2020), D.E. 1; *see* Thomas Plank, *Idaho Candidate for US House Sues Secretary of State's Office Over May 19 Website Issues*, Idaho Press-Tribune, May 21, 2020, at A1.

5855. Amended Motion, *Nicholas Jones for Congress*, No. 1:20-cv-242 (D. Idaho May 20, 2020), D.E. 2.

day, providing in the public docket sheet information for public attendance.[5856]

At the hearing, Judge Winmill granted the plaintiffs immediate relief:

> Defendants are ordered to extend the deadline to request an absentee ballot until 8:00 p.m. on May 26, 2020 and reopen the absentee ballot request website for those voters who certify that they attempted to request an absentee ballot before the deadline but were unable to do so. Defendants shall further take necessary measures to notify voters—via news and social media—that they will be able to request an absentee ballot before May 26, 2020 at 8:00 p.m.[5857]

In the event, the plaintiff campaign received about twenty percent of the vote,[5858] and the voting participation rate was higher for this primary election in Idaho than for any since 1980.[5859]

Judge Winmill awarded the plaintiffs $26,873.50 in attorney fees and costs on September 16, 2020.[5860]

No Immediate Relief from Expanded Absentee-Voting Opportunities During an Infectious Pandemic Because of a Delay in Bringing the Case

Curtin v. Virginia State Board of Elections (Rossie D. Alston, Jr., E.D. Va. 1:20-cv-546)

> Because of the Covid-19 global infectious pandemic, Virginia voters were permitted to vote absentee on account of disability. A suit challenging broad absentee-voting rights as diluting plaintiffs' voting rights did not result in immediate relief, because the suit was brought about two months after the guidelines became public. After the preliminary-injunction decision, plaintiffs voluntarily dismissed the case.

5856. Docket Sheet, *id.* (May 19, 2020) (D.E. 4); *see* Minutes, *id.* (May 22, 2020), D.E. 10; *see also Hearing for Election Extension Scheduled for Friday Afternoon*, Idaho Press-Tribune, May 22, 2020, at A3.

5857. Order, *Nicholas Jones for Congress*, No. 1:20-cv-242 (D. Idaho May 23, 2020), D.E. 9; *see* John O'Connell, *Congressional Candidate Reflects on His Court "Upset" to Extend Election Deadline*, Idaho Press-Tribune, May 26, 2020, at A5; Betsy Z. Russell, *Federal Judge Extends Deadline for Absentee Ballots to Tuesday*, Idaho Press-Tribune, May 23, 2020, at A1.

5858. *See* Betsy Z. Russell, *Jordan Wins Primary, Will Face Risch in November*, Idaho Press-Tribune, June 3, 2020, at A1.

5859. *See* Ryan Suppe, *Idahoans Vote in Record Numbers for May Primary*, Idaho Press-Tribune, June 4, 2020, at A1.

5860. Order, *Nicholas Jones for Congress*, No. 1:20-cv-242 (D. Idaho Sept. 16, 2020), D.E. 14, 2020 WL 5549143.

Topics: Absentee ballots; Covid-19; laches; primary election; case assignment; recusal; early voting.

Six voters filed a federal complaint in the Eastern District of Virginia on May 13, 2020, challenging Virginia's election officials' decision to regard the health risks arising from the global infectious Covid-19 pandemic as providing voters with a disability justifying absentee voting in a June 23 primary election (postponed because of the pandemic from June 9).[5861] With their complaint, the voters filed a motion for a preliminary injunction to curtail absentee voting,[5862] a motion to expedite consideration of the motion (proposing a hearing on May 22 and resolution by the court on May 26),[5863] and a motion to consolidate consideration of the injunction motion with resolution of the case.[5864] Two days later, the voters filed notice of a May 22 hearing.[5865]

A day after the case was filed, it was reassigned from Judge Leonie M. Brinkema to Judge T.S. Ellis III, and then to Judge Rossie D. Alston, Jr.[5866]

Four days before the noticed hearing date, Judge Alston ordered briefing concluded by May 22 at 5:00 p.m. and notice to the court by 5:00 p.m. on the day of his order whether the parties intended to proceed with a hearing by teleconference or videoconference.[5867] On May 21, he set the case for a video hearing on May 27.[5868] Some attorneys were present in the

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5861. Complaint, Curtin v. Va. State Bd. of Elections, No. 1:20-cv-546 (E.D. Va. May 13, 2020), D.E. 1; Curtin v. Va. State Bd. of Elections, 463 F. Supp. 3d 653, 656–60 (E.D. Va. 2020); *see* Justin Mattingly & Andrew Cain, *Virginia Officials Prepare for Surge in Mail-In Voting After Municipal Elections*, Richmond Times-Dispatch, May 24, 2020, at 2A.

5862. Preliminary-Injunction Motion, *Curtin*, No. 1:20-cv-546 (E.D. Va. May 13, 2020), D.E. 3.

5863. Motion to Expedite, *id.* (May 13, 2020), D.E. 5.

5864. Consolidation Motion, *id.* (May 13, 2020), D.E. 6.

5865. Notice, *id.* (May 15, 2020), D.E. 15.

5866. Docket Sheet, *id.* (May 13, 2020).

Tim Reagan interviewed Judge Alston for this report by telephone on October 20, 2020.

5867. Order, *Curtin*, No. 1:20-cv-546 (E.D. Va. May 17, 2020), D.E. 17; *see* Curtin v. Va. State Bd. of Elections, 463 F. Supp. 3d 653, 657 (E.D. Va. 2020).

5868. Order, *Curtin*, No. 1:20-cv-546 (E.D. Va. May 21, 2020), D.E. 27; *see Curtin*, 463 F. Supp. 3d at 655, 657; Minutes, *Curtin*, No. 1:20-cv-546 (E.D. Va. May 27, 2020), D.E. 44.

courtroom.[5869] They and the judge wore face coverings, except when speaking.[5870]

Judge Alston's strategies for handling the emergent case included promptly finding out who the lawyers were and where they were to plan for getting them together.[5871] Judge Alston's judicial assistant did a technical rehearsal with participants on the day before the videoconference.[5872] Guidelines were presented in advance regarding who would speak and when, and participants were instructed to mute their microphones when not speaking.[5873] Members of the public could dial in, and they were instructed to mute their microphones and refrain from recording the proceeding.[5874] The lawyers were zealous and professional, and because they respected the process the proceeding was a success.[5875] Among the keys to success were preparation, cooperation, and professionalism.[5876]

Judge Alston denied immediate relief because of the voters' delay in filing the case.[5877]

> The limited record here supports the conclusion that Plaintiffs had an incentive to file suit as soon as [the alleged vote-dilution] injuries became apparent in order to rectify the perceived wrong prior to the actual commencement of the absentee ballot period. The disputed COVID-19 Guidance was issued to local registrars on March 16, 2020, and to the public on March 17, 2020, and the absentee ballot period began May 8 or 9, 2020, yet Plaintiffs did not file suit until May 13, 2020. Ultimately, the Court finds that Plaintiffs failed to demonstrate the requisite diligence.[5878]

On June 18, Judge Alston approved the voters' voluntary dismissal of their case.[5879]

5869. Transcript at 1–2, *Curtin*, No. 1:20-cv-546 (E.D. Va. May 27, 2020, filed June 2, 2020), D.E. 51 [hereinafter *Curtin* Transcript].

5870. *Id.* at 1.

5871. Interview with Judge Rossie D. Alston, Jr., Oct. 20, 2020.

5872. *Id.*

5873. *Id.*

5874. *Id.*

5875. *Id.*

5876. *Id.*; *see Curtin* Transcript, *supra* note 5869, at 43 ("THE COURT: . . . I also appreciate the professionalism that we have seen.").

5877. Curtin v. Va. State Bd. of Elections, 463 F. Supp. 3d 659 (E.D. Va. 2020).

5878. *Id.* at 659.

5879. Order, Curtin v. Va. State Bd. of Elections, No. 1:20-cv-546 (E.D. Va. June 18, 2020), D.E. 57.

Opportunity to Cure Missing and Mismatched Absentee-Ballot Signatures in California

Fugazi v. Padilla (Kimberly J. Mueller, E.D. Cal. 2:20-cv-970)

> A candidate and several voters challenged the certification of a primary election, alleging that absentee voters were not given sufficient opportunities to cure missing or mismatched signatures. Absentee voting was important in the election because of a global infectious pandemic. The district judge denied the plaintiffs immediate relief because although a mailing to voters who had signature problems was confusing, and the election office was closed to visitors, clarifications were available by telephone.
>
> *Topics:* Signature matching; absentee ballots; Covid-19; enjoining certification; intervention; primary election; class action.

A federal class-action complaint filed in the Eastern District of California on May 12, 2020, by fourteen plaintiffs against California's secretary of state and San Joaquin County's registrar of voters alleged that absentee voters in a March 3 primary election whose signatures either were absent or did not appear to match signatures on record were not given sufficient opportunities to cure the defect.[5880] On May 13, the plaintiffs filed an application for a temporary restraining order.[5881]

Two days later, the legislature candidate who had edged out the first plaintiff for a spot on the general-election ballot sought to be included in the case as a defendant.[5882] Judge Kimberly J. Mueller set the case for a hearing by videoconference on May 19.[5883]

Judge Mueller granted intervention on May 19 because the candidate's "ability to protect her interests would be impaired if at this point she were not joined to this action."[5884] The case raised a concrete possibility that the first plaintiff could displace the prospective intervener as a candidate in the general election if disputed ballots were counted.[5885]

Judge Mueller denied the plaintiffs immediate relief on May 22.[5886] Being able to vote by mail in the election was very important because of the

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5880. Complaint, Fugazi v. Padilla, No. 2:20-cv-970 (E.D. Cal. May 12, 2020), D.E. 1.
5881. Temporary-Restraining-Order Application, *id.* (May 13, 2020), D.E. 4.
5882. Intervention Application, *id.* (May 15, 2020), D.E. 7.
5883. Docket Sheet, *id.* (May 12, 2020) (D.E. 14, 15, 21).
5884. Opinion at 3, *id.* (May 19, 2020), D.E. 22, 2020 WL 2539286.
5885. *Id.* at 4.
5886. Opinion, *id.* (May 22, 2020), D.E. 27, 2020 WL 2615742.

global Covid-19 infectious pandemic.[5887] The registrar's notice to absentee voters with missing or mismatched signatures was confusing as to the deadline for a cure: it specified the deadline as two days before certification of the election without specifying the certification day.[5888] But although the office was closed because of the pandemic, the office was responding to clarification inquiries by telephone.[5889]

Judge Mueller dismissed an amended complaint as moot on October 29.[5890]

Electronic At-Home Absentee Voting for Blind Voters

Powell v. Benson (Gershwin A. Drain, E.D. Mich. 2:20-cv-11023), Drenth v. Boockvar (Jennifer P. Wilson, M.D. Pa. 1:20-cv-829), Hernandez v. New York State Board of Elections (Lewis J. Liman, S.D.N.Y. 1:20-cv-4003), Merrill v. Dunlap (John A. Woodcock, Jr., D. Me. 1:20-cv-248), and Rivero v. Galvin (Douglas P. Woodlock, D. Mass. 1:20-cv-11808)

> In light of the greater need for absentee voting in 2020 because of the Covid-19 global infectious pandemic, lawsuits in five states resulted in electronic at-home absentee voting for blind voters that protected the secrecy of their ballots.
>
> *Topics:* Covid-19; absentee ballots; Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA); intervention; class action; primary election.

In light of the greater need for absentee voting in 2020 because of the Covid-19 global infectious pandemic, blind voters and state affiliates of the National Federation of the Blind filed federal actions in Michigan, Pennsylvania, New York, Maine, and Massachusetts seeking at-home electronic voting that would allow blind voters to vote without the assistance of others in order to protect the secrecy of their ballots.[5891] The lawsuits resulted in consent decrees in Michigan, New York, and Massachusetts. In Pennsylvania, the judge granted the plaintiffs a remedy proposed by the defendants. The Maine case was resolved by a settlement that the court reserved jurisdiction to enforce.

5887. *Id.* at 15.

5888. *Id.*

5889. *Id.* at 15–16.

5890. Opinion, *id.* (Oct. 29, 2020), D.E. 61, 2020 WL 6342959; *see* Amended Complaint, *id.* (June 30, 2020), D.E. 41.

5891. *See* Christina A. Cassidy, *Blind Fear Privacy Loss with Shift to Mail Voting*, S. Fla. Sun-Sentinel, June 17, 2020, at A12.

Michigan

Two blind voters filed a federal class-action complaint in the Eastern District of Michigan on Saturday, April 25, 2020, claiming that mail-in absentee ballots available only in paper form deprived them of an opportunity to vote in private, because blind voters needed the assistance of others to complete ballots of that type.[5892]

> For example, Maryland has developed an online ballot marking tool that allows voters to view and mark their absentee ballots on their computers. Maryland created the tool so that it would work with screen access software and has extensively tested the tool's usability for individuals with a variety of disabilities.[5893]

The complaint argued that a remedy was especially needed because the global infectious Covid-19 pandemic made voting by mail essential.[5894] With their complaint, the plaintiffs filed a motion for a preliminary injunction seeking a remedy in time for the May 5 primary election.[5895] Two days later, Judge Gershwin A. Drain set the case for a hearing by videoconference on Friday, May 1.[5896]

On April 28, the plaintiffs filed an amended complaint adding the National Federation of the Blind of Michigan as a plaintiff.[5897] On the next day, the plaintiffs filed a motion to convert their motion for a preliminary injunction to a motion for a temporary restraining order.[5898] Judge Drain set the case for a telephonic status conference on April 30.[5899] The confer-

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5892. Complaint, Powell v. Benson, No. 2:20-cv-11023 (E.D. Mich. Apr. 25, 2020), D.E. 1 [hereinafter *Powell* Complaint]; *see* Taylor DesOrmeau, *Blind Voters Sue Michigan as Tuesday Nears, Absentee Ballots Are Not Available*, Jackson Citizen Patriot, Apr. 30, 2020, at A1.

5893. *Powell* Complaint, *supra* note 5892, at 6.

On February 10, 2020, District of Maryland Judge Stephanie A. Gallagher denied the National Federation of the Blind a preliminary injunction that would require Maryland election officials to use electronic ballot-marking devices for in-person voting by most voters that would allow blind voters to cast secret votes indistinguishable from sighted voters' votes. Nat'l Fed'n of the Blind, Inc. v. Lamone, 438 F. Supp. 3d 510 (D. Md. 2020); *see* Complaint, Nat'l Fed'n of the Blind, Inc. v. Lamone, No. 1:19-cv-2228 (D. Md. Aug. 1, 2019), D.E. 1. The case was settled in 2021. Docket Sheet, *Nat'l Fed'n of the Blind, Inc.*, No. 1:19-cv-2228 (D. Md. Aug. 1, 2019) (order, Sept. 24, 2021, D.E. 99).

5894. *Powell* Complaint, *supra* note 5892, at 9.

5895. Preliminary-Injunction Motion, *Powell*, No. 2:20-cv-11023 (E.D. Mich. Apr. 25, 2020), D.E. 2.

5896. Order, *id.* (Apr. 27, 2020), D.E. 6.

5897. Amended Complaint, *id.* (Apr. 28, 2020), D.E. 13.

5898. Temporary-Restraining-Order Motion, *id.* (Apr. 29, 2020), D.E. 16.

5899. Notice, *id.* (Apr. 30, 2020), D.E. 19.

ence closed with instructions to the parties to reconvene that afternoon for settlement discussions.[5900] Following the conference, Judge Drain appointed a facilitator "to facilitate a resolution of issues in this matter."[5901]

On May 1, the court filed a notice of specifications for the use of Zoom that day for the conference: "Notice of this proceeding is only going to the [seven] attorneys listed above. It is the responsibility of these attorneys to invite other necessary participants."[5902]

The May 1 proceeding turned out to be a settlement conference,[5903] and on that day Judge Drain issued a consent order requiring Michigan to use for the May 5 elections the same technology that it used for overseas absentee ballots pursuant to the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA).[5904]

Following three additional conferences,[5905] Judge Drain issued a consent decree on May 19: "So that it may be used for the August 2020 Election, Defendants shall acquire a remote accessible vote-by-mail system ('RAVBM') that shall allow voters with print disabilities to review and mark vote-by-mail ballots electronically . . . ."[5906]

Because Michigan was unable to acquire RAVBM election materials in time for the August 4 primary election, Judge Drain ordered them in place in time for absentee voting for the November 3 general election and ordered that UOCAVA procedures be used again for the August election.[5907]

On September 2, Judge Drain allowed intervention by a blind voter who alleged that she was not able to vote in the August election without assistance of a family member because of technical deficiencies in Michi-

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5900. Transcript at 17–21, *id.* (Apr. 30, 2022, filed July 12, 2020), D.E. 42.

5901. Order, *id.* (Apr. 30, 2020), D.E. 21.

5902. Notice, *id.* (May 1, 2020), D.E. 22.

5903. Docket Sheet, *id.* (Apr. 25, 2020) [hereinafter *Powell* Docket Sheet].

5904. Consent Order, *id.* (May 1, 2020), D.E. 24; *see* 52 U.S.C. §§ 20301–20311; Robert Timothy Reagan, Overseas Voting: The Uniformed and Overseas Citizens Absentee Voting Act (Federal Judicial Center 2016).

5905. Transcript, *Powell*, No. 2:20-cv-11023 (E.D. Mich. May 14, 2020, filed July 13, 2020), D.E. 45; Transcript, *id.* (May 8, 2020, filed July 13, 2020), D.E. 44; Transcript, *id.* (May 4, 2020, filed July 13, 2020), D.E. 43; *Powell* Docket Sheet, *supra* note 5903.

5906. Consent Decree at 6, *Powell*, No. 2:20-cv-11023 (E.D. Mich. May 19, 2020), D.E. 31.

5907. Order, *id.* (July 13, 2020), D.E. 48.

The order followed four proceedings in July. Transcript, *id.* (July 10, 2020, filed July 13, 2020), D.E. 47; Transcript, *id.* (July 8, 2020, filed July 13, 2020), D.E. 46; Transcript, *id.* (July 7, 2020, filed July 31, 2020), D.E. 64; Transcript, *id.* (July 2, 2020, filed July 31, 2020), D.E. 63; *Powell* Docket Sheet, *supra* note 5903.

gan's voting website.[5908] The plaintiffs filed a notice of settlement on September 4.[5909]

Pennsylvania

On May 21, a voter and the National Federation of the Blind of Pennsylvania filed a federal complaint in the Middle District of Pennsylvania "to vindicate the right of individuals with disabilities to vote privately and independently by absentee or mail-in ballot in the June 2, 2020 primary election and in future elections."[5910] The plaintiffs asked for Pennsylvania to ultimately establish "an accessible online ballot tool so that blind voters have equal access to vote independently and privately in all elections through absentee and mail-in voting," noting that in light of the Covid-19 pandemic, blind voters would have to choose between risking their health by going to the polls and forgoing the secret ballot by voting by mail using a paper ballot.[5911] According to the complaint,

> 12. When Michigan faced a similar inaccessible ballot problem earlier this month, a federal judge approved the same UOCAVA solution Plaintiffs proposed here. The judge entered a stipulated order approving this interim solution on May 1, 2020—a mere four days before the May 5, 2020 election in that state.
>
> 13. As a more permanent fix, Michigan has agreed to purchase a remote accessible vote-by-mail system in time for its August 2020 elections, and to continue to use this system in future elections.[5912]

With their complaint, the plaintiffs filed a motion for a temporary restraining order or a preliminary injunction.[5913] Judge Jennifer P. Wilson set the case for a telephonic status conference on Friday, May 22, at 3:00 p.m.[5914] The order stated, "Given the expedited nature of this order and the current circumstances caused by the COVID-19 pandemic, Plaintiffs are permitted to effect service upon Defendants via email."[5915] Judge Wilson's

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5908. Opinion, *Powell*, No. 2:20-cv-11023 (E.D. Mich. Sept. 2, 2020), D.E. 87, 2020 WL 5229104; *see* Intervention Motion, *id.* (Aug. 17, 2020), D.E. 70.

5909. Notice, *id.* (Sept. 4, 2020), D.E. 89.

5910. Complaint at 3–4, Drenth v. Boockvar, No. 1:20-cv-829 (M.D. Pa. May 21, 2020), D.E. 1 [hereinafter *Drenth* Complaint]; *see* Matt Miller, *Blind Voters Sue Pa.*, Harrisburg Patriot News, May 26, 2020, at A3.

5911. *Drenth* Complaint, *supra* note 5910, at 2–3.

5912. *Id.* at 4.

5913. Motion, *Drenth*, No. 1:20-cv-829 (M.D. Pa. May 21, 2020), D.E. 4.

5914. Order, *id.* (May 21, 2020), D.E. 3 [hereinafter May 21, 2020, *Drenth* Order].

Tim Reagan interviewed Judge Wilson for this report by telephone on September 4, 2020.

5915. May 21, 2020, *Drenth* Order, *supra* note 5914, at 1.

goal for the conference was to determine what information she would need to rule.[5916]

Following the conference call, Judge Wilson set the case for a telephonic hearing on May 27, should the parties not come to an agreement before then.[5917] She heard testimony from three witnesses at the hearing.[5918]

"At the outset of the hearing, the court stated that the motion for temporary restraining order and/or preliminary injunction would be granted and the hearing would focus on the adequacy and feasibility of the proposed remedies."[5919] Following the evidentiary hearing, Judge Wilson issued a preliminary injunction with a remedy proposed by the defendants, who nevertheless denied liability: an accessible write-in ballot.[5920] She wanted to rule quickly so that her ruling would not be an exercise in futility.[5921]

Judge Wilson observed that a judge often comes to election litigation knowing about as much as a voter about the complexities of election management, and understanding the complexities is very important when presiding over an election case.[5922] Fortunately, the attorneys in this case were very good, and that was very helpful.[5923]

On August 12, Pennsylvania finalized a contract for internet voting:

> An eligible voter who applies for an accessible ballot will be able to access the ballot through a web link. The voter will then be able to vote on the accessible ballot by marking his choices and will be able to use a variety of assistive technologies while doing so.[5924]

5916. Interview with Judge Jennifer P. Wilson, Sept. 4, 2020.

5917. Order, *Drenth*, No. 1:20-cv-829 (M.D. Pa. May 22, 2020), D.E. 16.

5918. Transcript, *id.* (May 27, 2020, filed June 25, 2020), D.E. 42 [hereinafter *Drenth* Transcript].

"The hearing is limited to two hours because of previously scheduled matters. Each side has forty-five minutes to present testimony and fifteen minutes to present argument." *Id.* at 6.

5919. Opinion at 6–7, *id.* (May 27, 2020), D.E. 31 [hereinafter May 27, 2020, *Drenth* Opinion], 2020 WL 2745729; *see Drenth* Transcript, *supra* note 5918, at 6.

5920. May 27, 2020, *Drenth* Opinion, *supra* note 5919, at 1, 16; *see* Matt Miller, *Ballot Change Ordered to Aid Blind Voters*, Harrisburg Patriot News, May 31, 2020, at A12; *see also* Accessible Remote Ballot Marking Solution for Mail Voting, www.vote.pa.gov/voting-in-PA/Pages/Accessible-Remote-Ballot-Marking-Solution-for-Mail-Voting.aspx.

5921. Interview with Judge Jennifer P. Wilson, Sept. 4, 2020.

5922. *Id.* (recommending that other judges try to study the complexities of election management as soon as possible in election litigation).

5923. *Id.*

5924. Opinion at 9, *Drenth*, No. 1:20-cv-829 (M.D. Pa. Aug. 18, 2020), D.E. 80, 2020 WL 4805621.

Because Pennsylvania had established a way for blind voters to vote privately and independently, Judge Wilson determined on August 18 that the case was moot, and she awarded summary judgment to the defendants.[5925]

Maine

Four blind voters and Disability Rights Maine filed a federal complaint in the District of Maine against state and local election officials on July 15 to vindicate their voting rights in the November 3 and subsequent elections.[5926] With their complaint, the voters filed a motion for a temporary restraining order or a preliminary injunction.[5927]

Five days later, Judge John A. Woodcock, Jr., set the case for a telephonic conference on July 23.[5928] At the conference, "counsel for the Secretary [of State] reported that the Secretary was already developing a plan to implement accessible absentee voting for the November 2020 general election and anticipated being able to outline more details of that plan to the other parties by August 7, 2020."[5929] So Judge Woodcock stayed the case until August 10.[5930]

On August 14, following an August 10 status conference, the parties reported that new accessible voting systems were expected by September 19.[5931]

Following a September 30 amended complaint,[5932] the plaintiffs withdrew their injunction motion in February 2021.[5933] On June 24, 2021, Judge Woodcock approved a settlement agreement specifying that the court would retain enforcement jurisdiction.[5934]

5925. *Id.* at 2, 13–21.

5926. Complaint, Merrill v. Dunlap, No. 1:20-cv-248 (D. Me. July 15, 2020), D.E. 1.

5927. Motion, *id.* (July 15, 2020), D.E. 3.

5928. Docket Sheet, *id.* (July 15, 2020) [hereinafter *Merrill* Docket Sheet] (D.E. 9); *see id.* (minutes, D.E. 11).

5929. Joint Status Report at 1–2, *id.* (Aug. 10, 2020), D.E. 17.

5930. *Merrill* Docket Sheet, *supra* note 5928 (order, July 24, 2020, D.E. 12).

5931. Joint Status Report, *Merrill*, No. 1:20-cv-248 (D. Me. Aug. 14, 2020), D.E. 20; *Merrill* Docket Sheet, *supra* note 5928 (minutes, Aug. 10, 2020, D.E. 18); *see* Megan Gray, *Maine Agrees to Improve Absentee Ballot Access for Visually Impaired*, Waterville Morning Sentinel, Aug. 18, 2020, at 2B.

5932. Amended Complaint, *Merrill*, No. 1:20-cv-248 (D. Me. Sept. 30, 2020), D.E. 42; *see* Scott Thistle, *Maine Launching New System That Lets Disabled Vote Online*, Portland Press Herald, Oct. 2, 2020, at B2.

5933. *Merrill* Docket Sheet, *supra* note 5928 (text order granting withdrawal motion, D.E. 57); Withdrawal Motion, *Merrill*, No. 1:20-cv-248 (D. Me. Feb. 17, 2021), D.E. 56.

5934. Settlement Agreement, *Merrill*, No. 1:20-cv-248 (D. Me. June 24, 2021), D.E. 77.

New York

An action in the Southern District of New York took longer to resolve. The National Federation of the Blind of New York State, three other organizations, and four voters filed a federal complaint on May 22, 2020, seeking accessible absentee ballots in New York and suggesting that New York accomplish that by modifying the electronic ballots it already provided for overseas voters.[5935] With their complaint, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction[5936] and a proposed order to show cause why immediate relief should not be granted.[5937] Judge Lewis J. Liman scheduled a telephonic conference for 4:30 that afternoon, posting in the public record contact information for the conference.[5938] Throughout this case, Judge Liman was keen to move quickly.[5939]

At the conference, Judge Liman asked the parties about the evidence that he would have to consider to rule.[5940] He also asked the plaintiffs to order a copy of the conference transcript for the court's benefit.[5941]

Judge Liman set the case for a telephonic oral argument on the morning of May 29, again posting contact information in the public record.[5942] He preferred affidavits over live testimony, because the case did not involve much in the way of factual disputes, and witness credibility was not an issue.[5943] Evidence by affidavit would make it easier for him to rule quickly.[5944] He conducted the proceedings by telephone rather than by video for ease of the parties, the public, and the court, and because seeing speakers was not necessary for this case.[5945]

5935. Complaint, Hernandez v. N.Y. State Bd. of Elections, No. 1:20-cv-4003 (S.D.N.Y. May 22, 2020), D.E. 1; Hernandez v. N.Y. State Bd. of Elections, 479 F. Supp. 3d 1, 5 (S.D.N.Y. 2020).

5936. Motion, *Hernandez*, No. 1:20-cv-4003 (S.D.N.Y. May 22, 2020), D.E. 8; *Hernandez*, 479 F. Supp. 3d at 5.

5937. Proposed Order, *Hernandez*, No. 1:20-cv-4003 (S.D.N.Y. May 22, 2020), D.E. 3.

5938. Order, *id.* (May 22, 2020), D.E. 9.

Tim Reagan interviewed Judge Liman for this report by telephone on September 8, 2020.

5939. Interview with Judge Lewis J. Liman, Sept. 8, 2020.

5940. Transcript at 7–8, *Hernandez*, No. 1:20-cv-4003 (S.D.N.Y. May 22, 2020, filed May 28, 2020), D.E. 32.

5941. *Id.* at 15.

5942. Order, *id.* (May 26, 2020), D.E. 24; Docket Sheet, *id.* (May 22, 2020).

5943. Interview with Judge Lewis J. Liman, Sept. 8, 2020 (noting that the judge used videoconference technology in other cases during the pandemic).

5944. *Id.*

5945. *Id.*

Following oral argument, Judge Liman ordered the parties to submit by 5:00 p.m. on June 3 either a consent decree or a statement that they were unable to agree to one.[5946] On June 2, he issued a consent decree: "Defendants agree to instruct county boards of elections to provide by email an accessible fillable PDF absentee ballot ('accessible absentee ballot') to voters who have a disability that prevents them from privately and independently using a paper absentee ballot."[5947]

On August 14, Judge Liman denied a second motion for a preliminary injunction to govern the November general election.[5948] Declaring the call close, he concluded that the plaintiffs had not shown that their preferred method of accommodating disabled voters would be superior to methods adopted by the defendants.[5949] But he did order state election officials to provide county election officials with some specific guidance on how to accommodate disabled absentee voters.[5950]

Following nine endorsed status reports from January 2021 to March 2022,[5951] Judge Liman approved a settlement agreement on April 5, 2022.[5952] On July 21, however, he concluded that New York's election authorities were in breach of the agreement.[5953] According to an October 14 status report, "Defendants have completed the procurement and implementation of the RAVBM system and County Boards of Election are now providing General Election ballots to eligible voters via the RAVBM system."[5954] Two days after the general election, Judge Liman relieved the defendants of an obligation to submit weekly status reports.[5955] He approved an attorney-fee settlement on March 8, 2023, for $110,000 to cover the enforcement motion.[5956]

5946. Order, *Hernandez*, No. 1:20-cv-4003 (S.D.N.Y. May 29, 2020), D.E. 36.

5947. Consent Decree, *id.* (June 2, 2020), D.E. 38; *see* Hernandez v. N.Y. State Bd. of Elections, 479 F. Supp. 3d 1, 5–6 (S.D.N.Y. 2020).

5948. *Hernandez*, 479 F. Supp. 3d 1; *see* Second Preliminary-Injunction Motion, *Hernandez*, No. 1:20-cv-4003 (S.D.N.Y. July 28, 2020), D.E. 55.

5949. *Hernandez*, 479 F. Supp. 3d 1.

5950. Order, *Hernandez*, No. 1:20-cv-4003 (S.D.N.Y. Aug. 19, 2020), D.E. 110, 2020 WL 4883889.

5951. Endorsements, *id.* (Jan. 22, 2021, to Mar. 1, 2022), D.E. 119, 124, 126, 128, 130, 134, 136, 138, 140.

5952. Stipulated Dismissal, *id.* (Apr. 5, 2022), D.E. 143; Settlement Agreement, *id.* (Apr. 5, 2022), D.E. 142.

5953. Order, *id.* (July 21, 2022), D.E. 159; Transcript at 129, *id.* (July 21, 2022, filed Aug. 18, 2022), D.E. 164.

5954. Letter, *id.* (Oct. 14, 2022), D.E. 180.

5955. Order, *id.* (Nov. 10, 2022), D.E. 185; *see* Letter, *id.* (Nov. 10, 2022), D.E. 184.

5956. Settlement Order, *id.* (Mar. 8, 2023), D.E. 193.

Massachusetts

A suit filed in the District of Massachusetts was filed last and resolved most quickly. Four voters and two organizations filed the federal complaint against the secretary of the commonwealth on October 2, 2020, seeking an order permitting blind voters to submit their ballots by email.[5957] With their complaint, the plaintiffs filed a motion for a preliminary injunction.[5958]

Judge Douglas P. Woodlock set the case for a videoconference hearing on October 16.[5959] The court provided a link in the docket sheet for public-attendance registration.[5960]

On October 9, the parties submitted a motion to approve a consent judgment.[5961] Judge Woodlock approved the settlement providing for email voting on October 13.[5962]

Whether Voting by Mail During a Pandemic Dilutes Legitimate Votes

Paher v. Cegavske (Miranda M. Du, D. Nev. 3:20-cv-243)

> A district judge denied an injunction to voters who complained that extensive voting by mail during a global infectious pandemic would dilute legitimate votes, finding the allegation too speculative to afford standing or merit relief.
>
> *Topics:* Covid-19; absentee ballots; intervention; primary election.

Four voters filed a federal complaint in the District of Nevada on April 21, 2020, alleging that Nevada's plan to provide mail-in absentee ballots to all active registered voters for a June 9 primary election in light of the global Covid-19 infectious pandemic would dilute legitimate votes.[5963] With their complaint, the plaintiffs filed a motion for a preliminary injunction,[5964] a motion to expedite the case,[5965] and a motion to consolidate consideration of the injunction with resolution of the case.[5966]

5957. Complaint, Rivero v. Galvin, No. 1:20-cv-11808 (D. Mass. Oct. 2, 2020), D.E. 1.

5958. Preliminary-Injunction Motion, *id.* (Oct. 2, 2020), D.E. 2.

5959. Docket Sheet, *id.* (Oct. 2, 2020) (D.E. 8).

5960. *Id.* (D.E. 9).

5961. Motion, *id.* (Oct. 9, 2020), D.E. 12.

5962. Judgment, *id.* (Oct. 13, 2020), D.E. 14.

5963. Complaint, Paher v. Cegavske, No. 3:20-cv-243 (D. Nev. Apr. 21, 2020), D.E. 1; Paher v. Cegavske, 457 F. Supp. 3d 919, 924 (D. Nev. 2020).

5964. Preliminary-Injunction Motion, *Paher*, No. 3:20-cv-243 (D. Nev. Apr. 21, 2020), D.E. 2; *Paher*, 457 F. Supp. 3d at 924.

5965. Motion to Expedite, *Paher*, No. 3:20-cv-243 (D. Nev. Apr. 21, 2020), D.E. 3;

On April 22, Judge Miranda M. Du agreed to permit the plaintiffs to supplement their motion to expedite the case by 3:00 p.m. that day with an explanation for their waiting until April 21 to bring the case, when the policy they challenged was announced on March 24.[5967] The voters informed Judge Du that they did not learn of the policy until April 15,[5968] and Judge Du agreed to expedite the case.[5969] She set the case for a telephonic hearing at 10:00 a.m. on April 29.[5970]

The hearing was telephonic because of the Covid-19 pandemic.[5971] An in-person hearing would have been particularly difficult because of quarantine expectations for the out-of-state attorneys on the case.[5972]

On April 27, Judge Du agreed to consolidate the preliminary-injunction motion with resolution of the case.[5973] On April 28, she granted an April 27 motion to intervene in opposition to the injunction motion.[5974]

Judge Du began the April 29 hearing with awareness of the public-health emergency: "The fact that we have this hearing by phone because the Court is limiting in-person appearances, demonstrates the unusual circumstances of our time. So, I don't need counsel to explain to me how COVID-19 has affected our communities. I'm well aware of that."[5975]

Judge Du denied the plaintiffs a preliminary injunction on April 30.[5976] Because their claims of injury would apply to any voter, their claims were

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Paher, 457 F. Supp. 3d at 924.

5966. Consolidation Motion, *Paher*, No. 3:20-cv-243 (D. Nev. Apr. 21, 2020), D.E. 4; *Paher*, 457 F. Supp. 3d at 924.

5967. Docket Sheet, *Paher*, No. 3:20-cv-243 (D. Nev. Apr. 21, 2020) [hereinafter *Paher* Docket Sheet] (minutes, D.E. 12); *see Paher*, 457 F. Supp. 3d at 924; *see also* James DeHaven, *Nevadans to Mail Ballots for June's Primary Election*, Reno Gazette-J., Mar. 26, 2020, at A6; Bill Dentzer, *Nevada's Primary Election in June Will Be Conducted by Mail Only*, Las Vegas Rev.-J., Mar. 25, 2020, at B1.

Tim Reagan interviewed Judge Du for this report by telephone on August 20, 2020.

5968. Supplement, *Paher*, No. 3:20-cv-243 (D. Nev. Apr. 22, 2020), D.E. 13.

5969. Order, *id.* (Apr. 22, 2020), D.E. 14.

5970. *Id.*; *see Paher* Docket Sheet, *supra* note 5967 (minutes, D.E. 49).

5971. Interview with Judge Miranda M. Du, Aug. 20, 2020.

5972. *Id.*; *Paher* Docket Sheet, *supra* note 5967.

5973. *Paher* Docket Sheet, *supra* note 5967 (minutes, D.E. 36); Paher v. Cegavske, 457 F. Supp. 3d 919, 924 (D. Nev. 2020).

5974. Order, *Paher*, No. 3:20-cv-243 (D. Nev. Apr. 28, 2020), D.E. 39, 2020 WL 2042365; Intervention Motion, *id.* (Apr. 27, 2020), D.E. 27; *Paher*, 457 F. Supp. 3d at 924–25.

5975. Transcript at 4, *Paher*, No. 3:20-cv-243 (D. Nev. Apr. 29, 2020, filed May 16, 2020), D.E. 70.

5976. *Paher*, 457 F. Supp. 3d 919; *see* Bill Dentzer, *Nevada Judge Rejects Lawsuit Op-*

not concrete and particularized, so the plaintiffs did not have standing to bring them.[5977] Their claims would also fail on the merits.[5978]

> The Court finds that Defendants' interests in protecting the health and safety of Nevada's voters and to safeguard the voting franchise in light of the COVID-19 pandemic far outweigh any burden on Plaintiffs' right to vote, particularly when that burden is premised on a speculative claim of voter fraud resulting in dilution of votes.[5979]

On July 31, Judge Du dismissed an amended complaint as moot.[5980]

Nullification of an Absentee-Ballot Witness Requirement During a Global Infectious Pandemic

League of Women Voters of Virginia v. Virginia State Board of Elections (Norman K. Moon, W.D. Va. 6:20-cv-24)

> During the global Covid-19 infectious pandemic, seven weeks before a primary election, a district judge approved a consent decree that nullified the witness requirement for absentee ballots in the election. Later, the judge approved a similar consent decree for the general election.
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> *Topics:* Covid-19; absentee ballots; intervention; primary election; attorney fees.

In light of the global Covid-19 infectious pandemic, the League of Women Voters of Virginia and three voters filed a federal complaint in the Western District of Virginia's Lynchburg courthouse on Friday, April 17, 2020, seeking relief from a witness requirement for absentee ballots.[5981] On Tuesday, the plaintiffs filed a motion for a preliminary injunction.[5982]

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posing Mail-In Primary, Las Vegas Rev.-J., May 1, 2020, at B1.

5977. *Paher*, 457 F. Supp. 3d 922, 926.

5978. *Id.* at 927–35.

5979. *Id.* at 922.

5980. Opinion, *Paher*, No. 3:20-cv-243 (D. Nev. July 31, 2020), D.E. 92; *see* Amended Complaint, *id.* (May 13, 2020), D.E. 64.

5981. Complaint, League of Women Voters of Va. v. Va. State Bd. of Elections, No. 6:20-cv-24 (W.D. Va. Apr. 17, 2020), D.E. 1; League of Women Voters of Va. v. Va. State Bd. of Elections, 481 F. Supp. 3d 580, 584 (W.D. Va. 2020); League of Women Voters of Va. v. Va. State Bd. of Elections, 458 F. Supp. 3d 442, 444, 446–47 (W.D. Va. 2020); League of Women Voters of Va. v. Va. State Bd. of Elections, 458 F. Supp. 3d 460, 462 (W.D. Va. 2020); *see* Denise Lavoie, *Virginia Sued Over Witness Requirement for Absentee Ballots*, Norfolk Virginian, Apr. 18, 2020, at A3.

5982. Preliminary-Injunction Motion, *League of Women Voters of Va.*, No. 6:20-cv-24 (W.D. Va. Apr. 21, 2020), D.E. 18; *League of Women Voters of Va.*, 481 F. Supp. 3d at 584; *League of Women Voters of Va.*, 458 F. Supp. 3d at 447; *League of Women Voters of Va.*, 458 F. Supp. 3d at 462.

Judge Norman K. Moon set the case for a telephonic status conference on April 24.[5983]

At the conference, Judge Moon granted the plaintiffs' unopposed motion to expedite briefing and set the case for hearing on May 4.[5984] The parties agreed that witness testimony would not be necessary, and the hearing also was held by telephone rather than by video.[5985] Judge Moon knew that he would have to reach a decision before election officials started mailing out absentee ballots, and his chambers prioritized this case over other matters.[5986]

On April 29, Judge Moon granted a political party's motion to intervene in defense of the witness requirement, and he denied motions to intervene by voters in defense of the requirement.[5987]

Leaving the preliminary-injunction motion pending, on May 5, Judge Moon approved a consent decree partially resolving the case.[5988] The de-

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5983. Minutes, *League of Women Voters of Va.*, No. 6:20-cv-24 (W.D. Va. Apr. 24, 2020), D.E. 30 [hereinafter Apr. 24, 2020, *League of Women Voters of Va.* Minutes]; Docket Sheet, *id.* (Apr. 17, 2020) [hereinafter *League of Women Voters of Va.* Docket Sheet] (notice, D.E. 20); *see League of Women Voters of Va.*, 458 F. Supp. 3d at 447.

For this report, Tim Reagan interviewed Judge Moon and his law clerks Rob DeRise and Josh Lefebvre by telephone on September 2, 2020.

5984. Order, *League of Women Voters of Va.*, No. 6:20-cv-24 (W.D. Va. Apr. 24, 2020), D.E. 31; Apr. 24, 2020, *League of Women Voters of Va.* Minutes, *supra* note 5983; Motion, *League of Women Voters of Va.*, No. 6:20-cv-24 (W.D. Va. Apr. 21, 2020), D.E. 18; *see League of Women Voters of Va.*, 481 F. Supp. 3d at 585; Minutes, *League of Women Voters of Va.*, No. 6:20-cv-24 (W.D. Va. May 4, 2020), D.E. 66.

5985. Interview with Judge Norman K. Moon and his law clerks Rob DeRise and Josh Lefebvre, September 2, 2020.

5986. *Id.*

5987. *League of Women Voters of Va.*, 458 F. Supp. 3d 460 (denying intervention to voters, whose interests were shared by all voters, to prevent prejudice to the parties by an influx of intervening voters, but granting permission to participate as amici curiae); Opinion, *League of Women Voters of Va.*, No. 6:20-cv-24 (W.D. Va. Apr. 30, 2020), D.E. 60, 2020 WL 2090678 (granting intervention to a political party but denying intervention to voters); Order, *id.* (Apr. 29, 2020), D.E. 57 (same); Order, *id.* (Apr. 29, 2020), D.E. 55 (denying intervention to voters); *League of Women Voters of Va.*, 481 F. Supp. 3d at 584; *League of Women Voters of Va.*, 458 F. Supp. 3d at 447; *see* Intervention Motion, *League of Women Voters of Va.*, No. 6:20-cv-24 (W.D. Va. Apr. 24, 2020), D.E. 28 (political party and voters); Intervention Motion, *id.* (Apr. 23, 2020), D.E. 22 (just voters); *see also* Amy Friedenberger, *GOP Seeking to Retain Ballot Witnessing Rule*, Roanoke Times, May 6, 2020, at 6R.

5988. *League of Women Voters of Va.*, 458 F. Supp. 3d 442; *League of Women Voters of Va.*, 481 F. Supp. 3d at 585; *see* Joint Consent Decree Motion, *League of Women Voters of Va.*, No. 6:20-cv-24 (W.D. Va. Apr. 27, 2020), D.E. 35.

cree stated that voters in the June 23 primary election who did not believe that they could safely have their ballots witnessed did not have to do so, and no ballot would be rejected for lack of a witness.[5989]

> In ordinary times, Virginia's witness signature requirement may not be a significant burden on the right to vote. But these are not ordinary times. In our current era of social distancing—where not just Virginians, but all Americans, have been instructed to maintain a minimum of six feet from those outside their household—the burden is substantial for a substantial and discrete class of Virginia's electorate.[5990]

Judge Moon set the case for a bench trial beginning May 19, 2021.[5991] The plaintiffs withdrew their preliminary-injunction motion on May 13, 2020,[5992] and filed amended complaints on June 19[5993] and July 17.[5994] They filed a new preliminary-injunction motion on July 24.[5995] On August 21, Judge Moon approved a second partial consent decree relaxing the witness signature requirement for the November 3 general election.[5996]

"There remains no dispute that, based on the Census Bureau's 2018 Current Population Survey, over twenty-five percent of Virginians over the age of eighteen live alone. Nor do the parties dispute that some at-risk populations are more likely to live alone, such as Virginians over the age of sixty-five."[5997]

5989. *League of Women Voters of Va.*, 458 F. Supp. 3d at 448; *see* Proposed Partial Consent Decree, *League of Women Voters of Va.*, No. 6:20-cv-24 (W.D. Va. Apr. 27, 2020), D.E. 35-1; *see also* Amy Friedenberger, *State to Waive Witness Requirement for Voting*, Roanoke Times, Apr. 29, 2020, at 1B; Amy Friedenberger, *Witness Requirement Waived for Absentee Ballots in June Primaries*, Roanoke Times, May 6, 2020, at 2B.

5990. *League of Women Voters of Va.*, 458 F. Supp. 3d at 452.

5991. *League of Women Voters of Va.* Docket Sheet, *supra* note 5983 (D.E. 76).

5992. Notice, *League of Women Voters of Va.*, No. 6:20-cv-24 (W.D. Va. May 13, 2020), D.E. 73.

5993. Amended Complaint, *id.* (June 19, 2020), D.E. 81.

5994. Second Amended Complaint, *id.* (July 17, 2020), D.E. 84; League of Women Voters of Va. v. Va. State Bd. of Elections, 481 F. Supp. 3d 580, 584 (W.D. Va. 2020).

5995. Preliminary-Injunction Motion, *League of Women Voters of Va.*, No. 6:20-cv-24 (W.D. Va. July 24, 2020), D.E. 87; *League of Women Voters of Va.*, 458 F. Supp. 3d at 448.

5996. *League of Women Voters of Va.*, 481 F. Supp. 3d 580; Second Partial Consent Decree, *League of Women Voters of Va.*, No. 6:20-cv-24 (W.D. Va. Aug. 21, 2020), D.E. 110 [hereinafter *League of Women Voters of Va.* Second Partial Consent Decree]; *see* Order, *id.* (Oct. 9, 2020), D.E. 117, 2020 WL 6365622 (denying a motion for contempt because "the State Defendants' initial actions and prompt corrective measures show substantial compliance with the consent decree").

5997. *League of Women Voters of Va.*, 481 F. Supp. 3d at 582.

One condition of the consent decree was the plaintiffs' waiving any entitlement to attorney fees accrued up to Judge Moon's approval of the consent decree.[5998]

Through February 2021, Judge Moon approved two amended consent decrees.[5999] On May 3, 2021, he dismissed the action as settled in light of intervening legislation.[6000]

Judge Moon observed that the civility of the parties and the interveners in this case greatly helped the court manage the time pressure.[6001]

Whether Requiring Postage for a Mailed Ballot Is an Unconstitutional Poll Tax

Black Voters Matter Fund v. Raffensperger (Amy Totenberg, N.D. Ga. 1:20-cv-1489)

> In light of widespread absentee voting by mail during the 2020 global Covid-19 infectious pandemic, a federal complaint alleged that requiring voters to pay the postage was an unconstitutional poll tax. The district judge denied relief for an imminent primary election for practical reasons. After careful consideration of the law and the facts, the judge ultimately decided that absentee-ballot postage is not a poll tax.
>
> *Topics:* Covid-19; absentee ballots; class action; primary election.

A voting-rights organization and a voter filed a federal class-action complaint in the Northern District of Georgia on April 8, 2020, claiming that requiring voters to pay for postage when they vote by mail is an unconstitutional poll tax and otherwise an unconstitutional burden on voting, especially during the global Covid-19 infectious pandemic, which would keep both voters and poll workers away from the polls.[6002] With their complaint, the plaintiffs filed a motion for a preliminary injunction.[6003]

5998. *Id.* at 586; *League of Women Voters of Va.* Second Partial Consent Decree, *supra* note 5996, D.E. 110-1 at 9.

5999. Opinion, *League of Women Voters of Va.*, No. 6:20-cv-24 (W.D. Va. Feb. 17, 2021), D.E. 131 (extending coverage of the consent decree to include a special state legislature election on March 23, 2021); Opinion, *id.* (Dec. 23, 2020), D.E. 126 (extending coverage of the consent decree to include two special state legislature elections on January 5, 2021).

6000. Order, *id.* (May 3, 2021), D.E. 136.

6001. Interview with Judge Norman K. Moon and his law clerks Rob DeRise and Josh Lefebvre, September 2, 2020.

6002. Complaint, Black Voters Matter Fund v. Raffensperger, No. 1:20-cv-1489 (N.D. Ga. Apr. 8, 2020), D.E. 1; Black Voters Matter Fund v. Sec'y of State, 11 F.4th 1227, 1230

On April 10, Judge Amy Totenberg ordered a response to the motion filed by 2:00 p.m. on Friday, April 17, and a reply filed by 2:00 p.m. five days later.[6004] She set the case for hearing on the morning of April 24,[6005] but as the urgency of the case became more clear, she held additional conferences on April 14 and 17.[6006] At the second conference, she set the case for hearing on April 23.[6007]

Judge Totenberg generally conducted conferences and discovery hearings by telephone, open to the attorneys and their clients, and other hearings open to the public.[6008]

In light of changing facts, the plaintiffs moderated their request for relief with respect to the upcoming June primary election,[6009] and Judge Totenberg rescheduled the hearing for the original April 24 time.[6010] The hearing included testimony by two witnesses, and it was conducted using videoconference technology.[6011] The public docket sheet included connection information and a notice that outside recording of the hearing was strictly prohibited.[6012] Judge Totenberg observed that evidence generally made speedy rulings even more challenging[6013]

(11th Cir. 2021); Black Voters Matter Fund v. Raffensperger, 478 F. Supp. 3d 1278, 1284 (N.D. Ga. 2020); *see* Amended Complaint, *Black Voters Matter Fund*, No. 1:20-cv-1489 (N.D. Ga. May 11, 2020), D.E. 88; *see also* Mark Niesse, *Lawsuit Argues Cost of Postage to Vote by Mail Is Illegal Poll Tax*, Atlanta J.-Const., Apr. 10, 2020, at 8B.

6003. Preliminary-Injunction Motion, *Black Voters Matter Fund*, No. 1:20-cv-1489 (N.D. Ga. Apr. 8, 2020), D.E. 2.

6004. Scheduling Order, *id.* (Apr. 10, 2020), D.E. 9 [hereinafter *Black Voters Matter Fund* Scheduling Order].

Tim Reagan interviewed Judge Totenberg for this report by telephone on September 3, 2020.

6005. *Black Voters Matter Fund* Scheduling Order, *supra* note 6004.

6006. Transcript, *Black Voters Matter Fund*, No. 1:20-cv-1489 (N.D. Ga. Apr. 17, 2020, filed Apr. 21, 2020), D.E. 52; Transcript, *id.* (Apr. 14, 2020, filed Apr. 17, 2020), D.E. 39.

6007. Minutes, *id.* (Apr. 17, 2020), D.E. 43.

6008. Interview with Judge Amy Totenberg, Sept. 3, 2020.

6009. Brief, *Black Voters Matter Fund*, No. 1:20-cv-1489 (N.D. Ga. Apr. 17, 2020), D.E. 44.

6010. Docket Sheet, *id.* (Apr. 8, 2020) [hereinafter N.D. Ga. *Black Voters Matter Fund* Docket Sheet]; *see* Minutes, *id.* (Apr. 24, 2020), D.E. 69; Black Voters Matter Fund v. Raffensperger, 478 F. Supp. 3d 1278, 1284 (N.D. Ga. 2020).

6011. Transcript, *Black Voters Matter Fund*, No. 1:20-cv-1489 (N.D. Ga. Apr. 24, 2020, filed Apr. 28, 2020), D.E. 75.

6012. N.D. Ga. *Black Voters Matter Fund* Docket Sheet, *supra* note 6010.

6013. Interview with Judge Amy Totenberg, Sept. 3, 2020.

On April 30, Judge Totenberg ruled that there was not time to provide a remedy for any wrong respecting the June 9 primary election, and she deferred consideration of elections coming up in August and November.[6014]

On August 11, after careful consideration of the evidence, she concluded that requiring postage for a returned absentee ballot is not a poll tax:

> The fact that any registered voter may vote in Georgia on election day without purchasing a stamp, and without undertaking any "extra steps" besides showing up at the voting precinct and complying with generally applicable elections regulations, necessitates a conclusion that stamps are not poll taxes under the Twenty-Fourth Amendment prism.[6015]

Judge Totenberg closed the case by dismissing a second amended complaint on August 28.[6016] The court of appeals affirmed the dismissal on August 27, 2021.[6017]

Standing to Seek an Absentee-Ballot Extension During a Pandemic

Mays v. Thurston (James M. Moody, Jr., E.D. Ark. 4:20-cv-341)

> A district judge denied a request for an order during a global infectious pandemic extending the deadline for absentee ballots from received by election day to mailed by election day, finding that any difficulty that the plaintiffs would have in submitting their absentee ballots on time would arise from the pandemic and not from state action.
>
> *Topics:* Covid-19; absentee ballots.

In light of an upcoming March 31, 2020, runoff election in Arkansas during a global Covid-19 infectious pandemic, two voters and a coalition of religious leaders filed a federal complaint in the Eastern District of Arkansas on March 26 seeking more accommodations for absentee voters than the governor had ordered.[6018] In particular, they wanted absentee ballots to be counted if mailed by election day, not just received by election day.[6019]

6014. Opinion, *Black Voters Matter Fund*, No. 1:20-cv-1489 (N.D. Ga. Apr. 30, 2020), D.E. 83, 2020 WL 2079240; *see Black Voters Matter Fund*, 478 F. Supp. 3d at 1284–85.

6015. *Black Voters Matter Fund*, 478 F. Supp. 3d at 1314; *see* Black Voters Matter Fund v. Sec'y of State, 11 F.4th 1227, 1230–31 (11th Cir. 2021).

6016. Order, *Black Voters Matter Fund*, No. 1:20-cv-1489 (N.D. Ga. Aug. 28, 2020), D.E. 144; *see* Second Amended Complaint, *id.* (Aug. 28, 2020), D.E. 143.

6017. *Black Voters Matter Fund*, 11 F.4th 1227.

6018. Complaint, Mays v. Thurston, No. 4:20-cv-341 (E.D. Ark. Mar. 26, 2020), D.E. 1.

6019. *Id.* at 3, 18–19 (requesting a receipt deadline of ten days after election day).

On the case's second day, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction.[6020]

On March 30, Judge James M. Moody, Jr., denied the plaintiffs relief, finding that they did not have standing to pursue the complaint: "Any injury caused by Plaintiffs' failing to take advantage of [the governor's additional] available avenues to exercise their rights to vote are not caused by or fairly traceable to the actions of the State, but rather are caused by the global pandemic."[6021]

The plaintiffs voluntarily dismissed their complaint on March 31.[6022]

Election Modifications in Wisconsin Because of a Pandemic

Democratic National Committee v. Bostelmann (3:20-cv-249), Gear v. Knudson (3:20-cv-278), and Lewis v. Knudson (3:20-cv-284) (William M. Conley, W.D. Wis.) and City of Green Bay v. Bostelmann (William C. Griesbach, 1:20-cv-479) and Taylor v. Milwaukee Election Commission (Pamela Pepper, 2:20-cv-545) (E.D. Wis.)

> In light of a global infectious pandemic, federal litigation to modify election procedures for the April 2020 election in Wisconsin, which included a presidential primary election, began about three weeks before the election. Shortly after a complaint was filed, and again a few days before the election, a federal judge in the Western District of Wisconsin ordered some modifications to enable absentee voting by mail. The judge declined to order a delay in the election. The court of appeals reversed the district judge's modification to absentee-voter witness-certification requirements, and the Supreme Court reversed the district judge's extension of time to mail absentee ballots after election day. Suits in the Eastern District were unsuccessful. For the general election in November, the Western District judge again ordered modifications, but the court of appeals stayed the injunction. After the election, the court of appeals stayed the injunction.
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> *Topics:* Covid-19; registration procedures; absentee ballots; enjoining elections; interlocutory appeal; voter identification; intervention; primary election; voting technology; attorney fees; case assignment; class action.

Federal courts gave Wisconsin voters limited relief to accommodate the Covid-19 pandemic in April 2020 voting.

6020. Motion, *id.* (Mar. 27, 2020), D.E. 2.

6021. Opinion at 3, *id.* (Mar. 30, 2020), D.E. 11, 2020 WL 1531359.

6022. Voluntary Dismissal, *id.* (Mar. 31, 2020), D.E. 14.

Western District of Wisconsin

Twenty days before an April 7, 2020, election in Wisconsin that included a presidential primary election, at a time when the coronavirus that causes Covid-19 was in the first few months of a global infectious pandemic, the Democratic Party sought from the U.S. District Court for the Western District of Wisconsin injunctive relief that would make it easier to vote by mail.[6023] With its complaint, the party filed a motion for a temporary restraining order and a preliminary injunction.[6024]

On the following day, an attorney writing on behalf of the state's legislature asked District Judge William M. Conley to delay ruling on the party's motion until the legislature could intervene and oppose "changing election laws in the middle of an ongoing election."[6025]

Judge Conley heard arguments at a telephonic status conference on the case's second day.[6026] He allowed the legislature to participate, and he ordered a response to the Democratic Party's injunction motion.[6027] Members of the news media were invited to listen, and they were told that they were forbidden to record the proceeding.[6028]

On the case's third day, the Republican Party asked Judge Conley to delay any decision until the party could be heard,[6029] and the party filed a motion to intervene two days later.[6030]

6023. Complaint, Democratic Nat'l Comm. v. Bostelmann, No. 3:20-cv-249 (W.D. Wis. Mar. 18, 2020), D.E. 1 (identifying the plaintiffs as the Democratic National Committee and the Democratic Party of Wisconsin); Democratic Nat'l Comm. v. Bostelmann, 466 F. Supp. 3d 957, 961 (W.D. Wis. 2020); Democratic Nat'l Comm. v. Bostelmann, 447 F. Supp. 3d 757, 761 (W.D. Wis. 2020); *see* Nick Corasaniti & Stephanie Saul, *Democrats Sue Wisconsin Over Early Voting*, N.Y. Times, Mar. 19, 2020, at A23. *See generally As Other States Look On, Wisconsin Plows Ahead with Troubled Election*, Milwaukee J. Sentinel, Apr. 4, 2020, at A8 (reporting that Wisconsin was "holding not just a presidential primary but general election contests for state Supreme Court and hundreds of local offices, including mayor of Milwaukee").

6024. Motion, *Democratic Nat'l Comm.*, No. 3:20-cv-249 (W.D. Wis. Mar. 18, 2020), D.E. 2.

6025. Letter, *id.* (Mar. 19, 2020), D.E. 8; *see* Intervention Motion, *id.* (Mar. 20, 2020), D.E. 20.

6026. Transcript, *id.* (Mar. 19, 2020, filed Mar. 25, 2020), D.E. 47 [hereinafter Mar. 19, 2020, *Democratic Nat'l Comm.* Transcript]; Docket Sheet, *id.* (Mar. 18, 2020) [hereinafter *Democratic Nat'l Comm.* Docket Sheet].

Tim Reagan interviewed Judge Conley for this report by telephone on November 18, 2020.

6027. *Democratic Nat'l Comm.*, 447 F. Supp. 3d at 761.

6028. Mar. 19, 2020, *Democratic Nat'l Comm.* Transcript, *supra* note 6026, at 3–4.

6029. Letter, *Democratic Nat'l Comm.*, No. 3:20-cv-249 (W.D. Wis. Mar. 20, 2020),

The case's third day was March 20, and on that day, Judge Conley extended the deadline for online voter registration from March 18 to March 30.[6031] He declined to grant a similar extension for registration by mail, because of the lag in receipt of mail-in registrations by election officials.[6032]

He decided to not yet rule on a request to extend the deadline for receipt of absentee ballots from the closing of the polls to a later time: "the court will not speculate about the need for this relief on the limited record before it."[6033] Nor did he provide relief from voter-identification requirements, although "obtaining [identification] documents may require individuals to venture out into the public," because of the recognized state interest with respect to voter identification.[6034]

On March 26, the Democratic Party filed an amended complaint seeking an extension until April 3 for registration by mail, suspension of identification requirements for voter registration and absentee-ballot applications, an extension of the deadline for receipt of cast absentee ballots to a postmark by election day rather than receipt by election day, and an injunction against a witness requirement for absentee ballots.[6035] Two other groups of plaintiffs filed related complaints:[6036] (1) plaintiffs advocating for voter participation, including among retired veterans, seeking an injunction against the witness requirement,[6037] and (2) plaintiffs advocating for minority voting rights seeking similar relief and a delay in the election.[6038]

On March 28, Judge Conley granted intervention to the Republican Party, but denied it to the legislature, nevertheless permitting the legisla-

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D.E. 34.

6030. Intervention Motion, *id.* (Mar. 22, 2020), D.E. 41; *see also* Elise Viebeck, Amy Gardner & Michael Sherer, *GOP Fights Efforts to Ease Voting During Pandemic*, Wash. Post, Apr. 5, 2020, at A2.

6031. *Democratic Nat'l Comm.*, 447 F. Supp. 3d 761.

6032. *Id.* at 767.

6033. *Id.* at 769.

6034. *Id.* at 768; *see* Crawford v. Marion Cty. Election Bd., 553 U.S. 181 (2008).

6035. Amended Complaint, *Democratic Nat'l Comm.*, No. 3:20-cv-249 (W.D. Wis. Mar. 26, 2020), D.E. 55; *see* Preliminary-Injunction Motion, *id.* (Mar. 27, 2020), D.E. 61.

6036. *See* Haley BeMiller & Patrick Marley, *Judge Promises Quick Ruling on Suit That Seeks to Stall Election*, Milwaukee J. Sentinel, Mar. 27, 2020, at A4.

6037. Complaint, Gear v. Knudson, No. 3:20-cv-278 (W.D. Wis. Mar. 26, 2020), D.E. 1 ("Disenfranchising mail-in absentee voters because they are self-quarantining . . . cannot be justified . . . ."); *see* Motion, *id.* (Mar. 28, 2020), D.E. 8.

6038. Complaint, Lewis v. Knudson, No. 3:20-cv-284 (W.D. Wis. Mar. 26, 2020), D.E. 1; *see* Motion, *id.* (Mar. 28, 2020), D.E. 17.

ture and other interested nonparties to participate as amici.[6039] He also consolidated the three cases.[6040]

Three days later, he set a videoconference for later that day to test the technology, which had rapidly become widely used because of the pandemic.[6041] An evidentiary hearing was held on April 1.[6042] The hearing was held by videoconference even more to accommodate the attorneys and witnesses on short notice than to accommodate Covid-19.[6043]

On April 2, Judge Conley extended the deadline for receipt of absentee-ballot requests by mail, fax, or email to April 3; extended the deadline for receipt of cast absentee ballots to April 13; and allowed absentee voters to substitute for witness certifications a statement that they were unable to safely obtain one.[6044] Judge Conley declined to delay the election for insufficient clarity that that was an appropriate remedy.[6045]

> Contrary to the view of at least a dozen other states, as well as the consensus of medical experts across the country as to the gathering of large groups of people, the State of Wisconsin appears determined to proceed with an in-person election on April 7, 2020. . . . [S]tate election officials are confronting a huge backlog in requests for absentee ballots made online, by mail or in person, including an unprecedented number of questions regarding how to satisfy certain registration requirements, properly request an absentee ballot, and return a properly completed absentee ballot in time to be considered for the April 7 election.
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> . . .
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> However unlikely [an outcome of a successful election without dissemination of Covid-19] may be, or ill-advised in terms of the public health risks and the likelihood of a successful election, the only role of a federal district court is to take steps that help avoid the impingement on citizens' rights to exercise their voting franchise as protected by the United States Constitution and federal statutes. That is what the court at-

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6039. Opinion, *id.* (Mar. 28, 2020), D.E. 85, 2020 WL 1505640.

6040. Order, *id.* (Mar. 28, 2020), D.E. 86.

6041. *Democratic Nat'l Comm.* Docket Sheet, *supra* note 6026 (D.E. 116).

6042. Democratic Nat'l Comm. v. Bostelmann, 451 F. Supp. 3d 952, 958 (W.D. Wis. 2020).

6043. Interview with Judge William M. Conley, Nov. 19, 2020.

6044. *Democratic Nat'l Comm.*, 451 F. Supp. 3d at 959; Democratic Nat'l Comm. v. Bostelmann, 488 F. Supp. 3d 776, 787 (W.D. Wis. 2020); *see* Emily Bazelon, *Can Democracy Survive the Pandemic?*, N.Y. Times Magazine, May 10, 2020, at 26, 28; Amy Gardner, *Federal Judge Declines to Delay Wis. Primaries, Set for Tuesday*, Wash. Post, Apr. 3, 2020, at A2; Patrick Marley, *Judge Rips Officials for Not Stalling Election*, Milwaukee J. Sentinel, Apr. 2, 2020, at A10; Stephen Vladeck, The Shadow Docket 210 (2023).

6045. *Democratic Nat'l Comm.*, 451 F. Supp. 3d at 970–75.

> tempts to do in this opinion and the order below, understanding that a consequence of these measures may be to further the public health crisis in this State. Unfortunately, that is beyond the power of this court to control.[6046]

Judge Conley clarified his injunction on April 3 to forbid the reporting of election results until April 13.[6047]

Also on April 3, the court of appeals stayed Judge Conley's order on witness certification, leaving accommodation of witness issues to election officials.[6048] And the court of appeals determined that the legislature should be permitted to intervene.[6049] The court of appeals declined to stay other parts of Judge Conley's injunction pending appeal.[6050] Judge Conley decided to regard the legislature as an intervening party as of the time of the appellate court's ruling.[6051]

On the evening before the April 7 election, the Supreme Court, over the dissent of four justices, stayed Judge Conley's order requiring Wisconsin to count ballots postmarked after election day.[6052]

> Importantly, in their preliminary injunction motions, the plaintiffs did not ask that the District Court allow ballots mailed and postmarked after election day, April 7, to be counted. That is a critical point in the case. Nonetheless, five days before the scheduled election, the District Court unilaterally ordered that absentee ballots mailed and postmarked after election day, April 7, still be counted so long as they are received by April 13. Extending the date by which ballots may be cast by voters—not just received by the municipal clerks but cast by voters—for an additional six

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6046. *Id.* at 957–58.

6047. Order, Democratic Nat'l Comm. v. Bostelmann, No. 3:20-cv-249 (W.D. Wis. Apr. 3, 2020), D.E. 179.

6048. Stay Order, Democratic Nat'l Comm. v. Bostelmann, No. 20-1539 (7th Cir. Apr. 3, 2020), D.E. 30 [hereinafter Apr. 3, 2020, *Democratic Nat'l Comm.* Stay Order], 2020 WL 3619499.

On May 14, 2020, the court of appeals dismissed appeals filed in April as moot. Dismissal Order, *id.* (May 14, 2020), D.E. 43.

6049. Apr. 3, 2020, *Democratic Nat'l Comm.* Stay Order, *supra* note 6048.

6050. *Id.*; Democratic Nat'l Comm. v. Bostelmann, 488 F. Supp. 3d 776, 788 (W.D. Wis. 2020).

6051. *Democratic Nat'l Comm.* Docket Sheet, *supra* note 6026 (D.E. 191).

6052. Republican Nat'l Comm. v. Democratic Nat'l Comm., 589 U.S. ___, 140 S. Ct. 1205 (2020); *Democratic Nat'l Comm.*, 488 F. Supp. 3d at 788; *see* Bazelon, *supra* note 6044, at 28; Steve Coll, Comment, *Pandemic Politics*, New Yorker, May 4, 2020, at 11; Adam Liptak, *Supreme Court Blocks Extended Voting*, N.Y. Times, Apr. 7, 2020, at A21; Vladeck, *supra* note 6044, at 210–11.

> days after the scheduled election day fundamentally alters the nature of the election.[6053]

Meanwhile, on the day before the election, the governor issued an executive order delaying it, but that order was vacated by the state's supreme court.[6054]

As Judge Conley determined later,

> All told, absentee ballots represented 73.8% of all ballots counted. Approximately 61.8% of absentee ballots were mailed in, while the remaining 12% were cast in-person absentee or hand-delivered, meaning only roughly 26.2% were cast on election day. Absentee votes never comprised more [than] 20% of all ballots in recent past elections, and often, they represented less than 10% of ballots cast.[6055]

The *New York Times* reported problems with in-person voting:

> Even before voting began, there were lines outside polling locations that stretched for several blocks. Some poll workers wore hazmat suits. Nearly every voter wore a face mask, removing it only to make small talk that reflected a combination of determination and grim humor about the extraordinary experience of voting amid a deadly pandemic.
>
> . . .
>
> In Milwaukee—where the number of polling stations was reduced from 180 to only five—voters tried to exercise proper social distancing as they waited, in some cases, for more than two hours. But in other areas of the state, including Madison, suburbs like Brookfield, and more rural areas like Beloit, the voting process was altered but not totally disrupted, with options that included curbside ballot access and poll locations that were more fully staffed.[6056]

6053. *Republican Nat'l Comm.*, 589 U.S. at ___, 140 S. Ct. at 1206–07.

6054. *See* Molly Beck & Patrick Marley, *Wisconsin Supreme Court Reinstates Tuesday Voting*, Milwaukee J. Sentinel, Apr. 7, 2020, at A6; Amy Gardner, Elise Viebeck & Dan Simmons, *In Wis., Election Whiplash Sows Confusion*, Wash. Post, Apr. 7, 2020, at A1; Astead W. Herndon & Jim Rutenberg, *In Wisconsin, a Voting Fight for a Virus Era*, N.Y. Times, Apr. 7, 2020, at A1.

6055. *Democratic Nat'l Comm.*, 488 F. Supp. 3d at 790.

6056. Astead W. Herndon & Alexander Burns, *In Wisconsin, Sense of Strain Shadows Vote*, N.Y. Times, Apr. 8, 2020, at A1; *see also* Nick Corasaniti & Stephanie Saul, *Wisconsin's Mail-in Mess Grows, with Thousands of Ballots Missing or Voided*, N.Y. Times, Apr. 10, 2020, at A25; Bill Glauber, Molly Beck & Mary Spicuzza, *An Election Day Unlike Any Other*, Milwaukee J. Sentinel, Apr. 8, 2020, at A5; John McCormick & Alexa Corse, *Wisconsin Signals Risk in November*, Wall St. J., Apr. 8, 2020, at A3; Elise Viebeck, Amy Gardner, Dan Simons & Jan M. Larson, *Anger and Fear as Wisconsin Votes*, Wash. Post, Apr. 8, 2020, at A1.

On June 10, Judge Conley granted the plaintiffs permission to file an amended complaint.[6057]

Eastern District of Wisconsin

A federal complaint filed by Green Bay on Tuesday, March 24, in the Eastern District sought suspension of the April 7 election and various injunctive provisions protecting its city workers and poll workers from Covid-19 risks.[6058] With its complaint, the city filed a motion for a temporary restraining order and a preliminary injunction.[6059]

Judge William C. Griesbach set a telephone conference for Thursday afternoon, encouraging settlement in the interim because even if the city was determined to not have standing to bring the suit others might.[6060] The state legislature, the Republican Party, and the Wisconsin Counties Association requested permission to participate in the conference as possible intervenors.[6061] At the conference, Judge Griesbach ordered briefing by 3:00 p.m. on Friday and expected a ruling by Monday.[6062] After the conference, the City of Neenah sought intervention as a plaintiff.[6063]

On Monday, March 27, Judge Griesbach dismissed the action for lack of jurisdiction: a political subdivision of the state cannot sue the state for equal protection.[6064] Judge Griesbach denied the intervention motions as moot.[6065]

An April 3 action required somewhat less court attention. Two candidates and an organization filed a federal complaint in the Eastern District's Milwaukee courthouse against Milwaukee and Wisconsin election officials alleging that encouraging online requests for absentee ballots disadvantaged voters without internet access.[6066] Among the requested relief was a

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6057. Democratic Nat'l Comm. v. Bostelmann, 466 F. Supp. 3d 957 (W.D. Wis. 2020).

6058. Complaint, City of Green Bay v. Bostelmann, No. 1:20-cv-479 (E.D. Wis. Mar. 24, 2020), D.E. 1; *see* Amended Complaint, *id.* (Mar. 26, 2020), D.E. 26.

6059. Motion, *id.* (Mar. 24, 2020), D.E. 2.

6060. Order, *id.* (Mar. 25, 2020), D.E. 7; Notice, *id.* (Mar. 25, 2020), D.E. 8.

6061. Letters, *id.* (Mar. 25, 2020), D.E. 13, 16, 19; *see* Intervention Motion, *id.* (Mar. 27, 2020), D.E. 41 (Wisconsin Legislature); Intervention Motion, *id.* (Mar. 27, 2020), D.E. 36 (Washington County and the Wisconsin Counties Association); Intervention Motion, *id.* (Mar. 26, 2020), D.E. 24 (Republican Party).

6062. Minutes, *id.* (Mar. 26, 2020), D.E. 40.

6063. Intervention Motion, *id.* (Mar. 27, 2020), D.E. 52.

6064. Opinion, *id.* (Mar. 27, 2020), D.E. 53, 2020 WL 1492975.

6065. *Id.* at 3.

6066. Complaint, Taylor v. Milwaukee Election Comm'n, No. 2:20-cv-545 (E.D. Wis. Apr. 3, 2020), D.E. 1 [hereinafter *Taylor* Complaint]; Taylor v. Milwaukee Election Comm'n, 452 F. Supp. 3d 818, 819 (E.D. Wis. 2020).

temporary restraining order and a preliminary injunction delaying the April 7 election to September.[6067]

Adjudging the plaintiffs' filing "a procedural muddle" at about 2:00 p.m. on Sunday, April 5, Judge Pamela Pepper denied the plaintiffs immediate injunctive relief and offered to reconsider the motion if the defendants were served by 10:30 a.m. on Monday.[6068]

On April 6, the day before the election, Judge Pepper declined to order a postponement of the election, mindful of the Supreme Court's and Judge Conley's earlier decisions.[6069]

> Despite all this, it appears that tomorrow morning, those who have not yet voted will face a grim choice: go to the polling places (the ones that are open) and risk being exposed to the virus or spreading it to their friends and neighbors, or forego one of the most sacred rights of citizenship—the right to have a say in the governance of their communities, the state and their nation.[6070]

Later, Judge Pepper granted the legislature's April 6 motion to intervene.[6071]

Additional Cases

In April and May, the district court assigned to Judge Conley two additional cases as related to the first three: a class action to redo the April 7 election and establish better mail-in voting procedures for the upcoming elections in 2020[6072] and an action to improve social distancing for in-person voting during upcoming elections.[6073]

The General Election

Judge Conley issued an injunction on September 21 to cover the general election.[6074]

6067. *Taylor* Complaint, *supra* note 6066, at 25, D.E. 1-15; *Taylor*, 452 F. Supp. 3d at 819–20, 827.

6068. Opinion, *Taylor*, No. 2:20-cv-545 (E.D. Wis. Apr. 5, 2020), D.E. 4, 2020 WL 1676481; *Taylor*, 452 F. Supp. 3d at 820.

6069. *Taylor*, 452 F. Supp. 3d 818.

6070. *Id.* at 830.

6071. Order, *Taylor*, No. 2:20-cv-545 (E.D. Wis. May 12, 2020), D.E. 28; Intervention Motion, *id.* (Apr. 6, 2020), D.E. 16.

6072. Complaint, Edwards v. Vos, No. 3:20-cv-340 (W.D. Wis. Apr. 13, 2020), D.E. 1; Docket Sheet, *id.* (Apr. 13, 2020); Amended Complaint, *id.* (May 4, 2020), D.E. 5; *see* Chris Rickert, *Some Voters Want a Do-Over*, Wis. State J., Apr. 14, 2020, at A1.

6073. Complaint, Swenson v. Bostelmann, No. 3:20-cv-459 (W.D. Wis. May 18, 2020), D.E. 1; Docket Sheet, *id.* (May 18, 2020); *see* Patrick Marley, *Suit Seeks Ballot Requests Sent to All*, Milwaukee J. Sentinel, May 19, 2020, at A6.

6074. Democratic Nat'l Comm. v. Bostelmann, 488 F. Supp. 3d 776 (W.D. Wis. 2020);

1. He extended the deadline for electronic and mail-in voter registration from three Wednesdays before the election to two.[6075] "Cutting off electronic and mail-in registrations three weeks before the election will not just thwart efforts to encourage Wisconsin voters to vote by mail via absentee ballots, but increase the burdens and risks on those choosing to vote in person."[6076] Judge Conley relied on election-official testimony that the one-week extension would provide election officials with enough time to prepare poll books.[6077]

2. Election officials would count absentee ballots received by November 9 if mailed and postmarked by election day, November 3.[6078]

> Regardless of cause, plaintiffs have established significant problems with fulfilling absentee ballot requests timely, and even greater problems in getting them back in time to be counted. Indeed, those problems would have resulted in the disenfranchisement of some 80,000 voters during the April election but for this court's entry of a preliminary injunction, and there is *no* evidence to suggest that the fundamental causes of these problems have resolved *or* will be resolved in advance of the November election.[6079]

3. Judge Conley authorized electronic absentee voting under certain circumstances, similar to what was permitted for overseas and military voters.[6080]

4. Poll workers did not have to be voters within the county.[6081] "At minimum, eliminating the residence requirement would provide greater flexibility across the state to meet unanticipated last-minute demands for staffing due to COVID-19 outbreaks or fear."[6082]

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see Alexa Corse, *Wisconsin Voters Get Mail-In Extension*, Wall St. J., Sept. 22, 2020, at A6; Patrick Marley, *What to Know About the Ruling Extending Election Deadlines*, Milwaukee J. Sentinel, Sept. 23, 2020, at A4.

6075. *Democratic Nat'l Comm.*, 488 F. Supp. 3d at 784, 801–03.

6076. *Id.* at 802; *see id.* at 803 ("discontinuing electronic and mail registration options precipitously on October 14 will likely restrict many Wisconsin citizens' freedom to exercise their right to vote").

6077. *Id.* at 803.

6078. *Id.* at 784, 806–08.

6079. *Id.* at 807.

6080. *Id.* at 784, 809–10.

6081. *Id.* at 784, 812–13.

6082. *Id.* at 812.

Judge Conley stayed his injunction for one week to permit appellate review.[6083] The court of appeals stayed the injunction six days later.[6084] But the court of appeals vacated its stay on September 29.[6085]

> The three intervening defendants have appealed and asked us to issue a stay; the executive-branch defendants have not appealed. . . .
>
> . . . [N]one of the three appellants has a legal interest in the outcome of this litigation.
>
> This conclusion is straightforward with respect to the Republican National Committee and the Republican Party of Wisconsin. The district court did not order them to do something or forbid them from doing anything. Whether the deadline for online registration (for example) is October 14 or October 21 does not affect any legal interest of either organization. Neither group contends that the new deadlines established by the district court would violate the constitutional rights of any of their members. The political organizations themselves do not suffer any injury caused by the judgment. . . .
>
> That leaves the legislature. . . . The interest at stake here, however, is not the power to legislate but the validity of rules established by legislation. All of the legislators' votes were counted; all of the statutes they passed appear in the state's code.[6086]

On the following day, the legislature asked the court of appeals to certify to Wisconsin's supreme court the question of whether the legislature had standing under Wisconsin law to appeal an injunction blocking state law.[6087] The court of appeals certified the question on October 2, and Wisconsin's supreme court answered on October 6.[6088] By a vote of four to three, Wisconsin's court decided that its legislature could intervene to defend a state statute.[6089]

6083. *Id.* at 784, 818.

6084. Order, Democratic Nat'l Comm. v. Republican Nat'l Comm., No. 20-2844 (7th Cir. Sept. 27, 2020), D.E. 38; Order, Wis. State Legislature v. Bostelmann, No. 20-2835 (7th Cir. Sept. 27, 2020), D.E. 49.

6085. Democratic Nat'l Comm. v. Bostelmann, 976 F.3d 764 (7th Cir. 2020); *see* Scott Bauer, *Judges Uphold State's Absentee Ballot Extension*, Wis. State J., Sept. 30, 2020, at A1.

6086. *Democratic Nat'l Comm.*, 976 F.3d at 766–67.

6087. Motion, *Democratic Nat'l Comm.*, No. 20-2835 (7th Cir. Sept. 30, 2020), D.E. 52.

6088. Answer to Certified Question, *id.* (Oct. 6, 2020), D.E. 69; Certification, *id.* (Oct. 2, 2020); *see* Patrick Marley, *High Court to Clarify Ruling Affecting Ballot Cases*, Milwaukee J. Sentinel, Oct. 3, 2020, at A4.

6089. Democratic Nat'l Comm. v. Bostelmann, 394 Wis. 2d 33, 949 N.W.2d 423 (Wis. 2020); *see* Democratic Nat'l Comm. v. Bostelmann, 977 F.3d 639, 641 (7th Cir. 2020).

By a vote of two to one, the court of appeals stayed Judge Conley's injunction on October 8.[6090] The court of appeals agreed with the legislature that "a federal court should not change the rules so close to an election," and "political rather than judicial officials are entitled to decide when a pandemic justifies changes to rules that are otherwise valid."[6091] "Voters have had many months since March to register or obtain absentee ballots; reading the Constitution to extend deadlines near the election is difficult to justify when the voters have had a long time to cast ballots while preserving social distancing."[6092] The Supreme Court declined three requests to vacate the stay.[6093]

On December 1, after the election, the court of appeals vacated Judge Conley's injunction and remanded the case for a mootness determination.[6094] Voluntary dismissals in the district court followed.[6095]

Judge Conley denied an award of attorney fees to plaintiffs in the case primarily advocating for minority voting rights—which had not been voluntarily dismissed—on May 12, 2022. [6096] "[T]he six-day extension of the ballot receipt deadline might have entitled [them] to attorney's fees if they had been the primary party to achieve this victory," but "they were largely along for the ride while the [Democratic Party and its] attorneys were in the driver's seat."[6097]

6090. *Democratic Nat'l Comm.*, 977 F.3d 639; *see* Brent Kendall & Alexa Corse, *Court Rejects Longer Wisconsin Mail-In Vote*, Wall St. J., Oct. 9, 2020, at A4.

6091. *Democratic Nat'l Comm.*, 977 F.3d at 641.

6092. *Id.* at 642.

6093. Democratic Nat'l Comm. v. Wis. State Legislature, 592 U.S. ___, 141 S. Ct. 28 (2020); Gear v. WI State Legislature, 592 U.S. ___, 141 S. Ct. 644 (2020); Swenson v. WI State Legislature, 592 U.S. ___, 141 S. Ct. 644 (2020); *see* Robert Barnes, *Justices Block Extension of Vote-Counting in Wisconsin*, Wash. Post, Oct. 27, 2020, at A1; Brent Kendall & Jess Bravin, *Justices Reject Pandemic-Tied Voting Changes in Wisconsin*, Wall St. J., Oct. 27, 2020, at A3; Adam Liptak, *Justices Deny Extension of Deadline in Wisconsin*, N.Y. Times, Oct. 27, 2020, at A23; Vladeck, *supra* note 6044, at 215.

6094. Order, Democratic Nat'l Comm. v. Bostelmann, No. 20-2835 (7th Cir. Dec. 1, 2020), D.E. 86.

6095. Stipulated Dismissal, Democratic Nat'l Comm. v. Bostelmann, No. 3:20-cv-249 (Jan. 19, 2021), D.E. 560; Stipulated Dismissal, Edwards v. Vos, No. 3:20-cv-340 (Jan. 15, 2021), D.E. 359; Stipulated Dismissal, Gear v. Knudson, No. 3:20-cv-278 (Jan. 8, 2021), D.E. 491; Stipulated Dismissal, Swenson v. Bostelmann, No. 3:20-cv-459 (W.D. Wis. Dec. 22, 2020), D.E. 380.

6096. Opinion, Lewis v. Bostelmann, No. 3:20-cv-284 (W.D. Wis. May 12, 2022), D.E. 372, 2022 WL 1500287.

6097. *Id.* at 6–7.

Case Management

For Judge Conley, the key to managing litigation with lots of moving parts and a tight time frame was managing expectations.[6098] Employing active case management, Judge Conley focused the parties on what he needed to know to rule.[6099]

No Ordered Modification of Absentee-Ballot Procedures on the Night Before an Election

Williams v. DeSantis (Robert L. Hinkle, N.D. Fla. 1:20-cv-67)

> During the global infectious Covid-19 pandemic, a federal judge declined to modify absentee-ballot provisions in a presidential primary election in response to a complaint filed on the night before election day.
>
> *Topics:* Absentee ballots; Covid-19; laches; intervention; case assignment; primary election.

A district court denied immediate relief to plaintiffs who sought modification of absentee-voting procedures on the night before election day. Continued litigation over procedures for future elections also did not result in court-ordered relief.

First Case

At 9:29 p.m. on the night before Florida's March 17, 2020, presidential primary election, three organizations and five voters—including two students who had moved away from their polling places because of the closing of their schools in light of the global infectious Covid-19 pandemic—filed a federal complaint in the Northern District of Florida against Florida election officials seeking "the extension of vote-by-mail options and other accommodations at polling places" because of the pandemic.[6100] At 11:16 p.m., the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction.[6101]

6098. Interview with Judge William M. Conley, Nov. 19, 2020.

6099. *Id.*

6100. Complaint at 2, Williams v. DeSantis, No. 1:20-cv-67 (N.D. Fla. Mar. 16, 2020), D.E. 1; First Temporary-Restraining-Order Denial at 1, *id.* (Mar. 17, 2020), D.E. 12 [hereinafter *Williams* First Temporary-Restraining-Order Denial], 2020 WL 6589657.

One of the plaintiffs voluntarily dismissed her claims on the next day. Voluntary Dismissal, *id.* (Mar. 17, 2020), D.E. 17; Second Temporary-Restraining-Order Denial, *id.* (Mar. 18, 2020), D.E. 18, 2020 WL 6589658.

6101. Motion, *id.* (Mar. 16, 2020), D.E. 4; *Williams* First Temporary-Restraining-Order Denial, *supra* note 6100, at 1.

Judge Robert L. Hinkle denied the plaintiffs immediate relief on March 17.[6102]

> At this hour, with voting in progress, a temporary restraining order would be adverse to the public interest. At least until the polls close, and under all the circumstances, it will be in the public interest to allow the Governor, Secretary of State and Supervisors of Elections to perform their respective roles.[6103]

The plaintiffs filed a second motion for a temporary restraining order that day.[6104] Judge Hinkle denied it on the next day.[6105] Amended complaints filed on April 20 and May 8 by an adjusted group of four organizations and six voters sought relief for future elections.[6106]

Second Case

Meanwhile, on May 4, seven voters and three organizations filed a separate federal complaint in the Northern District seeking judicial review of procedures for an August 18 primary election for offices other than President and for the November 3 general election.[6107] With their complaint, the plaintiffs filed a notice that their case was similar to the March 16 case,[6108] and the court assigned the second case to Judge Hinkle,[6109] who consolidated the cases for case-management purposes and set a combined preliminary-injunction hearing and trial to begin on July 20.[6110] He allowed intervention by Republican Party organizations[6111] and by five blind voters and

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6102. *Williams* First Temporary-Restraining-Order Denial, *supra* note 6100.

Tim Reagan interviewed Judge Hinkle for this report by telephone on August 17, 2020.

6103. *Williams* First Temporary-Restraining-Order Denial, *supra* note 6100, at 3.

6104. Motion, *Williams*, No. 1:20-cv-67 (N.D. Fla. Mar. 17, 2020), D.E. 16.

6105. Second Temporary Restraining Order Denial, *id.* (Mar. 18, 2020), D.E. 18.

6106. Second Amended Complaint, Dream Defenders v. DeSantis, No. 1:20-cv-67 (N.D. Fla. May 8, 2020), D.E. 47; First Amended Complaint, *id.* (Apr. 20, 2020), D.E. 35; *see* Third Amended Complaint, Nielsen v. DeSantis, No. 4:20-cv-236 (N.D. Fla. June 25, 2020), D.E. 341-1.

6107. Complaint, *Nielsen*, No. 4:20-cv-236 (N.D. Fla. May 4, 2020), D.E. 1; *see* Second Amended Complaint, *id.* (June 21, 2020, deemed filed June 24, 2020), D.E. 292-1; Amended Complaint, *id.* (May 20, 2020), D.E. 37; *see also* Jim Saunders, *Lawsuit Challenges Mail-In Ballot Rules Amid Pandemic*, Daytona Beach News-J., May 9, 2020, at D2.

6108. Notice, *Nielsen*, No. 4:20-cv-236 (N.D. Fla. May 4, 2020), D.E. 2.

6109. Order, *id.* (May 5, 2020), D.E. 6.

6110. Consolidation Order, *id.* (May 26, 2020), D.E. 67; *see* State Defendants' Motion to Consolidate, *id.* (May 19, 2020), D.E. 32.

6111. Intervention Order, *id.* (May 28, 2020), D.E. 101; *see* Intervention Motion, *id.* (May 21, 2020), D.E. 53.

another organization.[6112]

As the litigation progressed, Judge Hinkle made a ruling on postage: "Requiring a voter to pay for postage to mail a registration form or ballot to a Supervisor of Elections is not unconstitutional or otherwise unlawful. Nor is it unconstitutional or otherwise unlawful for some counties to pay for postage while others do not."[6113]

On August 5, the litigation came to a settled conclusion.[6114] The parties did not file a detailed settlement agreement or present one to Judge Hinkle.[6115] Florida agreed to accommodate some of the plaintiffs' requests.[6116]

The Administrative Office of the United States Courts provided the court with a videoconference platform for conferences and hearings, and Judge Hinkle observed that the platform worked very well.[6117]

No Constitutional Right to Additional Early-Voting Locations

Gwinnett County NAACP v. Gwinnett County Board of Registration and Elections (Steven D. Grimberg, N.D. Ga. 1:20-cv-912)

> A federal complaint filed on the Thursday before three weeks of early voting set to begin on Monday challenged election officials' decision to offer early voting at only one location in the county during the first week. The district court held a hearing on Monday afternoon and denied the plaintiffs immediate relief, finding no constitutional entitlement to additional early-voting locations.
>
> *Topics:* Early voting; primary election; 42 U.S.C. § 1983.

A federal complaint filed in the Northern District of Georgia on Thursday, February 27, 2020, challenged a decision by the election officials for Gwinnett County, located about twenty miles northeast of Atlanta, to offer early voting for the March presidential primary election at only one location during the first of three weeks of early voting, which would begin on March 2.[6118] With their complaint, the plaintiffs filed a motion for a tem-

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6112. Intervention Order, *id.* (June 10, 2020), D.E. 216; *see* Intervention Motion, Dream Defenders v. DeSantis, No. 1:20-cv-67 (N.D. Fla. June 2, 2020), D.E. 121.

6113. Nielsen v. DeSantis, 469 F. Supp. 3d 1261, 1268 (N.D. Fla. 2020).

6114. Dismissal, *Nielsen*, No. 4:20-cv-236 (N.D. Fla. Aug. 5, 2020), D.E. 620.

6115. Docket Sheet, *id.* (May 4, 2020); Interview with Judge Robert L. Hinkle, Aug. 17, 2020.

6116. *See* Dara Kam, *State, Liberal Groups Declare Victory in Settlement*, S. Fla. Sun-Sentinel, July 22, 2020, at B3.

6117. Interview with Judge Robert L. Hinkle, Aug. 17, 2020.

6118. Complaint, Gwinnett Cty. NAACP v. Gwinnett Cty. Bd. of Registration & Elec-

porary restraining order, a preliminary injunction, and expedited consideration.[6119] On the next day, Judge Steven D. Grimberg set the case for an evidentiary hearing on the afternoon of Monday, March 2.[6120]

At the hearing, counsel for the plaintiffs acknowledged that it was not possible to open satellite locations for early voting that day, and very difficult to open them on the next day, but possible to open at least some of them during the remainder of the week.[6121] About 4:22 in the afternoon, Judge Grimberg orally denied the plaintiffs immediate relief.[6122] The plaintiffs were not constitutionally entitled to more early-voting locations than required by Georgia law.[6123] With respect to how the plaintiffs might continue the case, Judge Grimberg noted that it would become moot on Friday.[6124] He issued a published opinion on March 3.[6125]

The plaintiffs dismissed the action voluntarily on March 9.[6126]

Onerous Absentee-Ballot Procedures in Mississippi

O'Neil v. Hosemann (Daniel P. Jordan III, S.D. Miss. 3:18-cv-815)

On the day before a runoff election, plaintiffs sought a federal-court injunction requiring the counting of absentee ballots postmarked by election day instead of received by the day before election day. The federal judge decided that the request for relief was too late and the relief requested was too disruptive.

Topics: Absentee ballots; laches.

Three voters and an organization promoting voting rights filed a federal complaint in the Southern District of Mississippi on Monday, November 21, 2018, six days before a runoff election, against state election officials and election officials of two counties, challenging Mississippi's procedures

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tions, No. 1:20-cv-912 (N.D. Ga. Feb. 27, 2020), D.E. 1; Gwinnett Cty. NAACP v. Gwinnett Cty. Bd. of Registration & Elections, 446 F. Supp. 3d 1111, 1118 (N.D. Ga. 2020).

6119. Motion, *Gwinnett Cty. NAACP*, No. 1:20-cv-912 (N.D. Ga. Feb. 27, 2020), D.E. 2; *Gwinnett Cty. NAACP*, 446 F. Supp. 3d at 1118.

6120. Notice, *Gwinnett Cty. NAACP*, No. 1:20-cv-912 (N.D. Ga. Feb. 28, 2020), D.E. 4; *Gwinnett Cty. NAACP*, 446 F. Supp. 3d at 1116, 1118; *see* Minutes, *Gwinnett Cty. NAACP*, No. 1:20-cv-912 (N.D. Ga. Mar. 2, 2020), D.E. 24.

6121. Transcript at 4–5, *Gwinnett Cty. NAACP*, No. 1:20-cv-912 (N.D. Ga. Mar. 2, 2020, filed Mar. 16, 2020), D.E. 31 [hereinafter *Gwinnett Cty. NAACP* Transcript].

6122. *Id.* at 76–81; *Gwinnett Cty. NAACP*, 446 F. Supp. 3d at 1116.

6123. *Gwinnett Cty. NAACP*, 446 F. Supp. 3d at 1121–25.

6124. *Gwinnett Cty. NAACP* Transcript, *supra* note 6121, at 81.

6125. *Gwinnett Cty. NAACP*, 446 F. Supp. 3d 1111; *see* Amanda C. Coyne, *Judge Rules for County in Early-Voting Dispute*, Atlanta J.-Const., Mar. 4, 2020, at 3B.

6126. Notice, *Gwinnett Cty. NAACP*, No. 1:20-cv-912 (N.D. Ga. Mar. 9, 2020), D.E. 30.

for absentee voting as unusually onerous.[6127] Five days later, on the day before election day, the plaintiffs filed an "Emergency Motion for Temporary Restraining Order and Preliminary Injunction"[6128] to require the counting of absentee ballots that are postmarked by election day instead of received as of the day before.[6129]

Judge Daniel P. Jordan III heard the case on election day, completing the hearing late in the morning.[6130] That day, he issued an opinion denying immediate relief.[6131] "There are two related problems with Plaintiffs' requested relief—it is too late and disturbs the status quo."[6132] Changing the deadline for absentee ballots after the deadline had passed and on the day for postmarked ballots if the deadline were to change "would mean that different voters would be operating under different laws."[6133]

Moreover, Judge Jordan questioned "whether Plaintiffs named the correct defendants. . . . [U]nder Mississippi's election [statutes], the registrars, i.e., circuit clerks, for each county are given the relevant tasks."[6134]

He noted, however, that the Mississippi timeline for requesting and casting absentee ballots "is tight—if not impossible—for some voters."[6135]

Judge Jordan dismissed the case as settled in 2020.[6136]

Multiple Suits After an Election to Relax the Standards for Counting and Recounting Votes

Democratic Executive Committee of Florida v. Detzner (4:18-cv-520), VoteVets Action Fund v. Detzner (4:18-cv-524), DSCC v. Detzner (4:18-cv-526), and Democratic Senatorial Campaign Committee v. Detzner (4:18-cv-528) (Mark E. Walker and Robert L. Hinkle, N.D. Fla.)

> The campaign for the ultimately unsuccessful reelection of a U.S. senator filed four federal complaints during the week following a general election. Each complaint raised a different issue: signature matching on mail and provisional ballots, mail-ballot dead-

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6127. Complaint, O'Neil v. Hosemann, No. 3:18-cv-815 (S.D. Miss. Nov. 21, 2018), D.E. 1.

6128. Motion, *id.* (Nov. 26, 2018), D.E. 3.

6129. Brief at 6, *id.* (Nov. 26, 2018), D.E. 4.

6130. Docket Sheet, *id.* (Nov. 21, 2018); Opinion at 6, *id.* (Nov. 27, 2018), D.E. 19 [hereinafter *O'Neil* Opinion], 2018 WL 6188292.

6131. *O'Neil* Opinion, *supra* note 6130.

6132. *Id.* at 4.

6133. *Id.* at 6.

6134. *Id.* at 3.

6135. *Id.* at 2.

6136. Order, O'Neil v. Hosemann, No. 3:18-cv-815 (S.D. Miss. Oct. 30, 2020), D.E. 60.

> lines, manual-recount rules, and recount deadlines. The judge enjoined disqualification of votes for mismatched signatures without an opportunity to resolve the mismatch. He denied relief in the other cases.
>
> *Topics:* Signature matching; absentee ballots; provisional ballots; recounts; recusal; case assignment; intervention.

Four federal complaints were filed in the Northern District of Florida two to seven days after the 2018 general election by organizations affiliated with Senator Bill Nelson's ultimately unsuccessful reelection campaign.[6137] The plaintiffs filed with their complaints motions for temporary restraining orders and preliminary injunctions.[6138]

A case filed on Thursday, November 8, challenged the protocol for matching voters' signatures on mail and provisional ballots.[6139] A case filed

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6137. Complaint, Democratic Senatorial Campaign Comm. v. Detzner, No. 4:18-cv-528 (N.D. Fla. Nov. 13, 2018), D.E. 1 [hereinafter *Democratic Senatorial Campaign Comm.* Complaint]; Complaint, DSCC v. Detzner, No. 4:18-cv-526 (N.D. Fla. Nov. 13, 2018), D.E. 1 [hereinafter *DSCC* Complaint]; Complaint, VoteVets Action Fund v. Detzner, No. 4:18-cv-524 (N.D. Fla. Nov. 12, 2018), D.E. 1 [hereinafter *VoteVets Action Fund* Complaint]; Complaint, Democratic Exec. Comm. of Fla. v. Detzner, No. 4:18-cv-520 (N.D. Fla. Nov. 8, 2018), D.E. 1 [hereinafter *Democratic Exec. Comm. of Fla.* Complaint]; *see* Daniel Chang, Alex Daugherty & Maya Kaufman, *Dade Finishes Its Machine Recount as Broward Starts Process*, Miami Herald, Nov. 14, 2018, at 1A; Daniel Chang, Elizabeth Koh & Nicholas Nehamas, *Legal Sparring Continues; Recounts Get Uneven Start*, Miami Herald, Nov. 13, 2018, at 1A; David Smiley, Kyra Gurney, Steve Bousquet & Emily L. Mahoney, *It's "Prayer Mode" as Legal Decisions and Deadlines Loom*, Miami Herald, Nov. 15, 2018, at 1A; Sean Sullivan, Beth Reinhard, Vanessa Williams & Lori Rozsa, *New Court Moves Could Prolong Fla., Ga. Races*, Wash. Post, Nov. 14, 2018, at A1; *see also* Steve Bousquet & Steve Contorno, *Sluggish Campaign Ends a Lengthy Career*, Miami Herald, Nov. 18, 2018, at 1A; Joshua Jamerson, Alex Leary & Andrew Duehren, *GOP Wins Senate Race in Florida*, Wall St. J., Nov. 19, 2018, at A1; Patricia Mazzei, Frances Robles & Maggie Astor, *Scott Unseats Senate Democrat After a Manual Recount in Florida*, N.Y. Times, Nov. 19, 2018, at A11; Jeffrey Schweers, *Seven Lawsuits and Counting: Tallahassee Is Ground Zero*, Tallahassee Democrat, Nov. 14, 2018, at A6. *See generally* Jay Weaver & Steve Bousquet, *Federal Judge Takes Center Stage in Recount Battle*, Miami Herald, Nov. 15, 2018, at 3A.

6138. Motion, *Democratic Senatorial Campaign Comm.*, No. 4:18-cv-528 (N.D. Fla. Nov. 13, 2018), D.E. 3; Temporary-Restraining-Order Motion, *DSCC*, No. 4:18-cv-526 (N.D. Fla. Nov. 13, 2018), D.E. 3; Motion, *VoteVets Action Fund*, No. 4:18-cv-524 (N.D. Fla. Nov. 12, 2018), D.E. 4; Motion, *Democratic Exec. Comm. of Fla.*, No. 4:18-cv-520 (N.D. Fla. Nov. 8, 2018), D.E. 3.

6139. *Democratic Exec. Comm. of Fla.* Complaint, *supra* note 6137; Democratic Exec. Comm. of Fla. v. Nat'l Republican Senatorial Comm., 950 F.3d 790, 792 (11th Cir. 2020); Democratic Exec. Comm. of Fla. v. Lee, 915 F.3d 1312, 1317 (11th Cir. 2019); *see* Amy Gardner, *In the Land of Hanging Chads, a New Balloting Issue*, Wash. Post, Nov. 15, 2018,

on Monday sought an extension of deadlines for receipt of mail ballots.[6140] One case filed on the next day challenged rules for a manual recount.[6141] Another case filed that day sought an extension of recount deadlines.[6142]

Signature Mismatches

Judge Robert L. Hinkle held a telephonic hearing in the signature-matching case on November 9, the day after the case was filed.[6143] He granted[6144] motions to intervene by the National Republican Senatorial Committee[6145] and Florida's attorney general.[6146] Observing that relief from the matching protocol was not required before the November 10 submissions of unofficial election results, Judge Hinkle ordered a response from the defendants to the motion for relief by November 12—acknowledging that that was a federal holiday in observance of Sunday's Veterans Day—and set the case for hearing again at 1:00 p.m. on November 14.[6147] On Saturday, November 10, however, Judge Hinkle disqualified himself from the case:

> After conducting the scheduling conference and entering an order on November 9, I remembered that my brother is a party to a lawsuit involv-

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at A1; Patricia Mazzei & Frances Robles, *Protests and Lawsuits as Florida Keeps Counting*, N.Y. Times, Nov. 10, 2018, at A1; John McCarthy, *As Recount Rhetoric Rises, Scott and Nelson File Suit*, Tallahassee Democrat, Nov. 10, 2018, at A5.

6140. *VoteVets Action Fund* Complaint, *supra* note 6137; *see* Nick Madigan & Frances Robles, *Judge Urges Parties to "Ramp Down" Rhetoric in Florida Recount*, N.Y. Times, Nov. 13, 2018, at A10.

6141. *DSCC* Complaint, *supra* note 6137.

6142. *Democratic Senatorial Campaign Comm.* Complaint, *supra* note 6137; *see* Larry Barszewski & Lois Solomon, *Suits Seek to Extend Recount Deadlines*, Orlando Sentinel, Nov. 14, 2018, at A1; Allison McCann & Karen Yourish, *In Some Races, Results May Still Be Weeks Away*, N.Y. Times, Nov. 14, 2018, at A18.

6143. Minutes, *Democratic Exec. Comm. of Fla.*, No. 4:18-cv-520 (N.D. Fla. Nov. 9, 2018), D.E. 19 [hereinafter Nov. 9, 2018, *Democratic Exec. Comm. of Fla.* Minutes] (noting that the hearing ran from 4:07 p.m. to 4:34 p.m.).

A docket entry gave parties and the public dial-in information. Docket Sheet, *id.* (Nov. 8, 2018) (D.E. 10).

6144. Nov. 9, 2018, *Democratic Exec. Comm. of Fla.* Minutes, *supra* note 6143; Scheduling Order, *Democratic Exec. Comm. of Fla.*, No. 4:18-cv-520 (N.D. Fla. Nov. 9, 2018), D.E. 20 [hereinafter *Democratic Exec. Comm. of Fla.* Scheduling Order]; *Democratic Exec. Comm. of Fla.*, 950 F.3d at 792–93.

6145. Intervention Motion, *Democratic Exec. Comm. of Fla.*, No. 4:18-cv-520 (N.D. Fla. Nov. 9, 2018), D.E. 11.

6146. Intervention Motion, *id.* (Nov. 9, 2018), D.E. 15; *see* McCarthy, *supra* note 6139.

6147. *Democratic Exec. Comm. of Fla.* Scheduling Order, *supra* note 6144; *see* Glenn Thrush, Audra D.S. Burch & Frances Robles, *Parsing Signatures, Not Chads, in Florida Vote*, N.Y. Times, Nov. 15, 2018, at A1.

> ing Governor Rick Scott. This would not affect my handling of this case, but a reasonable person might think otherwise.
>
> Accordingly, I hereby disqualify myself from this case.[6148]

Judge Mark E. Walker adopted Judge Hinkle's previously issued scheduling order.[6149] On Sunday, Judge Walker issued guidance on the information he expected to receive at the Wednesday hearing, including an intention to seek testimony pursuant to Federal Rule of Evidence 614 from the local county supervisor of elections.[6150] At the November 14 hearing, "Reporters and campaign officials packed three rows of seats inside the courtroom, while cameras were staked out in the rain."[6151] The afternoon hearing lasted more than five hours.[6152]

On November 15, Judge Walker granted the plaintiffs a preliminary injunction.[6153]

6148. Disqualification Order, *Democratic Exec. Comm. of Fla.*, No. 4:18-cv-520 (N.D. Fla. Nov. 10, 2018), D.E. 21; *see* Minutes, *id.* (Nov. 14, 2018), D.E. 50; *see also* Schweers, *supra* note 6137 ("Don Hinkle sued [Governor] Scott for not disclosing what's in his blind trust.").

6149. Order, *Democratic Exec. Comm. of Fla.*, No. 4:18-cv-520 (N.D. Fla. Nov. 10, 2018), D.E. 25.

Tim Reagan interviewed Judge Walker for this report by telephone on December 12, 2018.

6150. Order, *Democratic Exec. Comm. of Fla.*, No. 4:18-cv-520 (N.D. Fla. Nov. 11, 2018), D.E. 26; *see* Transcript at 4, Fla. Democratic Party v. Detzner, No. 4:16-cv-607 (N.D. Fla. Oct. 14, 2016, filed Oct. 16, 2016), D.E. 32 (using the same procedure in an earlier case); *see also* Schweers, *supra* note 6137.

At the status conference in the recount deadlines case, Judge Walker expressed regret for not using Rule 614:

> THE COURT: . . .
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> . . . I wish under Rule 614 I'd have called the supervisor as a witness, and she could have testified by video in my courtroom from the video in the federal courthouse in Palm Beach, so I could have done it in the least disruptive way possible, but I—I didn't, and that's a failing on my part.

Transcript at 4–5, Democratic Senatorial Campaign Comm. v. Detzner, No. 4:18-cv-528 (N.D. Fla. Nov. 15, 2018, filed Nov. 15, 2018), D.E. 40 [hereinafter *Democratic Senatorial Campaign Comm.* Transcript].

6151. Sean Sullivan, Beth Reinhard & Amy Gardner, *Deadline to Certify Elections Looms in Fla. as Campaigns Await Court Ruling*, Wash. Post, Nov. 15, 2018, at A4.

6152. Transcript, *Democratic Exec. Comm. of Fla.*, No. 4:18-cv-520 (N.D. Fla. Nov. 14, 2018, filed Nov. 15, 2018), D.E. 66; *see* Jeffrey Schweers & Jeff Burlew, *All Eyes on Local Judge in Recount*, Tallahassee Democrat, Nov. 15, 2018, at A7; *see also* John Kennedy & Jane Musgrave, *Federal Judge Under Gun as 7 Lawsuits Await Action*, Palm Beach Post, Nov. 15, 2018, at 1A.

6153. Democratic Exec. Comm. of Fla. v. Detzner, 347 F. Supp. 3d 1017 (N.D. Fla. 2018); Democratic Exec. Comm. of Fla. v. Nat'l Republican Senatorial Comm., 950 F.3d

> The precise issue in this case is whether Florida's law that allows county election officials to reject vote-by-mail and provisional ballots for mismatched signatures—with no standards, an illusory process to cure, and no process to challenge the rejection—passes constitutional muster. The answer is simple. It does not.[6154]

Judge Walker ordered election officials to provide voters whose ballots were rejected for apparently mismatched signatures opportunities to cure.[6155]

Judge Walker denied the plaintiffs' request that he "order the Secretary of State to immediately produce, both to Plaintiffs and publicly, a list of all voters whose ballots were determined to contain a mismatched signature and have not yet been cured."[6156]

On that same day, the court of appeals denied, by a vote of two to one, motions to stay the injunction and expedite the appeal.[6157] The majority and dissenting judges issued opinions on February 15, 2019.[6158] The majority concluded, among other things, that "Defendants have identified no fraud-prevention interest that justifies depriving legitimate vote-by-mail and provisional voters of the ability to cure the signature mismatch, thereby disenfranchising them."[6159]

A compliance report filed by the secretary on December 7, 2018, showed 637 ballots statewide with signature mismatches cured since Judge Walker's order.[6160] Judge Walker often required an after-action report in

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790, 793 (11th Cir. 2020).

6154. *Democratic Exec. Comm. of Fla.*, 347 F. Supp. 3d at 1022.

6155. *Id.* at 1032–33; Democratic Exec. Comm. of Fla. v. Lee, 915 F.3d 1312, 1317 (11th Cir. 2019); *see* Andrew Duehren, *Florida Race Gets Manual Recount*, Wall St. J., Nov. 16, 2018, at A4; Beth Reinhard, Sean Sullivan, Amy Gardner & Lori Rozsa, *DeSantis Gains in Bid to Be Fla. Governor*, Wash. Post, Nov. 16, 2018, at A1; David Smiley & Steve Bousquet, *Florida Orders First Ever Statewide Hand Recounts for Senate and Agriculture Post*, Miami Herald, Nov. 16, 2018, at 1A.

6156. Minutes, Democratic Senatorial Campaign Comm. v. Detzner, No. 4:18-cv-520 (N.D. Fla. Nov. 15, 2018), D.E. 61; *see* Emergency Motion, *id.* (Nov. 15, 2018), D.E. 52.

A tally of rejected ballots per county showed a total of 5,686 statewide. Compliance Notice, *id.* (Nov. 16, 2018), D.E. 72.

6157. Order, Detzner v. Democratic Exec. Comm. of Fla., No. 18-14758 (11th Cir. Nov. 15, 2018); *Democratic Exec. Comm. of Fla.*, 950 F.3d at 793; *see* Reinhard et al., *supra* note 6155; Smiley and Bousquet, *supra* note 6155.

6158. *Democratic Exec. Comm. of Fla.*, 915 F.3d 1312; *Democratic Exec. Comm. of Fla.*, 950 F.3d at 793; *see* Dara Kam, *Appeals Court Agrees That Florida's Signature Rules on Mail Votes Are "Serious Burden,"* Miami Herald, Feb. 17, 2019, at 29A.

6159. *Democratic Exec. Comm. of Fla.*, 915 F.3d at 1322.

6160. Compliance Notice, *Democratic Exec. Comm. of Fla.*, No. 4:18-cv-520 (N.D. Fla.

election litigation so that there was a public record of the impact of the court's order.[6161]

The plaintiffs voluntarily dismissed an amended complaint following Florida's June 28, 2019, enactment of statutory changes "specifically address[ing] issues brought to light by Plaintiffs' lawsuit."[6162] In 2020, the court of appeals denied the National Republican Senatorial Committee's motions to vacate earlier opinions by the district court and the court of appeals in this case, which had become moot; none of them would be binding in future proceedings.[6163]

Mail Ballot Deadlines

Senior Judge William Stafford disqualified himself from the mail-ballot-deadlines case filed on November 12, 2018, the federal holiday,[6164] and Judge Walker set the case for a telephonic status conference on Tuesday, November 13.[6165] The docket sheet provided the parties and the public with dial-in information.[6166]

> THE COURT: . . .
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> . . . This is a public proceeding, but these proceedings should not and must not be recorded. Any proceeding that I do by phone will be open to the public because, again, it's a public proceeding. Any proceeding I conduct in the courtroom will be likewise open to the public.
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> But proceedings in federal court are not to be recorded.[6167]

An evidentiary hearing was held at 1:06 p.m. on Thursday.[6168] Judge Walker granted intervention motions[6169] by the Republican Senatorial

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Dec. 7, 2018), D.E. 84.

6161. Interview with Judge Mark E. Walker, Dec. 12, 2018; *see* Order, *Democratic Exec. Comm. of Fla.*, No. 4:18-cv-520 (N.D. Fla. Nov. 19, 2018), D.E. 78.

6162. Voluntary Dismissal at 6, *Democratic Exec. Comm. of Fla.*, No. 4:18-cv-520 (N.D. Fla. July 2, 2019), D.E. 143; *Democratic Exec. Comm. of Fla.*, 950 F.3d at 793; *see* 2019 Fla. Laws ch. 162; *see also* Order, *Democratic Exec. Comm. of Fla.*, No. 4:18-cv-520 (N.D. Fla. July 29, 2019), D.E. 149 (granting voluntary dismissal); Amended Complaint, *id.* (Jan. 14, 2019), D.E. 100.

6163. *Democratic Exec. Comm. of Fla.*, 950 F.3d 790.

6164. Disqualification Order, VoteVets Action Fund v. Detzner, No. 4:18-cv-524 (N.D. Fla. Nov. 12, 2018), D.E. 8; *see* Schweers, *supra* note 6137.

6165. Order, *VoteVets Action Fund*, No. 4:18-cv-524 (N.D. Fla. Nov. 12, 2018), D.E. 14; *see* Minutes, *id.* (Nov. 13, 2018), D.E. 30; *see* Schweers, *supra* note 6137.

6166. Docket Sheet, *VoteVets Action Fund*, No. 4:18-cv-524 (N.D. Fla. Nov. 11, 2018) (D.E. 15).

6167. Transcript at 3, *id.* (Nov. 13, 2018, filed Nov. 15, 2018), D.E. 52 [hereinafter Nov. 13, 2018, *VoteVets Action Fund* Transcript].

6168. Transcript, *id.* (Nov. 15, 2018, filed Nov. 15, 2018), D.E. 53; Minutes, *id.* (Nov. 15, 2018), D.E. 55.

Committee,[6170] Florida's Republican Party,[6171] and Florida's attorney general.[6172]

On November 16, Judge Walker denied the plaintiffs immediate relief:

> This case involves Florida laws that allow overseas voters the opportunity to vote, and have their votes counted, 10 days after election day, yet require domestic vote-by-mail voters to vote, and have their votes counted, on election day.
>
> . . .
>
> In this case, the asserted injury is outweighed by the state's important regulatory interest. . . . The fact that there might be problems with the mail does not outweigh the state's important interest in delineating finality in elections. . . . The restriction is reasonable, and the state's regulatory interest is sufficient to justify the deadline.
>
> . . .
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> . . . The law plainly imposes different deadlines for domestic and overseas voters to have their vote-by-mail ballots counted. But . . . the whole point of the 10-day exception for overseas voters is to give them the same right to vote as domestic voters.[6173]

Judge Walker ordered Florida's secretary of state to provide the court with a count of how many non-overseas mail-in ballots each county received that were postmarked before election day and received after election day.[6174] There were 6,882 statewide.[6175]

The plaintiffs voluntarily dismissed the action on January 18, 2019.[6176]

Challenge to the Rules for the Manual Recount

On November 13, 2018, the day that the case was filed, Judge Hinkle disqualified himself from the case challenging the rules for the manual re-

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6169. *See* Schweers, *supra* note 6137.

6170. Order, *VoteVets Action Fund*, No. 4:18-cv-524 (N.D. Fla. Nov. 12, 2018), D.E. 16; *see* Intervention Motion, *id.* (Nov. 12, 2018), D.E. 10.

6171. Order, *id.* (Nov. 12, 2018), D.E. 19; *see* Intervention Motion, *id.* (Nov. 13, 2018), D.E. 21.

6172. Order, *id.* (Nov. 13, 2018), D.E. 23; *see* Intervention Motion, *id.* (Nov. 13, 2018), D.E. 28.

6173. Opinion at 1, 6–7, *id.* (Nov. 16, 2018), D.E. 56; *see* Audra D.S. Burch & Glenn Thrush, *Florida Recounts Senate Votes Again, and Democrat's Chances Dwindle*, N.Y. Times, Nov. 17, 2018, at A20.

6174. Order, *VoteVets Action Fund*, No. 4:18-cv-524 (N.D. Fla. Nov. 19, 2018), D.E. 57.

6175. Compliance Notice, *id.* (Dec. 14, 2018), D.E. 65; *see* Gary Fineout, *Thousands of Mailed Ballots in Florida Were Not Counted*, Miami Herald, Dec. 12, 2018, at 3A.

6176. Dismissal Notice, *VoteVets Action Fund*, No. 4:18-cv-524 (N.D. Fla. Jan. 18, 2019), D.E. 73; Order, *id.* (Jan. 22, 2019), D.E. 74.

count.[6177] Judge Walker set a status conference for 11:00 on the next day.[6178] He granted motions to intervene by the Republican Senatorial Committee[6179] and the Democratic Party's gubernatorial campaign.[6180] At the status conference it was agreed that the case posed a question of law and not a question of fact.[6181]

Judge Walker denied the plaintiffs immediate relief on November 15, because the rules for ascertaining the intent of voters who did not properly mark their ballots were neutral and reasonable.[6182] The plaintiffs voluntarily dismissed the action on January 18, 2019.[6183]

Recount Deadlines

Judge Walker set the November 13 recount-deadline case for a status conference at 9:00 a.m. on November 15.[6184] He granted motions to intervene by the Republican Senatorial Committee[6185] and the Democratic Party's gubernatorial campaign.[6186] At the beginning of the status conference, he determined from the parties that the case did not require testimony.[6187]

6177. Disqualification Order, DSCC v. Detzner, No. 4:18-cv-526 (N.D. Fla. Nov. 13, 2018), D.E. 5.

6178. Order, *id.* (Nov. 13, 2018), D.E. 8; *see* Minutes, *id.* (Nov. 14, 2018), D.E. 20; *see also* Nov. 13, 2018, *VoteVets Action Fund* Transcript, *supra* note 6167, at 30 (noting in a mail-ballot-deadlines case proceeding that Judge Walker planned to set the manual-recount-rules case for a proceeding on the following morning).

6179. Order, *DSCC*, No. 4:18-cv-526 (N.D. Fla. Nov. 13, 2018), D.E. 12; *see* Intervention Motion, *id.* (Nov. 13, 2018), D.E. 10.

6180. Order, *id.* (Nov. 15, 2018), D.E. 32; *see* Intervention Motion, *id.* (Nov. 15, 2018), D.E. 30; *see also* Withdrawal Order, *id.* (Dec. 6, 2018), D.E. 44 (granting a motion to withdraw from intervention by the Democratic Party's gubernatorial campaign).

6181. Transcript at 4–5, *id.* (Nov. 14, 2018, filed Nov. 15, 2018), D.E. 34 [hereinafter *DSCC* Transcript].

6182. Democratic Senatorial Campaign Comm. v. Detzner, 347 F. Supp. 3d 1033 (N.D. Fla. 2018); *see* Burch & Thrush, *supra* note 6173; Manuel Roig-Franzia & Amy Gardner, *Nelson's Chances in Senate Race Dim as Key Fla. Counties Complete Recount*, Wash. Post, Nov. 17, 2018, at A4.

6183. Dismissal Notice, *DSCC*, No. 4:18-cv-526 (N.D. Fla. Jan. 18, 2019), D.E. 53.

6184. Order, Democratic Senatorial Campaign Comm. v. Detzner, No. 4:18-cv-528 (N.D. Fla. Nov. 13, 2018), D.E. 8; *see* Minutes, *id.* (Nov. 15, 2018), D.E. 33.

6185. Order, *id.* (Nov. 14, 2018, filed Nov. 13, 2018), D.E. 12; *see* Intervention Motion, *id.* (Nov. 14, 2018), D.E. 10.

6186. Order, *id.* (Nov. 15, 2018), D.E. 39; *see* Intervention Motion, *id.* (Nov. 15, 2018), D.E. 37; *see also* Withdrawal Order, *id.* (Dec. 6, 2018), D.E. 48 (granting a motion to withdraw from intervention by the Democratic Party's gubernatorial campaign).

6187. *Democratic Senatorial Campaign Comm.* Transcript, *supra* note 6150, at 4–5.

Judge Walker denied the plaintiffs immediate relief on November 15.[6188]

> The question [is] whether the statutory scheme of the Florida Election Code, which defaults to the acceptance of unofficial election returns if a recount cannot be completed by the official reporting deadline, is constitutionally tenable when it means that the votes of citizens in 66 counties will be recounted while those in the one remaining county will not.[6189]

The plaintiffs were not entitled to equitable relief, because "there is a complete dearth of evidence before this Court concerning the status, progress, or expected completion of the ordered recounts in Palm Beach County. . . . This Court does not and will not fashion a remedy in the dark."[6190]

In the event, all counties completed their manual recounts on time.[6191] The case was voluntarily dismissed in December.[6192]

Managing Four Related Emergency Cases

Judge Walker's strategy for managing these four cases under time pressure was to ascertain as early as possible whether he would need to hear evidence.[6193] Another priority was establishing a time frame that would allow for appellate review.[6194] "THE COURT: . . . [T]he people of Florida need to get orders out of me, as well as the parties, sooner rather than later. And then all the parties need to be able to get to the Eleventh Circuit . . . ."[6195]

In addition to the 11:00 a.m. conference and the 1:00 p.m. hearing on Wednesday, November 14, and the 9:00 a.m. conference and the 1:06 p.m. hearing on Thursday, November 15, in these four cases, Judge Walker held a conference at 10:02 a.m. on Wednesday[6196] and hearings on Thursday at 2:19 p.m.[6197] and 5:12 p.m.[6198] in other emergency-election-litigation cases.[6199] Long nights at work followed the proceedings.[6200]

6188. Opinion, *Democratic Senatorial Campaign Comm.*, No. 4:18-cv-528 (N.D. Fla. Nov. 15, 2018), D.E. 36 [hereinafter *Democratic Senatorial Campaign Comm.* Opinion]; *see* Duehren, *supra* note 6155.

6189. *Democratic Senatorial Campaign Comm.* Opinion, *supra* note 6188, at 2.

6190. *Id.* at 5.

6191. *See* Order, *Democratic Senatorial Campaign Comm.*, No. 4:18-cv-528 (N.D. Fla. Nov. 19, 2018), D.E. 42.

6192. Dismissal Order, *id.* (Dec. 17, 2018), D.E. 50.

6193. Interview with Judge Mark E. Walker, Dec. 12, 2018.

6194. *Id.*

6195. *DSCC* Transcript, *supra* note 6181, at 8.

6196. Minutes, League of Women Voters of Fla. v. Scott, No. 4:18-cv-525 (N.D. Fla. Nov. 14, 2018), D.E. 16.

6197. Minutes, *id.* (Nov. 15, 2018), D.E. 28; *see* League of Women Voters of Fla. v.

The clerk's office in this district was especially attuned to the possibility of recusal, and it identified election litigation and other emergency litigation as cases in which recusal decisions should be made quickly.[6201]

Extending the Deadline to Receive Absentee Ballots for Multiple Reasons

Democratic Party of Georgia v. Burkes (W. Louis Sands, M.D. Ga. 1:18-cv-212) and Democratic Party of Georgia v. Crittenden (Amy Totenberg, N.D. Ga. 1:18-cv-5443)

> Following a morning proceeding three days after an election, a federal judge signed a consent agreement extending the deadline for election officials to receive cast absentee ballots. Ballots were mailed late to voters because of a state-court injunction and a hurricane. In another district in the same state, a consent order similarly extended the deadline for absentee ballots statewide in a runoff election.
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> *Topics:* Absentee ballots; enjoining certification.

A major political party filed a federal complaint in the Middle District of Georgia on November 8, 2018, two days after a general election, seeking a court order requiring election officials in one county to accept absentee ballots postmarked by election day and received within three days after that instead of requiring that they be received by election day.[6202] The complaint alleged that an injunction benefiting a prospective candidate delayed transmission of absentee ballots until after the statutory deadline.[6203] Further, Hurricane Michael, arriving just after the government holiday of Columbus Day, closed offices, which performed at diminished capacity even after they opened again because of lingering disruptions to

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Scott, 366 F. Supp. 3d 1311 (N.D. Fla. 2018) (denying a motion to order the governor to recuse himself from vote-counting oversight while a candidate for another office).

6198. Minutes, Jim Bonfiglio Campaign v. Detzner, No. 4:18-cv-527 (N.D. Fla. Nov. 15, 2018), D.E. 49; *see* Order, *id.* (Nov. 15, 2018), D.E. 42; *see also* Opinion, *id.* (Nov. 16, 2018), D.E. 53 (clarifying the discretion of county election officials to recount a race that would require less time before recounting races that would require more time).

6199. *See* John McCarthy, *Recount Rundown of What Happened Wednesday*, Tallahassee Democrat, Nov. 15, 2018, at A3.

6200. Interview with Judge Mark E. Walker, Dec. 12, 2018.

6201. *Id.*

6202. Complaint, Democratic Party of Ga. v. Burkes, No. 1:18-cv-212 (M.D. Ga. Nov. 8, 2018), D.E. 1 [hereinafter *Democratic Party of Ga.* Complaint]; *see* Richard Fausset, Patricia Mazzei & Alan Blinder, *With No Clear-Cut Winner, the Bickering Builds*, N.Y. Times, Nov. 9, 2018, at A1.

6203. *Democratic Party of Ga.* Complaint, *supra* note 6202.

electricity and telephone systems.[6204] To top it off, the complaint alleged particularly poor mail service in the county.[6205]

With its complaint, the political party filed a motion for a preliminary injunction.[6206] Judge W. Louis Sands heard the case on the following morning.[6207] He temporarily enjoined certification of the election and instructed the parties to return at 2:00 p.m. with additional evidence.[6208] They returned with a proposed consent agreement.[6209] Judge Sands granted the political party relief:

> At the afternoon hearing, Defendants appeared before the undersigned and did not contest that some voters were, in fact, harmed by the late mailing of the absentee ballots, and accordingly, consent to the relief requested by the Democratic Party of Georgia, namely that the Board treat all absentee ballots received by Dougherty County that are postmarked by November 6, 2018, and are received within the three-day period following the election, if otherwise proper, as valid ballots, and shall count and include those ballots in the certified election results.[6210]

On November 29, the political party filed a federal action in the Northern District alleging that some election officials in the state were late in sending out absentee ballots for a December 4 runoff election for two statewide offices.[6211] The party sought "an injunction requiring Secretary of State Crittenden to order the Counties to treat absentee mail-in ballots like those sent by military voters and overseas voters, counting ballots postmarked by Election Day and received by the voter's county within three days following the election."[6212] With its complaint, the party filed a motion for a preliminary injunction.[6213]

6204. *See id.*

6205. *Id.*

6206. Preliminary-Injunction Motion, *Democratic Party of Ga.*, No. 1:18-cv-212 (M.D. Ga. Nov. 8, 2018), D.E. 2.

6207. Minutes, *id.* (Nov. 9, 2018), D.E. 6 [hereinafter *Democratic Party of Ga.* Minutes].

6208. Temporary Restraining Order, *id.* (Nov. 9, 2018), D.E. 4; *Democratic Party of Ga.* Minutes, *supra* note 6207.

6209. *Democratic Party of Ga.* Minutes, *supra* note 6207.

6210. Consent Order, *Democratic Party of Ga.*, No. 1:18-cv-212 (M.D. Ga. Nov. 9, 2018), D.E. 5; *see* Mark Niesse, *What Happens Next with Vote Count?*, Atlanta J.-Const., Nov. 10, 2018, at 1A; Elise Viebeck, Vanessa Williams & Sharon Dunten, *Trump Says Kemp "Won" in Georgia*, Wash. Post, Nov. 11, 2018, at A7.

6211. Complaint, Democratic Party of Ga. v. Crittenden, No. 1:18-cv-5443 (N.D. Ga. Nov. 29, 2018), D.E. 1.

6212. *Id.* at 4.

6213. Preliminary-Injunction Motion, *id.* (Nov. 29, 2018), D.E. 2.

On the day that the complaint was filed, Judge Amy Totenberg set the case for hearing on the following day with an order that the parties discuss with each other before the hearing the feasibility of relief.[6214] On the day of the hearing, Judge Totenberg signed a consent order granting the requested relief.[6215]

Northern District of Georgia Judge Steve C. Jones conducted a bench trial from April 11 to June 23, 2022,[6216] in a November 27, 2018, action generally challenging Georgia's oversight of elections, including concerns about absentee ballots.[6217] He did not find any flaws in the way that Georgia conducted elections requiring a judicial remedy.[6218]

Keeping Early Ballots Secret

Saball v. Town of Groton (Leo T. Sorokin, D. Mass. 1:18-cv-12312)

> A pro se federal complaint alleged that voters' names on envelopes containing early cast ballots violated the secret ballot. The district judge denied immediate relief for want of compelling arguments and for want of service on the defendants.
>
> *Topics:* Early voting; pro se party.

A pro se federal complaint filed in the District of Massachusetts on the day before the November 6, 2018, general election, alleged that election officials in Groton, Massachusetts, denied the early-voting plaintiff a secret ballot, because that ballot was in an envelope with the plaintiff's name on

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6214. Order, *id.* (Nov. 29, 2018), D.E. 3.

6215. Consent Order, *id.* (Nov. 30, 2018), D.E. 6; *see* Greg Bluestein, *Ga. to Count Runoff Votes by Absentees*, Atlanta J.-Const., Dec. 1, 2018, at 1B.

6216. Minutes, Fair Fight Action v. Crittenden, No. 1:18-cv-5391 (N.D. Ga. June 23, 2022), D.E. 852; Minutes, *id.* (Apr. 11, 2022), D.E. 789; Fair Fight Action, Inc. v. Raffensperger, 634 F. Supp. 3d 1128, 1148 (N.D. Ga. 2022) ("[a]fter a delay in the start of trial due to the Omicron variant of COVID-19"); *id.* at 1143 ("what is believed to have been the longest voting rights bench trial in the history of the Northern District of Georgia").

6217. Docket Sheet, *Fair Fight Action*, No. 1:18-cv-5391 (N.D. Ga. Nov. 27, 2018); Second Amended Complaint, *id.* (Dec. 3, 2020), D.E. 582; Amended Complaint, *id.* (Feb. 19, 2019), D.E. 41; Complaint at 39–41, *id.* (Nov. 27, 2018), D.E. 1; *see* Fair Fight Action v. Raffensperger, 413 F. Supp. 3d 1251 (N.D. Ga. 2019) (denying a motion to dismiss the amended complaint on standing, mootness, and other grounds, but dismissing the state election board from some claims for sovereign immunity); *see also* Valerie Bauerlein, *Suit Alleges Georgia Curbed Black Voters*, Wall St. J., Nov. 28, 2018, at A4; Richard Fausset, *Supporters of Candidate Who Lost Georgia Race Take the State to Court*, N.Y. Times, Nov. 28, 2018, at A19; Vanessa Williams, *Lawsuit by Abrams's PAC Alleges Voter Suppression in Georgia*, Wash. Post, Nov. 30, 2018, at A4.

6218. *Fair Fight Action, Inc.*, 634 F. Supp. 3d 1128; *see* Matthew Brown, *Judge Upholds Ga. Law in Challenge Brought by Abrams After 2018 Loss*, Wash. Post, Oct. 2, 2022, at A8.

it.[6219] With his form complaint, the plaintiff filed a hand-written emergency request for relief before the secret ballots were opened.[6220]

The complaint alleged that election officials told the plaintiff that "they would not look at [his] personal ballot because 'they don't have the time.'"[6221]

On the day that the complaint was filed, Judge Leo T. Sorokin entered a docket-sheet order denying emergency relief without prejudice: the plaintiff had not provided the court with compelling legal arguments and had not shown service on the defendants.[6222]

Judge Sorokin dismissed the case on March 15, 2019,[6223] on an unanswered February 20, 2019, order to show cause why the case should not be dismissed for failure of service on the defendants.[6224]

Record Mismatches on Absentee Ballots

Martin v. Kemp (1:18-cv-4776) and Georgia Muslim Voter Project v. Kemp (1:18-cv-4789) (Leigh Martin May) and Democratic Party of Georgia v. Crittenden (Steve C. Jones, 1:18-cv-5181) (N.D. Ga.)

> Not quite two weeks before the 2018 general election, a district judge ordered election officials to regard absentee ballots with signatures apparently not matching signatures on file as provisional ballots with an opportunity for the voters to resolve discrepancies. Before the election, the judge declined to order immediate relief from the rejection of absentee ballots for clerical errors. After the election, while absentee ballots were being counted, the judge ordered a county to not reject absentee ballots that arrived with a missing or incorrect year of birth, because only eligible voters would have received absentee ballots. In another case with election officials for an additional county as defendants, another judge issued a similar order on the following day.
>
> *Topics:* Absentee ballots; early voting; signature matching; provisional ballots; class action.

Georgia voters filed a federal complaint in the Northern District of Georgia on Monday, October 15, 2018, seeking relief from the possible disfranchisement of mail voters.[6225] According to the complaint,

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6219. Complaint, Saball v. Town of Groton, No. 1:18-cv-12312 (D. Mass. Nov. 5, 2018), D.E. 1 [hereinafter *Saball* Complaint].

6220. Emergency Request, *id.* (Nov. 5, 2018), D.E. 2.

6221. *Saball* Complaint, *supra* note 6219, at 5.

6222. Docket Sheet, *Saball*, No. 1:18-cv-12312 (D. Mass. Nov. 5, 2018) (D.E. 6).

6223. *Id.* (D.E. 8).

6224. Order to Show Cause, *id.* (Feb. 20, 2019), D.E. 7.

> Mail ballots are frequently rejected because of a perceived signature discrepancy—a determination that can be made by election staff without signature analysis training on a subjective and arbitrary basis without oversight of supervisors or of authorized pollwatchers appointed by political parties and candidates.
>
> Another common discrepancy is the unintentional voter error of dating the oath with the current date rather than the required date of birth.[6226]

Defendants were election officials for Georgia and Gwinnett County, a county northeast of Atlanta.[6227]

Four days later, the plaintiffs filed a motion for a preliminary injunction.[6228] Three days after that, the plaintiffs filed an amended complaint adding a voter-participation coalition as a sixth plaintiff.[6229] An amended preliminary-injunction motion followed on the next day.[6230]

Two other voter-participation organizations filed a similar complaint in the Northern District on October 16, alleging, among other things,

> A person's signature . . . may vary for a variety of reasons, both intentional and unintentional. Unintentional factors include age, physical and mental condition, disability, medication, stress, accidents, and inherent differences in a person's neuromuscular coordination and stance. Variants are more prevalent in people who are elderly, disabled, or who speak English as a second language.[6231]

6225. Complaint, Martin v. Kemp, No. 1:18-cv-4776 (N.D. Ga. Oct. 15, 2018), D.E. 1 [hereinafter *Martin* Complaint]; Martin v. Crittenden, 347 F. Supp. 3d 1302, 1304 (N.D. Ga. 2018); *see* Ga. Muslim Voter Project v. Kemp, 918 F.3d 1262, 1262, 1264–65 (11th Cir. 2019); *see also* Tyler Estep, *Voting, Rights Groups Focus on Absentee Ballots*, Atlanta J.-Const., Oct. 17, 2018, at 1B.

The caption named five plaintiffs, but only four were identified in the complaint. *Martin* Complaint, *supra*, at 1, 8–10.

6226. *Martin* Complaint, *supra* note 6225, at 3 (paragraph numbers omitted).

6227. *Id.* at 10–13.

6228. Preliminary-Injunction Motion, *Martin*, No. 1:18-cv-4776 (N.D. Ga. Oct. 19, 2018), D.E. 4; *Martin*, 347 F. Supp. 3d at 1305.

6229. First Amended Complaint, *Martin*, No. 1:18-cv-4776 (N.D. Ga. Oct. 22, 2018), D.E. 10.

All five voter plaintiffs were identified in the amended complaint. *Id.* at 8–10.

6230. Amended Preliminary-Injunction Motion, *id.* (Oct. 23, 2018), D.E. 19; *see* Martin v. Kemp, 341 F. Supp. 3d 1326, 1329 (N.D. Ga. 2018).

6231. Complaint at 3, Ga. Muslim Voter Project v. Kemp, No. 1:18-cv-4789 (N.D. Ga. Oct. 16, 2018), D.E. 1; *see Martin*, 347 F. Supp. 3d at 1304–05; *see also* Estep, *supra* note 6225.

A day later, the organizations filed a motion for a temporary restraining order.[6232]

Judge Leigh Martin May began an October 23 hearing on both cases[6233] with an observation that there were less clear ways to address signature mismatches than other absentee-ballot discrepancies and a reflection that she did not herself know what her signature looked like when she first registered to vote at age eighteen.[6234] She ordered that briefing in the first case conclude by October 31.[6235]

On Wednesday, October 24, she issued a thirty-one-page injunction opinion.[6236]

> Because the Electors just filed a motion for preliminary injunction on Friday and an amended motion for preliminary injunction on Tuesday morning (the day of the hearing), the Court will only consider the Electors' arguments as to signature mismatch. All other Elector claims will be addressed by the Court at a later time, after Defendants have had an opportunity to be heard.[6237]

The opinion concluded with a proposed injunction, and Judge May gave the parties until noon on the next day for comments as to clarity.[6238] The decision required election officials to regard mail ballots with apparently mismatched signatures as provisional, and it required them to provide voters with opportunities to resolve the discrepancies.[6239]

6232. Temporary-Restraining-Order Motion, *Ga. Muslim Voter Project*, No. 1:18-cv-4789 (N.D. Ga. Oct. 17, 2018), D.E. 5; *see Martin*, 341 F. Supp. 3d at 1329.

6233. Minutes, *Ga. Muslim Voter Project*, No. 1:18-cv-4789 (N.D. Ga. Oct. 23, 2018), D.E. 27; Minutes, *Martin*, No. 1:18-cv-4776 (N.D. Ga. Oct. 23, 2018), D.E. 22; *see* Tyler Estep, *Judge Mulls Action on Ga. Absentee Ballots*, Atlanta J.-Const., Oct. 24, 2018, at 6A.

6234. Transcript at 6–7, *Martin*, No. 1:18-cv-4776 (N.D. Ga. Oct. 23, 2018, filed Oct. 26, 2018), D.E. 28.

6235. Order, *id.* (Oct. 23, 2018), D.E. 21.

6236. *Martin*, 341 F. Supp. 3d 1326; Ga. Muslim Voter Project v. Kemp, 918 F.3d 1262, 1262–63, 1265–67 (11th Cir. 2019).

6237. *Martin*, 341 F. Supp. 3d at 1329; *see* Martin v. Crittenden, 347 F. Supp. 3d 1302, 1305 (N.D. Ga. 2018).

6238. *Martin*, 341 F. Supp. 3d at 1341–42; *see* Tyler Estep, *U.S. Judge Sides with Absentee Voters*, Atlanta J.-Const., Oct. 25, 2018, at 1B.

6239. *Martin*, 341 F. Supp. 3d at 1341–42; Temporary Restraining Order, *Martin*, No. 1:18-cv-4776 (N.D. Ga. Oct. 25, 2018), D.E. 26; *see* Amy Gardner, *Georgia Must Stop Tossing Absentee Ballots Over Signatures*, Wash. Post, Oct. 25, 2018, at A6; Cameron McWhirter, *Judge Orders Georgia to Ease Ballot Rules*, Wall St. J., Oct. 26, 2018, at A4; Mark Niesse, *Your Guide to Georgia Voting Integrity*, Atlanta J.-Const., Nov. 2, 2018, at 6A; Glenn Thrush, Audra D.S. Burch & Frances Robles, *Parsing Signatures, Not Chads, in Florida Vote*, N.Y. Times, Nov. 15, 2018, at A1.

On October 30, Judge May declined the secretary's motion to stay the injunction pending appeal.[6240] On November 2, the court of appeals declined to stay the injunction or expedite the appeals from each case, which the court consolidated.[6241] One month after the election, the appeals were voluntarily dismissed.[6242] The circuit judges issued their concurring and dissenting opinions on the denial of a stay on March 21, 2019.[6243]

Judge May decided the amended preliminary-injunction motion in the first case, which was filed on the day of the hearing, on November 2, 2018.[6244] She declined to order immediate relief from rejected mail-in ballots for reasons other than signature mismatches.[6245] A mismatching signature needed a resolution opportunity, but clerical errors could be avoided by carefully following instructions.[6246] "This does not mean that the Court is not troubled by some of the allegations in Plaintiffs' Motion. Instead, it merely holds that there is not enough time to adequately implement the more wide-ranging solutions proposed."[6247]

On election day, November 6, "a state judge ordered three precincts in suburban Gwinnett County—a populous swing county in metro Atlanta—to extend their polling hours, one of them as late as 9:25 p.m."[6248] At the end of the day on November 7, one day after the election, Brian Kemp had 50.33% of the votes counted for governor, slightly more than the amount necessary to avoid a runoff election.[6249]

6240. Opinion, *Martin*, No. 1:18-cv-4776 (N.D. Ga. Oct. 30, 2018), D.E. 38; *Ga. Muslim Voter Project*, 918 F.3d at 1266.

6241. Order, Ga. Muslim Voter Project v. Kemp, No. 18-14502 (11th Cir. Nov. 2, 2018).

6242. Voluntary Dismissals, *id.* and No. 18-14503 (Dec. 7, 2018).

6243. *Ga. Muslim Voter Project*, 918 F.3d 1262.

Dissenting, Judge Gerald Bard Tjoflat argued, "When, as here, it is impracticable for a state like Georgia to provide pre-deprivation process for erroneous signature reviews because the state must conduct over half a million reviews in short order, a post-deprivation suit against election officials in state court is a constitutionally sufficient remedy." *Id.* at 1285.

6244. Injunction-Denial Opinion at 2, *Martin*, No. 1:18-cv-4776 (N.D. Ga. Nov. 2, 2018), D.E. 41.

6245. *Id.* at 10–11.

6246. *Id.* at 9.

6247. *Id.* at 10–11.

6248. Bill Barrow & Ben Nadler, *Long Lines and Technical Issues as Georgians Vote for Governor*, Miami Herald, Nov. 7, 2018, at 10A.

6249. *See* Alan Judd, *Abrams Faces Long Odds to Prolong Campaign*, Atlanta J.-Const., Nov. 8, 2018, at 10A; *see also* Alan Judd & Bill Rankin, *Security Doubts Not Over After Race Ends*, Atlanta J.-Const., Nov. 18, 2018, at 1A ("this year, Georgia experienced its

On Sunday, November 11, the plaintiffs filed an emergency motion for a temporary restraining order preventing Gwinnett County election officials "from rejecting absentee ballots containing immaterial errors or omissions, including those cast by" three voters[6250] whom the plaintiffs would move on the following day to add as additional plaintiffs.[6251]

Also on November 11, a candidate for Congress and a voter filed a motion to intervene as plaintiffs.[6252] Judge May granted the motion two days later.[6253]

In her November 13 decision, Judge May ordered Gwinnett County not to reject absentee ballots solely for an omitted or incorrect year of birth.[6254] The Civil Rights Act of 1964 forbids the disqualification of a voter for an omission or error that is not material to the voter's eligibility.[6255] A voter need not show the voter's age when returning an absentee ballot, because only eligible voters receive absentee ballots.[6256]

> Unlike Plaintiffs' arguments with respect to missing or incorrect birth years, Plaintiffs offer only conclusory statements and no supporting authority for their claim that a missing signature, incorrect address, or other clerical errors are immaterial pursuant to the Civil Rights Act. Thus, Plaintiffs have not met their high burden on this point and the requested broader injunction is not granted.[6257]

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tightest race for governor in 52 years").

6250. Amended Temporary-Restraining-Order Motion, *Martin*, No. 1:18-cv-4776 (N.D. Ga. Nov. 11, 2018), D.E. 44 (adding reference to three additional proposed plaintiffs); Temporary-Restraining-Order Motion, *id.* (Nov. 11, 2018), D.E. 42; Martin v. Crittenden, 347 F. Supp. 3d 1302, 1305 (N.D. Ga. 2018).

6251. Complaint-Amendment Motion, *Martin*, No. 1:18-cv-4776 (N.D. Ga. Nov. 12, 2018), D.E. 53.

6252. Intervention Motion, *id.* (Nov. 11, 2018), D.E. 45; *Martin*, 347 F. Supp. 3d at 1305; *see* Tamar Hallerman, Tyler Estep & Amanda C. Coyne, *U.S. House Candidate Seeks Delay of Vote Certification*, Atlanta J.-Const., Nov. 13, 2018, at 1B.

6253. *Martin*, 347 F. Supp. 3d at 1306–07; *see* Intervention Complaint, *Martin*, No. 1:18-cv-4776 (N.D. Ga. Nov. 13, 2018), D.E. 56.

6254. *Martin*, 347 F. Supp. 3d at 1308–11; *see* Opinion, *Martin*, No. 1:18-cv-4776 (N.D. Ga. Nov. 15, 2018), D.E. 59, 2018 WL 9943564 (denying the intervening plaintiffs' motion for reconsideration); *see also* Greg Bluestein & Mark Niesse, *Vote Count Plays Out in Counties, Courts*, Atlanta J.-Const., Nov. 14, 2018, at 1A; Allison McCann & Karen Yourish, *In Some Races, Results May Still Be Weeks Away*, N.Y. Times, Nov. 14, 2018, at A18.

6255. Pub. L. No. 88-352, § 101(a)(2)(B), 78 Stat. 241, 241 (1964), *as amended*, 28 U.S.C. § 10101(a)(2)(B); *see Martin*, 347 F. Supp. 3d at 1308; *see also* Judd & Rankin, *supra* note 6249.

6256. *Martin*, 347 F. Supp. 3d at 1308–09.

6257. *Id.* at 1308 n.4; *see* Tamar Hallerman & Tyler Estep, *Gwinnett's Result: Woodall*

Amended complaints remained pending in both cases into 2019.[6258] An appeal in the first case by Gwinnett County's election officials was dismissed voluntarily.[6259]

A third federal case was filed in the Northern District on November 11, 2018, by the campaign of a candidate for governor and her nominating party against election officials for Georgia, Gwinnett County, and DeKalb County—a county between Atlanta and Gwinnett County—that sought court-ordered counting of valid absentee and provisional ballots.[6260] On the following day, the plaintiffs filed a motion for a preliminary injunction.[6261] Judge Steve C. Jones heard the case one day after that,[6262] and he promised a ruling by noon on the case's fourth day.[6263]

The complaint included the words "class action" in its caption, and text stated that the plaintiffs asserted claims against a class of defendants comprised of election officials for Georgia's 159 counties, but absent a request to certify a class Judge Jones declined to consider relief against a class.[6264]

On November 14, Judge Jones extended Judge May's decision proscribing the rejection of absentee ballots for failure to include the voter's correct year of birth: "for the sake of statewide uniformity and assurance that all absentee mail-in ballots are equally treated, the Court adopts the rationale set forth in Judge May's Order and holds that absentee mail-in

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Wins by 419, Atlanta J.-Const., Nov. 16, 2018, at 4A.

6258. Second Amended Complaint, *Martin*, No. 1:18-cv-4776 (N.D. Ga. Oct. 15, 2018); Amended Complaint, Ga. Muslim Voter Project v. Kemp, No. 1:18-cv-4789 (N.D. Ga. Oct. 29, 2018), D.E. 41; *see* Order, Nos. 1:18-cv-4776 and 1:18-cv-4789 (Mar. 18, 2019), D.E. 82 and 58, respectively (substituting the new secretary of state Brad Raffensperger as the lead defendant).

6259. Order, Martin v. Kemp, No. 18-15148 (11th Cir. Feb. 22, 2019).

6260. Complaint, Democratic Party of Ga. v. Crittenden, No. 1:18-cv-5181 (N.D. Ga. Nov. 11, 2018), D.E. 1 [hereinafter *Democratic Party of Ga.* Complaint]; Democratic Party of Ga. v. Crittenden, 347 F. Supp. 3d 1324, 1331 (N.D. Ga. 2018); *see Democrat Abrams Files New Suit in Too-Close-to-Call Ga. Governor's Race*, Miami Herald, Nov. 12, 2018, at 8A.

6261. Preliminary-Injunction Motion, *Democratic Party of Ga.*, No. 1:18-cv-5181 (N.D. Ga. Nov. 12, 2018), D.E. 4; *Democratic Party of Ga.*, 347 F. Supp. 3d at 1330.

6262. Minutes, *Democratic Party of Ga.*, No. 1:18-cv-5181 (N.D. Ga. Nov. 13, 2018), D.E. 34; *Democratic Party of Ga.*, 347 F. Supp. 3d at 1330.

6263. *See* Bluestein & Niesse, *supra* note 6254.

6264. *Democratic Party of Ga.*, 347 F. Supp. 3d at 35–36; *Democratic Party of Ga.* Complaint, *supra* note 6260, at 1–2, 14–16.

ballots rejected solely because of an omitted or erroneous birth date must be counted."[6265]

Judge Jones declined to provide the plaintiffs with relief on provisional ballots.[6266] "[T]here is a lack of evidentiary support for Plaintiffs' contention that there has not been enough time to cure the provisional ballots filed in the 2018 General Election."[6267] Respecting provisional ballots cast in the wrong county, "Plaintiffs do not present sufficient evidence to show that the State's interest in preventing voter fraud is unreasonable, nor do they show that the restriction was applied in a discriminatory manner."[6268]

Democratic nominee Stacey Abrams conceded Kemp's gubernatorial victory on November 16.[6269]

On April 2, 2019, Governor Kemp signed legislation that required election officials to regard an absentee ballot with an apparently mismatching signature as a provisional ballot affording the voter an opportunity to resolve the apparent discrepancy.[6270] Stipulated dismissals in the first two cases followed.[6271]

Judge Jones conducted a bench trial from April 11 to June 23, 2022,[6272] in a November 27, 2018, action generally challenging Georgia's oversight of elections.[6273] He did not find any flaws in the way that Georgia conducted elections requiring a judicial remedy.[6274]

6265. *Democratic Party of Ga.*, 347 F. Supp. 3d at 1341; *see* Hallerman & Estep, *supra* note 6257; Judd & Rankin, *supra* note 6249.

6266. *Democratic Party of Ga.*, 347 F. Supp. 3d at 1341–45; *see* Greg Bluestein & Tia Mitchell, *Judge: More Ballots Must Be Counted*, Atlanta J.-Const., Nov. 15, 2018, at 1A.

6267. *Democratic Party of Ga.*, 347 F. Supp. 3d at 1342.

6268. *Id.* at 1344.

The case was dismissed by stipulation on January 11, 2019. Stipulation, Democratic Party of Ga. v. Crittenden, No. 1:18-cv-5181 (N.D. Ga. Jan. 11, 2019), D.E. 47.

6269. *See* Alan Blinder & Richard Fausset, *Democrat Ends Bid in Georgia for Governor*, N.Y. Times, Nov. 17, 2018, at A1; Greg Bluestein & Tia Mitchell, *Abrams: Kemp Is Next Governor*, Atlanta J.-Const., Nov. 17, 2018, at 1A.

6270. 2019 Ga. Laws Act 24, www.legis.ga.gov/Legislation/en-US/display/20192020/HB/316.

6271. Stipulated Dismissal, Martin v. Raffensperger, No. 1:18-cv-4776 (N.D. Ga. Apr. 16, 2019), D.E. 85; Stipulated Dismissal, Ga. Muslim Voter Project v. Raffensperger, No. 1:18-cv-4789 (N.D. Ga. Apr. 15, 2019), D.E. 62.

6272. Minutes, Fair Fight Action v. Crittenden, No. 1:18-cv-5391 (N.D. Ga. June 23, 2022), D.E. 852; Minutes, *id.* (Apr. 11, 2022), D.E. 789; Fair Fight Action, Inc. v. Raffensperger, 634 F. Supp. 3d 1128, 1148 (N.D. Ga. 2022) ("[a]fter a delay in the start of trial due to the Omicron variant of COVID-19"); *id.* at 1143 ("what is believed to have been the longest voting rights bench trial in the history of the Northern District of Georgia").

6273. Docket Sheet, *Fair Fight Action*, No. 1:18-cv-5391 (N.D. Ga. Nov. 27, 2018);

An Opportunity to Cure Absentee-Ballot Signatures That Do Not Match Voter-Registration Records

Florida Democratic Party v. Detzner (Mark E. Walker, N.D. Fla. 4:16-cv-607)

> A little over one month before a general election, a political party filed a federal complaint seeking opportunities to cure mismatches between absentee-ballot signatures and voter-registration signatures, noting an existing opportunity to cure signature omissions. After taking testimony from the local county supervisor of elections, the district judge issued a preliminary injunction requiring an opportunity to cure signature mismatches.
>
> *Topics:* Signature matching; absentee ballots; equal protection; news media; attorney fees.

On October 3, 2016, a little over one month before the general election, a political party filed a federal complaint in the Northern District of Florida against Florida's secretary of state seeking an opportunity to cure when a voter's signature on a mailed absentee ballot is judged not to match the signature on file.[6275] According to the complaint, a mismatched signature caused the ballot to be excluded from the election, but an absent signature triggered an opportunity to cure the defect before the election, although "because Florida's system of signature review involves human reviewers, it

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Second Amended Complaint, *id.* (Dec. 3, 2020), D.E. 582; Amended Complaint, *id.* (Feb. 19, 2019), D.E. 41; Complaint at 39–41, *id.* (Nov. 27, 2018), D.E. 1; *see* Fair Fight Action v. Raffensperger, 413 F. Supp. 3d 1251 (N.D. Ga. 2019) (denying a motion to dismiss the amended complaint on standing, mootness, and other grounds, but dismissing the state election board from some claims for sovereign immunity); Opinion, *Fair Fight Action*, No. 1:18-cv-5391 (N.D. Ga. Nov. 15, 2021), D.E. 636 (denying the state summary judgment on whether requiring an exact match between names in voter registrations and other databases is racially discriminatory); Opinion, *id.* (Mar. 31, 2021), D.E. 617 (narrowing claims); Opinion, *id.* (Feb. 16, 2021), D.E. 612 (narrowing claims, some as moot); Opinion, *id.* (Dec. 27, 2019), D.E. 188 (denying a preliminary injunction to restore voter registrations that were canceled for inactivity); *see also* Valerie Bauerlein, *Suit Alleges Georgia Curbed Black Voters*, Wall St. J., Nov. 28, 2018, at A4; Richard Fausset, *Supporters of Candidate Who Lost Georgia Race Take the State to Court*, N.Y. Times, Nov. 28, 2018, at A19; Vanessa Williams, *Lawsuit by Abrams's PAC Alleges Voter Suppression in Georgia*, Wash. Post, Nov. 30, 2018, at A4.

6274. *Fair Fight Action, Inc.*, 634 F. Supp. 3d 1128; *see* Matthew Brown, *Judge Upholds Ga. Law in Challenge Brought by Abrams After 2018 Loss*, Wash. Post, Oct. 2, 2022, at A8.

6275. Complaint, Fla. Democratic Party v. Detzner, No. 4:16-cv-607 (N.D. Fla. Oct. 3, 2016), D.E. 5 [hereinafter *Fla. Democratic Party* Complaint]; *see* Steve Bousquet, *Florida Sued Over Mail Ballots*, Tampa Bay Times, Oct. 4, 2016, at 5; Steve Bousquet, *Mail Voting Heads to Record*, Tampa Bay Times, Oct. 6, 2016, at 1.

is necessarily fallible."[6276] With its complaint, the party filed an emergency motion for a preliminary injunction, noting that the "canvassing of returned vote-by-mail ballots is to begin on October 24."[6277]

The party experienced technical difficulties filing the case electronically,[6278] perhaps because the party's attorneys were not registered with the court as electronic filers.[6279] For that reason, there was a delay in Judge Mark E. Walker's learning that he had been assigned the case.[6280] On October 6, Judge Walker set a telephone conference for the following day and ordered the party to immediately serve the secretary's attorneys.[6281]

Judge Walker had a standard order for use in emergency cases, which he tailored to each case.[6282] The docket sheet included instructions for telephone participation by news media as well as the parties.[6283] In the future, Judge Walker would include in the participation notice an instruction that he issued orally: participants may not record the proceeding.[6284] In the future, Judge Walker would also instruct participants not to tweet or blog about the proceeding while it is occurring.[6285]

At the conference, the secretary asked for a week to develop a factual record in response to the party's filings.[6286] Judge Walker set a briefing schedule culminating in a hearing on October 18.[6287]

Later, Judge Walker set an additional hearing for October 14 and took testimony then from the local county supervisor of elections.[6288] Judge Walker was a fan of Federal Rule of Evidence 614, which provided for the

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6276. *Fla. Democratic Party* Complaint, *supra* note 6275, at 14.

6277. Motion, *Fla. Democratic Party*, No. 4:16-cv-607 (N.D. Fla. Oct. 3, 2016), D.E. 1.

6278. Interview with Judge Mark E. Walker, Oct. 31, 2016.

Tim Reagan interviewed Judge Walker for this report by telephone.

6279. Notice, *Fla. Democratic Party*, No. 4:16-cv-607 (N.D. Fla. Oct. 5, 2016), D.E. 8.

6280. Interview with Judge Mark E. Walker, Oct. 31, 2016 (noting the importance of the clerk's office keeping a judge informed about emergency filings assigned to the judge).

6281. Order, *Fla. Democratic Party*, No. 4:16-cv-607 (N.D. Fla. Oct. 6, 2016), D.E. 12.

6282. Interview with Judge Mark E. Walker, Oct. 31, 2016.

6283. *E.g.*, Docket Sheet, *Fla. Democratic Party*, No. 4:16-cv-607 (N.D. Fla. Oct. 3, 2016) [hereinafter *Fla. Democratic Party* Docket Sheet] (D.E. 20).

6284. Interview with Judge Mark E. Walker, Oct. 31, 2016.

6285. *Id.*

6286. Order at 2, *Fla. Democratic Party*, No. 4:16-cv-607 (N.D. Fla. Oct. 15, 2016), D.E. 30 [hereinafter Oct. 15, 2016, *Fla. Democratic Party* Order].

6287. Minutes, *id.* (Oct. 7, 2016), D.E. 21.

6288. Minutes, *id.* (Oct. 14, 2016), D.E. 27; Opinion at 7, *id.* (Oct. 16, 2016), D.E. 34 [hereinafter *Fla. Democratic Party* Opinion], 2016 WL 6090943; *Fla. Democratic Party* Docket Sheet, *supra* note 6283 (D.E. 24); *see* Steve Bousquet, *Federal Judge Could Reshape Vote in Florida*, Tampa Bay Times, Oct. 12, 2016, at 1.

court's calling and examining a witness.[6289] Judge Walker described his goals for the witness at the hearing:

> As I indicated in the notice, what I want is some background information in terms of the mechanics of how things work. I am not asking this witness what his opinions are, that is what I should or should not do or how things should or should not work. What I'm trying to find out is, as a practical matter, how things do work. And also find out where there's a difference from county to county, because there's going to be some things that vary from county to county, and again so I have a practical understanding of when votes are counted, how they are counted, how we respond to those that don't sign their ballots and so forth, and so that's the purpose of this testimony today.[6290]

Judge Walker learned from the witness information that he otherwise would not have learned about how the controversy and its possible resolution would likely play out for local election officials.[6291]

Reviewing the secretary's October 14 opposition papers,[6292] Judge Walker observed that they contained only legal arguments that the secretary customarily asserts in voting-rights cases, including a pleaded defense of sovereign immunity.[6293]

> Moreover, . . . the Florida Secretary of State has not responded to this case on the merits and thus has not contested a single fact presented by the Plaintiff. . . .
>
> . . . If one were skeptical, it would appear that the Florida Secretary of State requested as much time as he felt he could possibly justify so that he could use every second available to run out the clock.[6294]

On Saturday, October 15, Judge Walker decided, therefore, that he would rule without additional hearing.[6295]

6289. Interview with Judge Mark E. Walker, Oct. 31, 2016; *see Fla. Democratic Party* Docket Sheet, *supra* note 6283 (D.E. 24); Transcript at 4, *Fla. Democratic Party*, No. 4:16-cv-607 (N.D. Fla. Oct. 14, 2016, filed Oct. 16, 2016), D.E. 32 [hereinafter *Fla. Democratic Party* Transcript].

6290. *Fla. Democratic Party* Transcript, *supra* note 6289, at 11–12.

6291. Interview with Judge Mark E. Walker, Oct. 31, 2016.

6292. Motion to Dismiss, *Fla. Democratic Party*, No. 4:16-cv-607 (N.D. Fla. Oct. 14, 2016), D.E. 29; Opposition Brief, *id.* (Oct. 14, 2016), D.E. 28.

6293. Oct. 15, 2016, *Fla. Democratic Party* Order, *supra* note 6286, at 2–3.

6294. *Id.* at 5; *see* Arek Sarkissian, *Judge Critical of Detzner*, Orlando Sentinel, Oct. 17, 2016, at B2.

6295. Oct. 15, 2016, *Fla. Democratic Party* Order, *supra* note 6286, at 6 (noting that the party's reply brief was due by Sunday evening, October 16, instead of Monday morning, October 17); *see* Mike Schneider, *Judge Issues Sharp Rebuke in Ballot Suit*, Orlando Sentinel, Oct. 16, 2016, at B1.

On Sunday, October 16, he issued a thirty-three-page opinion granting the party a preliminary injunction.[6296]

He noted that the "county canvassing boards [that review absentee-ballot signatures] are staffed by laypersons that are not required to undergo—and many do not participate in—formal handwriting-analysis education or training."[6297] Judge Walker concluded that "there is no reason why mismatched-signature ballots cannot be treated the same as no-signature ballots during the review (and cure) process."[6298]

> It is illogical, irrational, and patently bizarre for the State of Florida to withhold the opportunity to cure from mismatched-signature voters while providing that same opportunity to no-signature voters. And in doing so, the State of Florida has categorically disenfranchised thousands of voters arguably for no reason other than they have poor handwriting or their handwriting has changed over time. Thus, Florida's statutory scheme does not even survive rational basis review.[6299]

Judge Walker ordered the party to post a $500 preliminary-injunction security bond.[6300]

On Monday, October 17, the secretary directed county supervisors of elections "to allow mismatched-signature ballots to be cured in precisely the same fashion as currently provided for non-signature ballots."[6301]

In 2017, the parties reached a settlement on attorney fees.[6302]

Talking Voting Machines for Blind Absentee Voters

Gray v. St. Louis City Board of Election Commissioners (Audrey G. Fleissig, E.D. Mo. 4:16-cv-1548)

> Near the beginning of absentee voting, two blind voters filed a federal complaint seeking accommodation for blind voters by talking voting machines in light of a recent state-court decision

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6296. *Fla. Democratic Party* Opinion, *supra* note 6288; *see* Democratic Exec. Comm. of Fla. v. Lee, 634 F.3d 1312, 1316 (11th Cir. 2019); Gray Rohrer, *Judge: Let Voters Fix Signatures on Ballots*, Orlando Sentinel, Oct. 18, 2016, at A1.

6297. *Fla. Democratic Party* Opinion, *supra* note 6288, at 5.

6298. *Id.* at 8–9.

6299. *Id.* at 22–23; *see id.* at 28 ("In our democracy, those who vote decide everything; those who count the vote decide nothing.").

6300. *Id.* at 26, 29–30; *see Fla. Democratic Party* Docket Sheet, *supra* note 6283 (noting receipt of security bond, D.E. 35).

6301. Letter, *attached to* Notice, Fla. Democratic Party v. Detzner, No. 4:16-cv-607 (N.D. Fla. Oct. 17, 2016), D.E. 37; *see* Steve Bousquet, *Judge Orders Fix for Faulty Mail Ballot Signatures*, Miami Herald, Oct. 18, 2016, at 1A.

6302. Order, *Fla. Democratic Party*, No. 4:16-cv-607 (N.D. Fla. Aug. 18, 2017), D.E. 69; Status Reports, *id.* (N.D. Fla. July 25 and Aug. 17, 2017), D.E. 66, 68.

tightening absentee-voting procedures. On the day that the complaint was filed, the defendant election board answered, and the judge granted the plaintiffs immediate relief. The parties stipulated dismissal of the action before election day.

Topics: Voting technology; absentee ballots; early voting.

Two blind voters filed a federal complaint in the Eastern District of Missouri on September 30, 2016, seeking accommodation by talking voting machines during the period of absentee voting for the November 8 general election.[6303] Absentee voting began on September 27, and voting procedures had been tightened as a result of a September 13 state-court decision finding irregularities among absentee votes in an August 2 primary election.[6304] With their complaint, the voters filed a motion for a temporary restraining order, a preliminary injunction, and permanent injunctive relief.[6305] The defendant, St. Louis's board of election commissioners, answered the complaint on the day that it was filed.[6306]

Judge Audrey G. Fleissig heard the case on the day that it was filed and answered.[6307] It was clear that the board was happy to continue providing blind voters with talking voting machines, but the board was concerned about violating the state court's interpretation of state law.[6308] Judge Fleissig's staff contacted the state court of appeals to see if it had ruled yet on a motion by the board for clarification, and the state court had not yet ruled on the board's motion.[6309]

At the hearing, Judge Fleissig issued a temporary restraining order, and set the case for another hearing on October 13.[6310] She ordered the

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6303. Complaint, Gray v. St. Louis City Bd. of Election Comm'rs, No. 4:16-cv-1548 (E.D. Mo. Sept. 30, 2016), D.E. 1.

6304. Opinion at 2–3, *id.* (Sept. 30, 2016), D.E. 9 [hereinafter *Gray* Opinion]; Franks v. Hubbard, 498 S.W.3d 862 (Mo. Ct. App. 2016); *see* Stephen Deere & Doug Moore, *Absentee Problems Revealed in St. Louis Election Will Affect Others Come November*, St. Louis Post-Dispatch, Sept. 26, 2016, at A1; Doug Moore, *Eliminating Touch Screen Voting Discriminates Against the Blind, Advocacy Group Says*, St. Louis Post-Dispatch, Sept. 29, 2016, at A3.

6305. Motion, *Gray*, No. 4:16-cv-1548 (E.D. Mo. Sept. 30, 2016), D.E. 2.

6306. Answer, *id.* (Sept. 30, 2016), D.E. 6.

6307. Minutes, *id.* (Sept. 30, 2016), D.E. 10 [hereinafter *Gray* Minutes].

Tim Reagan interviewed Judge Fleissig for this report by telephone on September 7, 2017.

6308. Interview with Judge Audrey G. Fleissig, Sept. 7, 2017.

6309. *Id.*

6310. *Gray* Opinion, *supra* note 6304; *Gray* Minutes, *supra* note 6307; *see* Order, *Gray*, No. 4:16-cv-1548 (E.D. Mo. Oct. 11, 2016), D.E. 13.

board to "make touch-screen voting machines with audio and all other accessible voting technology available for persons with disabilities during the absentee-voting period for the November 8, 2016 election."[6311]

Later on September 30, Missouri's court of appeals modified its opinion to add a footnote stating that "nothing in this opinion should be construed to prevent election authorities from complying with federal law."[6312]

The parties stipulated dismissal of the action on October 13.[6313] Legislation signed by the governor on July 7 provided statutory authorization for the use of voting machines for absentee voting beginning in 2018.[6314]

A Defective Absentee-Ballot Application by a Hospitalized Voter

Ramsden v. Husted (Benita Y. Pearson, N.D. Ohio 4:16-cv-641)

> After the polls closed, a hospitalized voter filed a federal complaint alleging that election authorities improperly refused to provide the voter with an absentee ballot on election day. The judge determined that the voter's application was defective and denied the voter relief.
>
> *Topics:* Absentee ballots; primary election; provisional ballots.

A voter hospitalized for a psychiatric condition on March 12, 2016, filed a federal complaint in the Northern District of Ohio's Youngstown courthouse at 11:48 p.m. on March 15 alleging that county election officials refused to provide him with an absentee ballot so that he could vote in a March 15 primary election.[6315] Named as defendants were Ohio's secretary of state and the director of Columbiana County's board of elections, serving the county just south of the county that includes Youngstown.[6316] With

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6311. *Gray* Opinion, *supra* note 6304, at 6; *see* Stephen Deere & Doug Moore, *Federal Judge Orders St. Louis Election Board to Allow Disabled to Vote on Electronic Machines*, St. Louis Post-Dispatch, Oct. 1, 2016, at A4.

6312. Franks v. Hubbard, 498 S.W.3d 862, 873 n.12 (Mo. Ct. App. 2016); Docket Sheet, Franks v. Hubbard, No. ED 104797 (Mo. Ct. App. Sept. 6, 2016) (noting a corrected opinion filed on September 30, 2016); *see* Deere & Moore, *supra* note 6311.

6313. Stipulated Dismissal, *Gray*, No. 4:16-cv-1548 (E.D. Mo. Oct. 13, 2016), D.E. 14.

6314. Mo. H.B. 1480, www.house.mo.gov/BillContent.aspx?bill=HB1480&year=2016&code=R&style=new; *see* Deere & Moore, *supra* note 6304; Plaintiffs' Brief at 13–14, *Gray*, No. 4:16-cv-1548 (E.D. Mo. Sept. 30, 2016), D.E. 3.

6315. Complaint, Ramsden v. Husted, No. 4:16-cv-641 (N.D. Ohio Mar. 15, 2016), D.E. 1 [hereinafter *Ramsden* Complaint]; Opinion at 2, *id.* (Mar. 16, 2016), D.E. 11 [hereinafter *Ramsden* Opinion].

6316. *Ramsden* Complaint, *supra* note 6315.

his complaint, the voter filed a motion for a temporary restraining order.[6317]

On March 16, Judge Benita Y. Pearson set the case for a telephonic hearing at noon that day and ordered the defendants to file a brief before the hearing.[6318] The hearing established that the voter's application for an absentee ballot did not provide either a fax number or contact information for a family member to facilitate delivery of the ballot.[6319] At the ninety-minute hearing, Judge Pearson announced that she would rule on the following day.[6320] On March 17, she denied immediate relief, concluding that "[a]ll evidence before the Court at this time indicates that a lack of compliance, rather than disability, precluded Plaintiff from submitting a ballot."[6321] Judge Pearson ordered the defendants to permit the plaintiff to cast a provisional absentee ballot, and she set the case for further hearing on April 1.[6322] The voter dismissed the action on March 24.[6323]

Counting Federal Overseas Votes on Ballots with State-Election Errors

United States v. West Virginia (John T. Copenhaver, Jr., S.D. W. Va. 2:14-cv-27456)

> A state supreme court ordered a replacement candidate for a state legislative election, granting a writ of mandamus that also requested the nullification of absentee ballots already sent out that included the withdrawn candidate's name. The U.S. Department of Justice sought an injunction requiring that votes for federal offices be counted in the otherwise voided absentee ballots for overseas voters if the overseas voters did not cast corrected ballots. Although the district judge denied the Justice Department preliminary relief, on full briefing the judge ordered federal votes counted for the four ballots at issue.
>
> *Topics:* Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA); absentee ballots; matters for state courts.

6317. Temporary-Restraining-Order Motion, *Ramsden*, No. 4:16-cv-641 (N.D. Ohio Mar. 15, 2016), D.E. 2; *see Ramsden* Opinion, *supra* note 6315, at 3 ("No request for a hearing was made.").

6318. Order, *Ramsden*, No. 4:16-cv-641 (N.D. Ohio Mar. 16, 2016), D.E. 6.

6319. *Ramsden* Opinion, *supra* note 6315, at 2 & n.2.

6320. Docket Sheet, *Ramsden*, No. 4:16-cv-641 (N.D. Ohio Mar. 15, 2016) (Mar. 16, 2016, minutes).

6321. *Ramsden* Opinion, *supra* note 6315, at 4.

6322. *Id.* at 9.

6323. Notice, *Ramsden*, No. 4:16-cv-641 (N.D. Ohio Mar. 24, 2016), D.E. 12.

The U.S. Department of Justice filed a federal complaint in the Southern District of West Virginia on October 31, 2014, alleging that West Virginia's sending overseas voters absentee ballots only thirty-two days before the November 4 general election—to accommodate a late candidate substitution for one state legislative office—violated the Uniformed and Overseas Citizens Absentee Voting Act of 1986 (UOCAVA).[6324] With its complaint, the Justice Department filed a proposed consent decree.[6325]

On November 3, Judge John T. Copenhaver, Jr., signed the consent decree, which extended the deadline for overseas absentee ballots cast by voters registered in the state legislative district at issue—district 35 of West Virginia's house of delegates—for the purposes of federal offices—the United States Senate and the United States House of Representatives—by thirteen days, so that federal overseas voters had the full forty-five days mandated by UOCAVA.[6326]

On November 6, the Justice Department sought an order requiring West Virginia election officials to count votes for federal offices cast by overseas voters registered in district 35 who returned the original absentee ballot and did not return a corrected absentee ballot.[6327]

West Virginia's supreme court of appeals ordered the ballot substitution on October 1[6328] in response to a September 22 petition for a writ of mandamus.[6329] The petition brief concluded,

> The Petitioners further request that this Court order the Secretary of State to certify Petitioner McDavid to the Kanawha County Clerk for the 35th House District and to instruct the County Clerk to mail valid ballots

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6324. Complaint, United States v. West Virginia, No. 2:14-cv-27456 (S.D. W. Va. Oct. 31, 2014), D.E. 1; *see* Pub. L. No. 99-410, 100 Stat. 924, *as amended*, 52 U.S.C. §§ 20301–20311. *See generally* Robert Timothy Reagan, Overseas Voting: The Uniformed and Overseas Citizens Absentee Voting Act (Federal Judicial Center 2016).

6325. Joint Consent-Decree Motion, *United States v. West Virginia*, No. 2:14-cv-27456 (S.D. W. Va. Oct. 31, 2014), D.E. 2.

6326. Consent Decree, *id.* (Nov. 3, 2014), D.E. 5.

6327. Motion for Emergency Supplemental Injunctive Relief, *id.* (Nov. 6, 2014), D.E. 6.

6328. Mandamus Opinion, West Virginia *ex rel.* McDavid v. Tennant, No. 14-939 (W. Va. Oct. 1, 2014) [hereinafter *McDavid* Mandamus Opinion], www.courtswv.gov/supreme-court/memo-decisions/fall2014/14-0939memo.pdf, 2014 WL 4922641.

6329. Mandamus Petition, *id.* (Sept. 22, 2014), *filed as* Ex. 1, Gov't Brief, *United States v. West Virginia*, No. 2:14-cv-27456 (S.D. W. Va. Nov. 6, 2014), D.E. 7 [hereinafter *United States v. West Virginia* Gov't Brief].

> to all absentee voters with *instructions that the invalid ballot that is incomplete shall be void*.[6330]

The supreme court of appeals concluded its opinion, "Writ Granted."[6331] On October 27, West Virginia election officials sought clarification on whether the court intended that federal votes cast on original district 35 ballots by overseas voters would be void.[6332] On October 30, the court denied the motion to clarify its earlier opinion.[6333]

Judge Copenhaver understood that three overseas voters registered in district 35 returned the original absentee ballot and did not return the amended absentee ballot, so those three voters' federal votes were at issue.[6334] Judge Copenhaver denied the Justice Department immediate relief, concluding, "From all that appears at this preliminary injunction stage, the state officials have taken such steps as necessary to ensure that affected overseas voters in House District 35 have sufficient opportunity to receive, mark and return ballots for the two federal offices."[6335] Judge Copenhaver set a final hearing on the merits for December 1, "[i]in an effort to conclude this matter prior to the Governor's proclamation of the federal election outcome."[6336] Upon a stipulation by the parties of undisputed facts,[6337] Judge Copenhaver canceled the December 1 hearing and ordered briefing completed by December 19.[6338]

On December 22, Judge Copenhaver issued a final injunction in favor of counting federal votes on the original district 35 absentee ballots cast by overseas voters who did not cast corrected ballots, now understood to number four.[6339]

6330. *Id.* at 12 (emphasis added).

6331. *McDavid* Mandamus Opinion, *supra* note 6328, at 10.

6332. Motion for Clarification, *McDavid*, No. 14-939 (W. Va. Oct. 27, 2014), *filed as* Ex. 7, *United States v. West Virginia* Gov't Brief, *supra* note 6329.

6333. Order, *id.* (Oct. 30, 2014), *filed as* Ex. 8, *United States v. West Virginia* Gov't Brief, *supra* note 6329; *see* Opinion at 5, *United States v. West Virginia*, No. 2:14-cv-27456 (S.D. W. Va. Nov. 18, 2014), D.E. 10 [hereinafter First *United States v. West Virginia* Opinion], 2014 WL 6471493.

6334. First *United States v. West Virginia* Opinion, *supra* note 6333, at 6, 9.

6335. *Id.* at 8.

6336. *Id.* at 10.

6337. Stipulation of Undisputed Facts and Law, *United States v. West Virginia*, No. 2:14-cv-27456 (S.D. W. Va. Nov. 25, 2014), D.E. 14.

6338. Order, *id.* (Nov. 26, 2014), D.E. 15.

6339. Opinion, *id.* (Dec. 22, 2014), D.E. 22 [hereinafter Second *United States v. West Virginia* Opinion], 2014 WL 7338867; *see* Notification of Compliance, *id.* (Jan. 22, 2015), D.E. 24.

> Here, the confusion caused by the issuance of the corrected ballots and the ensuing uncertainty about the validity of the original ballots deprived UOCAVA voters in the 35th House District of a meaningful opportunity to receive, mark, and return a ballot in the November 4, 2014 election. For the small number of those voters who expressed their intent to vote on an original ballot, but failed to return a corrected ballot, counting the original ballot provides the only meaningful relief available.[6340]

Accommodating a Disabled Voter

Mooneyhan v. Husted (Walter H. Rice, S.D. Ohio 3:12-cv-379)

> When a hospitalized voter's absentee ballot did not arrive in time, she asked election officials to deliver it by hand to her, but they refused. Ten days following a federal complaint filed shortly after the polls closed on election day, the district judge ordered that the absentee ballot be counted as a remedy for election officials' failing to accommodate the voter's disability.
>
> *Topics:* Absentee ballots; attorney fees; provisional ballots; laches.

At 7:38 p.m. on the day of the November 6, 2012, general election, soon after the polls had closed in Ohio, a voter filed a federal complaint in the Southern District of Ohio against election officials for Ohio and Darke County seeking relief from the refusal of election officials to accommodate the voter's disability to enable her to vote.[6341] With her complaint, the plaintiff filed a motion for a temporary restraining order allowing her to receive and submit an absentee ballot.[6342]

The plaintiff was hospitalized in psychiatric care on October 30, and she requested an absentee ballot on October 31.[6343] Election day arrived, but an absentee ballot did not, and election officials refused to hand-deliver one.[6344] The plaintiff's absentee ballot arrived in the mail on the day after election day.[6345] At a conference call held that day, Judge Walter H. Rice ordered the county election official to receive the cast ballot from the plaintiff as a provisional ballot pending further court rulings.[6346] On No-

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6340. Second *United States v. West Virginia* Opinion, *supra* note 6339, at 20.

6341. Complaint, Mooneyhan v. Husted, No. 3:12-cv-379 (S.D. Ohio Nov. 6, 2012), D.E. 1.

6342. Temporary-Restraining-Order Motion, *id.* (Nov. 6, 2012), D.E. 2.

6343. Injunction Opinion at 2, *id.* (Nov. 16, 2012), D.E. 12 [hereinafter *Mooneyhan* Injunction Opinion], 2012 WL 5834232.

6344. *Id.* at 2–3.

6345. *Id.* at 3; Minutes, *id.* (Nov. 9, 2012, filed Nov. 13, 2012), D.E. 8 [hereinafter *Mooneyhan* Minutes].

6346. *Mooneyhan* Minutes, *supra* note 6345.

vember 16, Judge Rice ordered that the ballot be counted as a remedy for election officials' refusal to reasonably accommodate the plaintiff's disability.[6347]

On March 29 and June 11, 2013, Judge Rice awarded the plaintiff a total of $29,910.50 in attorney fees and costs.[6348]

Last-Minute Absentee Voting by Last-Minute Prisoners

Fair Elections Ohio v. Husted (Susan J. Dlott and S. Arthur Spiegel, 1:12-cv-797) and Mays v. Husted (Michael H. Watson, 2:18-cv-1376) (S.D. Ohio)

> Prisoner-rights organizations filed a federal complaint seeking provisions ensuring the ability to vote by voters detained during the days immediately preceding the 2012 general election. The district judge denied the plaintiffs immediate relief because they had not presented compelling evidence of disfranchisement. The state's accommodations for persons with medical emergencies on election day did not create an equal protection violation because of the different burdens placed on election officials. After the case was transferred to another judge in 2014, and after additional discovery, the second judge granted the plaintiffs summary judgment on a showing that the burden on disfranchised voters outweighed the burden on accommodating late-jailed voters. The court of appeals determined, over a dissent, however, that the plaintiff organizations did not have standing. A lawsuit filed in 2018 by two persons arrested over the weekend before election day and detained through election day was successful for them. The judge later granted summary judgment to a certified plaintiff class. The court of appeals, however, determined that the franchise burden on arrested voters was modest and justified by election officials' burdens in providing new prisoners with ballots.
>
> *Topics:* Prisoner voters; equal protection; absentee ballots; class action.

Litigation begun in 2012 to provide absentee voting rights to voters arrested and detained just before election day was ultimately unsuccessful for reasons of standing. But litigation begun in 2018 by two plaintiffs detained beginning the weekend before election day was successful for those two plaintiffs. The court of appeals ultimately determined that it was constitutional to provide ballots to voters who were unexpectedly hospitalized but

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6347. *Mooneyhan* Injunction Opinion, *supra* note 6343.

6348. Fee Order, *Mooneyhan*, No. 3:12-cv-379 (S.D. Ohio June 11, 2013), D.E. 24; Fee Opinion, *id.* (Mar. 29, 2013), D.E. 22, 2013 WL 1326506.

not to voters who were unexpectedly arrested during the few days before an election.

2012 Case

Five prisoner-rights organizations filed a federal complaint in the Southern District of Ohio's Cincinnati courthouse on October 15, 2012, "to ensure that eligible electors who are jailed the weekend before Election Day and who remain confined through Election Day are afforded the right to vote."[6349] The plaintiffs named as defendants Ohio's secretary of state, Ohio's attorney general, and the chair of Hamilton County's board of elections, who was named as a representative for "all members of County Boards of Elections."[6350] With their complaint, the plaintiffs filed a motion for a temporary restraining order.[6351]

Judge Susan J. Dlott held a telephonic status conference on October 16, set another telephonic conference for two days later, and issued a list of questions for the parties to address at the second conference.[6352] The questions pertained to numbers of voters likely to be affected and the parties' standing.[6353] An amended complaint on October 18 named five additional board-of-elections chairs for Southern District counties.[6354] Judge Dlott set a hearing on the motion for a temporary restraining order for October 23.[6355]

Judge Dlott denied the plaintiffs immediate relief.[6356] She found that the plaintiffs had standing because the injury complained of had an impact on one or more plaintiff organization's allocation of resources.[6357] The

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6349. Complaint, Fair Elections Ohio v. Husted, No. 1:12-cv-797 (S.D. Ohio Oct. 15, 2012), D.E. 1.

6350. *Id.* at 6–8.

6351. Temporary-Restraining-Order Motion, *id.* (Oct. 15, 2012), D.E. 2.

6352. Order, *id.* (Oct. 16, 2012), D.E. 10 [hereinafter Oct. 16, 2012, *Fair Elections Ohio* Order]; Docket Sheet, *id.* (Oct. 15, 2012).

6353. Oct. 16, 2012, *Fair Elections Ohio* Order, *supra* note 6352.

6354. Amended Complaint, *Fair Elections Ohio*, No. 1:12-cv-797 (S.D. Ohio Oct. 18, 2012), D.E. 12.

6355. Notice, *id.* (Oct. 18, 2012), D.E. 11; *see* Transcript, *id.* (Oct. 23, 2012, filed Oct. 24, 2012), D.E. 24 (afternoon session); Transcript, *id.* (Oct. 23, 2012, filed Oct. 24, 2012), D.E. 23 (morning session); Minutes, *id.* (Oct. 24, 2012), D.E. 22; *see also Ohio Denies Recently Jailed Voters, Suit Says*, Cincinnati Enquirer, Oct. 24, 2012, at B5.

6356. Opinion, *Fair Elections Ohio*, No. 1:12-cv-797 (S.D. Ohio Nov. 1, 2012), D.E. 30 [hereinafter Nov. 1, 2012, *Fair Elections Ohio* Opinion], 2012 WL 5414454; *see Judge Won't Alter Election Law for Inmates*, Cincinnati Enquirer, Nov. 2, 2012, at C3.

6357. Nov. 1, 2012, *Fair Elections Ohio* Opinion, *supra* note 6356, at 21–25.

plaintiffs did not, however, present sufficiently compelling evidence of disfranchisement:

> [The plaintiffs presented evidence that] approximately forty-four percent of the people arrested during the weekend prior to the election will be registered to vote. Plaintiffs have submitted no evidence to demonstrate what percentage of those individuals will actually be prevented from voting, given that they will have already had an opportunity during the month prior to the election to request an absentee ballot or to take advantage of Ohio's in-person early voting system. Nor have Plaintiffs submitted any evidence to demonstrate the percentage of those individuals who are likely not only to be arrested during the weekend prior to the election but also detained through the actual election.[6358]

Ohio's statutory accommodation for medical emergencies on election day did not violate equal protection, because medical emergencies and sudden detentions following arrests are not similar situations with respect to the burdens placed on election officials.[6359]

A second amended complaint filed on February 8, 2013, by three of the original plaintiffs named only Ohio's secretary of state and its attorney general as defendants.[6360] The court transferred the case to Judge S. Arthur Spiegel on August 20, 2014.[6361] Following the parties' period of discovery, Judge Spiegel granted the plaintiffs summary judgment on September 16.[6362]

The plaintiffs proffered "expert evidence that at least, if not more than, 400 late-jailed voters state-wide were impeded from voting in the 2012 election."[6363] "The Court further finds late-jailed electors are similarly-situated to late-hospitalized electors whom the boards of election already accommodate. The boards of election teams should have no trouble locating late-jailed electors, as they literally have a captive audience."[6364]

6358. *Id.* at 30–31.

6359. *Id.* at 32–34.

6360. Second Amended Complaint, *Fair Elections Ohio*, No. 1:12-cv-797 (S.D. Ohio Feb. 8, 2013), D.E. 53.

6361. Order, *id.* (Aug. 20, 2014), D.E. 121.

Judge Spiegel died on December 31, 2014. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

6362. Fair Elections Ohio v. Husted, 47 F. Supp. 3d 607 (S.D. Ohio), *rev'd*, 770 F.3d 456 (6th Cir. 2014); *see* Dan Horn, *Arrest in Days Before Election Won't Stop Vote*, Cincinnati Enquirer, Sept. 18, 2014, at A7; Alan Johnson, *Jailed and Can't Post Bail? Ballot Will Come to You*, Columbus Dispatch, Sept. 18, 2014, at 4B.

6363. *Fair Elections Ohio*, 47 F. Supp. 3d at 611 (punctuation slightly altered for clarity).

6364. *Id.* at 615.

"[T]here is no genuine dispute that African-Americans are disproportionately affected by this policy."[6365] Moreover, "[t]hose detainees who can post bond can also vote, whereas those who cannot, cannot. As such, Ohio's denial of the ability to vote to late-jailed electors acts as an unconstitutional wealth-based voting restriction."[6366]

On October 24, a panel of the court of appeals, over a dissent, vacated Judge Spiegel's summary judgment and ordered the case dismissed, finding that the plaintiffs lacked standing.[6367] On the one hand, the court held, allocation of resources to advise persons how to comport with the law or to seek a change in the law cannot be sufficient to afford standing to challenge the law.[6368] On the other hand, the relationship between the organizations and election-weekend detainees is insufficient to afford third-party standing.[6369]

2018 Case

On the day of the 2018 general election, two plaintiffs who had been arrested for misdemeanors on Friday or Saturday night filed a class-action federal complaint against Ohio's secretary of state in the Southern District seeking absentee-voting accommodations comparable to hospitalized voters' for voters detained over the weekend.[6370]

Judge Michael H. Watson heard the case at 1:00 p.m.[6371] When asked why the complaint was not filed until Tuesday, the plaintiffs' attorney said that it could not be known that they would be detained on Tuesday until their arraignment the day before.[6372] At 1:57, Judge Watson announced that he was going to grant relief to the individual plaintiffs.[6373] He ordered personal delivery of absentee ballots to the plaintiffs by 5:30, a wait for their casting, collection of the ballots for counting, and notice to detention

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6365. *Id.* at 617.

6366. *Id.* at 615.

6367. *Fair Elections Ohio*, 770 F.3d 456 (opinion by Circuit Judge John M. Rogers, joined by Circuit Judge Deborah L. Cook); *see id.* at 461–64 (dissenting opinion by Circuit Judge R. Guy Cole, Jr.); *see also* Order, Fair Elections Ohio v. Husted, No. 1:12-cv-797 (S.D. Ohio Nov. 20, 2014), D.E. 128 (dismissing the case).

6368. *Fair Elections Ohio*, 770 F.3d at 460.

6369. *Id.* at 461.

6370. Complaint, Mays v. Husted, No. 2:18-cv-1376 (S.D. Ohio Nov. 6, 2018), D.E. 1; Mays v. LaRose, 951 F.3d 775, 780–81 (6th Cir. 2020).

6371. Transcript, *Mays*, No. 2:18-cv-1376 (S.D. Ohio Nov. 6, 2018, filed Dec. 10, 2018), D.E. 20.

6372. *Id.* at 15–16.

6373. *Id.* at 20; *see Mays*, 951 F.3d at 781.

authorities of the court's order.[6374] "The Court concludes that it would be impractical, if not logistically impossible, to grant any class-wide [temporary-restraining-order] relief this late on Election Day . . . ."[6375]

One year later, Judge Watson certified a plaintiff class and granted it summary judgment: persons suddenly confined to jail on election day had to be given the same opportunities for absentee voting as persons suddenly confined to hospital on election day.[6376]

The court of appeals determined to the contrary on March 3, 2020, that Ohio's secretary of state had

> identified several counties that do not have adequate resources to process late absentee ballot requests from unexpectedly jail-confined electors without foregoing other duties necessary to ensure the orderly administration of Ohio's elections. Thus, he has shown that the State's interests are important and weighty enough to overcome the moderate burden that Ohio's disparate treatment of confined electors imposes on Plaintiffs.[6377]

Extension for Overseas Voters in Wisconsin

Romney for President v. Wisconsin (William M. Conley, W.D. Wis. 3:12-cv-745)

> A presidential campaign sought an extension for absentee ballots because they were not mailed on time as required by the Uniformed and Overseas Citizens Absentee Voting Act of 1986 (UOCAVA). The matter settled.
>
> *Topics:* Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA); absentee ballots.

Mitt Romney's presidential campaign filed a federal complaint in Madison, Wisconsin, on October 12, 2012, seeking an extension of time for overseas voters to mail back their absentee ballots because Wisconsin had not mailed them out by forty-five days before the November 6 general election, as required by the Uniformed and Overseas Citizens Absentee Voting Act of 1986 (UOCAVA).[6378] With its complaint, the campaign filed

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6374. Injunction, *Mays*, No. 2:18-cv-1376 (S.D. Ohio Nov. 6, 2018), D.E. 12 [hereinafter *Mays* Injunction]; *see* Eric Heisig, *Judge Orders That 2 Jailed Voters Be Given Ballots*, Cleveland Plain Dealer, Nov. 7, 2018, at A22.

6375. *Mays* Injunction, *supra* note 6374, at 2.

6376. Opinion, Mays v. LaRose, No. 2:18-cv-1376 (S.D. Ohio Nov. 6, 2019), D.E. 70; *see Mays*, 951 F.3d at 781; *see also* Randy Ludlow, *Federal Judge Sides with Prisoners in Voting Case*, Cincinnati Enquirer, Nov. 12, 2019, at A9.

6377. *Mays*, 951 F.3d at 791.

6378. Complaint, Romney for President, Inc. v. Wisconsin, No. 3:12-cv-745 (W.D.

a motion for a temporary restraining order and a preliminary injunction.[6379]

Western District of Wisconsin District Judge William M. Conley drew the case and set the matter for hearing on October 26.[6380] On October 24, the parties stipulated dismissal without prejudice.[6381]

Early Voting on Indian Reservations

Wandering Medicine v. McCulloch (Richard F. Cebull and Donald W. Molloy, D. Mont. 1:12-cv-135)

> Members of three American Indian tribes sought the establishment of satellite county clerk-and-recorder offices for voter registration and in-person absentee voting. The first judge assigned to the case denied relief for lack of discriminatory intent and because reservation residents had successfully elected candidates of their choice. After the first judge retired, a second judge determined that the plaintiffs had alleged plausible equal-protection and voting-rights claims. The case was resolved by stipulation.
>
> *Topics:* Poll locations; equal protection; section 2 discrimination; early voting; absentee ballots.

Sixteen members of three American Indian tribes living on three Indian reservations filed a federal complaint in the District of Montana on October 10, 2012, seeking the establishment of satellite county clerk-and-recorder offices for voter registration and in-person absentee voting.[6382] With their complaint, the plaintiffs filed a motion for a preliminary injunction,[6383] but they did not move for expedited briefing.[6384]

Wis. Oct. 12, 2012), D.E. 1; *see* Pub. L. No. 99-410, 100 Stat. 924, *as amended*, 52 U.S.C. §§ 20301–20311; *see also* Mark Guarino, *Romney Campaign Sues Over Absentee Ballots in Wisconsin*, Christian Science Monitor, Oct. 15, 2012 ("The campaign . . . is concerned about 44 ballots that the state's Government Accountability Board says were sent out by local election officials after the Sept. 22 deadline."). *See generally* Robert Timothy Reagan, Overseas Voting: The Uniformed and Overseas Citizens Absentee Voting Act (Federal Judicial Center 2016).

6379. Motion, *Romney for President, Inc.*, No. 3:12-cv-745 (W.D. Wis. Oct. 12, 2012), D.E. 2.

6380. Docket Sheet, *id.* (Oct. 12, 2012).

6381. Stipulation, *id.* (Oct. 24, 2012), D.E. 12.

6382. Complaint, Wandering Medicine v. McCulloch, No. 1:12-cv-135 (D. Mont. Oct. 10, 2012), D.E. 1; *see Indians Sue Over Voting*, Great Falls Trib., Oct. 12, 2012, at A1.

6383. Preliminary-Injunction Motion, *Wandering Medicine*, No. 1:12-cv-135 (D. Mont. Oct. 10, 2012), D.E. 3.

6384. Wandering Medicine v. McCulloch, 906 F. Supp. 2d 1083, 1086 (D. Mont. 2012), *vacated as moot*, 544 F. App'x 699 (9th Cir. 2013); Transcript at 6–7, *Wandering*

Judge Richard F. Cebull set the matter for hearing on October 29.[6385] After a two-day hearing, he denied the plaintiffs immediate relief,[6386] because the plaintiffs had not shown a discriminatory intent.[6387] "It is undisputed that Native Americans living on the three Indian Reservations face greater hardships to in-person absentee voting than residents of the three counties who do not live on the reservations."[6388] Although the Voting Rights Act provides relief without a showing of intent, it was unavailing here because residents of the reservations had successfully elected candidates of their choice.[6389]

An appeal was heard on October 10, 2013, and dismissed on October 30 as moot.[6390]

Because of Judge Cebull's May 3, 2013, retirement,[6391] the court assigned the case to Judge Donald W. Molloy, who decided on March 26, 2014, that the plaintiffs had alleged plausible equal-protection and voting-rights claims.[6392] Judge Molloy signed a stipulated dismissal on July 11: "each party to pay its own fees and costs."[6393]

Overseas Absentee Ballot Consent Decree in the Virgin Islands

United States v. Virgin Islands (Curtis V. Gómez, D.V.I. 3:12-cv-69)

Eight days before a primary election, the government sought a consent decree on overseas absentee ballots, which had not been sent to overseas voters in time.

Topics: Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA); absentee ballots.

Medicine, No. 1:12-cv-135 (D. Mont. Oct. 29, 2012, filed Nov. 6, 2012), D.E. 76.

6385. Order, *Wandering Medicine*, No. 1:12-cv-135 (D. Mont. Oct. 22, 2012), D.E. 31.

6386. Transcript at 362, *Wandering Medicine*, No. 1:12-cv-135 (D. Mont. Oct. 30, 2012, filed Nov. 6, 2012), D.E. 77.

6387. *Wandering Medicine*, 906 F. Supp. 2d 1083.

6388. *Id.* at 1086.

6389. *Id.* at 1086, 1089–91.

6390. Wandering Medicine v. McCulloch, 544 F. App'x 699, 700 (9th Cir. 2013) ("Although plaintiffs' complaint requested 'preliminary and permanent injunctive relief . . . for the 2012 primary election and . . . for all future elections,' plaintiffs' motion for a preliminary injunction included no such language . . .") (first two ellipses in original); Docket Sheet, Wandering Medicine v. McCulloch, No. 12-35926 (9th Cir. Nov. 9, 2012).

6391. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

6392. Opinion, Wandering Medicine v. McCulloch, No. 1:12-cv-135 (D. Mont. Mar. 26, 2014), D.E. 153, 2014 WL 12588302.

6393. Order, *id.* (July 11, 2014), D.E. 223.

On August 31, 2012, the Justice Department filed a federal complaint in the District of the Virgin Islands[6394] to enforce the Uniformed and Overseas Citizens Absentee Voting Act of 1986 (UOCAVA),[6395] as amended by the Military and Overseas Voter Empowerment Act of 2009 (MOVE Act).[6396] According to the complaint, for the Saturday, September 8, primary election for the Virgin Islands' delegate to the U.S. House of Representatives the Virgin Islands failed to transmit absentee ballots to overseas voters forty-five days before the election, and Virgin Islands election procedures would not result in the timely transmission of general-election absentee ballots either.[6397] With its complaint, the Justice Department filed a joint motion for an expedited consent decree.[6398] The court set a hearing for September 5 before Judge Curtis V. Gómez.[6399]

Judge Gómez signed the consent decree on September 7.[6400] The decree specified express mail and email voting options and extended the deadlines for receipt of overseas absentee ballots.[6401]

Late Overseas Ballots in Michigan

United States v. Michigan (Robert J. Jonker, W.D. Mich. 1:12-cv-788)

> One week before Michigan's 2012 federal primary election, upon learning that a substantial number of election jurisdictions were not in compliance, the Justice Department filed a complaint to enforce a requirement that absentee ballots be sent to overseas voters at least forty-five days in advance of an election. Four days

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6394. Complaint, United States v. Virgin Islands, No. 3:12-cv-69 (D.V.I. Aug. 31, 2012), D.E. 1 [hereinafter *United States v. Virgin Islands* Complaint].

6395. Pub. L. No. 99-410, 100 Stat. 924, *as amended*, 52 U.S.C. §§ 20301–20311. *See generally* Robert Timothy Reagan, Overseas Voting: The Uniformed and Overseas Citizens Absentee Voting Act (Federal Judicial Center 2016).

6396. National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, 123 Stat. 2190, 2318–35.

6397. *United States v. Virgin Islands* Complaint, *supra* note 6394.

6398. Consent-Decree Motion, *United States v. Virgin Islands*, No. 3:12-cv-69 (D.V.I. Aug. 31, 2012), D.E. 2.

6399. Docket Sheet, *id.* (Aug. 31, 2012).

Judge Gómez was replaced by Judge Robert Molloy in 2020. *See* Judicial Milestones, www.uscourts.gov/judicial-milestones/robert-molloy; Suzanne Carlson, *AG: 17-Year-Old VLT Contract Was Never Legal*, V.I. Daily News, May 12, 2020; Suzanne Carlson, *Judge Robert Molloy Confirmed to District Court*, V.I. Daily News, Feb. 26, 2020.

6400. Consent Decree, *United States v. Virgin Islands*, No. 3:12-cv-69 (D.V.I. Sept. 7, 2012), D.E. 10 [hereinafter *United States v. Virgin Islands* Consent Decree]; *see* Reagan, *supra* note 6395, at 20–21; *Elections Accepts Consent Decree on Absentees*, St. Croix Source, Sept. 5, 2012.

6401. *United States v. Virgin Islands* Consent Decree, *supra* note 6400.

> before the election, the court approved a stipulated order extending the deadline for receipt of cast overseas ballots by the number of days that they were sent late.
>
> *Topics:* Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA); absentee ballots.

One week before Michigan's 2012 federal primary election, the Justice Department filed a federal complaint in the Western District of Michigan to enforce a requirement of the Uniformed and Overseas Citizens Absentee Voting Act of 1986 (UOCAVA),[6402] as amended by the Military and Overseas Voter Empowerment Act of 2009 (MOVE Act),[6403] that absentee ballots be sent to overseas voters at least forty-five days before a federal election.[6404] The complaint alleged a report, based on 71% of Michigan's 1,517 election jurisdictions, that "62 cities and townships reported that they failed to send all of their UOCAVA ballots by the June 23, 2012 deadline."[6405] The government filed with its complaint a motion for a temporary restraining order and a preliminary injunction.[6406] The court assigned the case to Judge Robert J. Jonker,[6407] who denied without prejudice a temporary restraining order on a conclusion that the government had made no effort to satisfy the procedural requirements for such relief.[6408]

Following an August 3 hearing,[6409] four days before the election, Judge Jonker approved a stipulated order on August 6 that, among other things, (1) gave overseas voters extensions beyond election day equal to the number of days late their jurisdictions sent out overseas absentee ballots and

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6402. Pub. L. No. 99-410, 100 Stat. 924, *as amended*, 52 U.S.C. §§ 20301–20311. *See generally* Robert Timothy Reagan, Overseas Voting: The Uniformed and Overseas Citizens Absentee Voting Act (Federal Judicial Center 2016).

6403. National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, 123 Stat. 2190, 2318–35.

6404. Complaint, United States v. Michigan, No. 1:12-cv-788 (W.D. Mich. July 31, 2012), D.E. 1 [hereinafter *United States v. Michigan* Complaint]; *see Ballot Deadline Missed*, Port Huron Times Herald, Aug. 1, 2012, at A1; *Lawsuit Possible in Late Ballots*, Detroit News, July 28, 2012, at A4.

6405. *United States v. Michigan* Complaint, *supra* note 6404, at 4.

6406. Motion, *United States v. Michigan*, No. 1:12-cv-788 (W.D. Mich. July 31, 2012), D.E. 2.

6407. Notice, *id.* (July 31, 2012), D.E. 5.

6408. Order, *id.* (July 31, 2012), D.E. 7.

6409. Transcript, *id.* (Aug. 3, 2012, filed Aug. 6, 2012), D.E. 14; Minutes, *id.* (Aug. 3, 2012), D.E. 17.

(2) permitted Michigan jurisdictions to certify results that could not be affected by outstanding overseas ballots.[6410]

Mailing Overseas Absentee Ballots on Time in Georgia in 2012

United States v. Georgia (Steve C. Jones, N.D. Ga. 1:12-cv-2230)

> The Justice Department filed a federal complaint against Georgia on June 27, 2012, because a planned primary runoff election would not allow enough time after the initial primary election to mail absentee ballots overseas. The district judge extended the deadline for return of absentee runoff ballots and ordered Georgia to pay for their express delivery. The court retained jurisdiction over absentee voting in Georgia in 2013 and 2014. In 2014, Georgia amended its election laws to comply with the Uniformed and Overseas Citizens Absentee Voting Act, so the lawsuit was dismissed.
>
> *Topics:* Absentee ballots; Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA); recusal.

The Justice Department filed a federal complaint in the Northern District of Georgia on June 27, 2012, to enforce the Uniformed and Overseas Citizens Absentee Voting Act of 1986 (UOCAVA),[6411] as amended by the Military and Overseas Voter Empowerment Act of 2009 (MOVE Act),[6412] because Georgia's scheduling a possible runoff election for August 21, only three weeks after a July 31 primary election, did not allow enough time for overseas voters to receive and cast their absentee ballots.[6413] With its complaint, the department filed a motion for a temporary restraining order and a preliminary injunction.[6414]

6410. Stipulated Order, *id.* (Aug. 6, 2012), D.E. 16; *see* Reagan, *supra* note 6402, at 10; *Deadline Pushed for Late Ballots*, Detroit News, Aug. 7, 2012, at A6.

6411. Pub. L. No. 99-410, 100 Stat. 924, *as amended*, 52 U.S.C. §§ 20301–20311. *See generally* Robert Timothy Reagan, Overseas Voting: The Uniformed and Overseas Citizens Absentee Voting Act (Federal Judicial Center 2016).

6412. National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, 123 Stat. 2190, 2318–35.

6413. Complaint, United States v. Georgia, No. 1:12-cv-2230 (N.D. Ga. June 27, 2012), D.E. 1; United States v. Georgia, 952 F. Supp. 2d 1318, 1321 (N.D. Ga. 2013); United States v. Georgia, 892 F. Supp. 2d 1367, 1369 (N.D. Ga. 2012); *see* Sarah Fay Campbell, *Federal Runoffs Could Pose Problem for Military Voters*, Newnan Times-Herald, July 15, 2012 ("On June 15, the Georgia Secretary of State's office received notice the federal government was suing the state over its runoff procedures . . . .").

6414. Motion, *United States v. Georgia*, No. 1:12-cv-2230 (N.D. Ga. June 27, 2012), D.E. 2; *United States v. Georgia*, 892 F. Supp. 2d at 1368, 1371.

The court assigned the case to Judge Steve C. Jones, who immediately directed all three of his law clerks to work on it.[6415] On the following day, Judge Jones set the matter for hearing on July 3.[6416] Aside from his ultimate ruling, the most important thing that Judge Jones did in the case was to promptly advise the parties of a clear schedule for how the case was to proceed at a fast pace.[6417]

At the July 3 hearing, Judge Jones informed the parties that he had known Georgia's secretary of state for fifteen years and the secretary was invited to Judge Jones's investiture the previous year, but that the secretary was a defendant in his official capacity only.[6418] Moreover, it was the legislature and not the secretary who established election dates.[6419] The attorney for the Justice Department stated that the department had no objection to Judge Jones's hearing the case.[6420]

On July 5, the first court day after the hearing, Judge Jones issued an injunction, ordering, among other things, that Georgia extend the deadline for return of absentee runoff ballots and pay for their express delivery.[6421]

On April 30, 2013, Judge Jones granted the Justice Department summary judgment and ordered Georgia to propose changes to its election laws that would allow for the transmittal to overseas voters of absentee ballots in runoff elections at least forty-five days before the election, as required by the statute.[6422] On July 11, because Georgia had offered no assurances that it would change its election laws and because the proposed remedy of extending the deadline for counting overseas ballots would not comport with UOCAVA, Judge Jones issued a permanent injunction spec-

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6415. Interview with Judge Steve C. Jones, Jan. 28, 2013.

Tim Reagan interviewed Judge Jones for this report by telephone.

6416. Notice, *United States v. Georgia*, No. 1:12-cv-2230 (N.D. Ga. June 28, 2012), D.E. 5; Minutes, *id.* (July 3, 2012), D.E. 9; *United States v. Georgia*, 892 F. Supp. 2d at 1371.

6417. Interview with Judge Steve C. Jones, Jan. 28, 2013.

6418. Transcript at 2–3, *United States v. Georgia*, No. 1:12-cv-2230 (N.D. Ga. July 3, 2012, filed Aug. 15, 2012), D.E. 17 [hereinafter *United States v. Georgia* Transcript]; *see* Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges (noting that Judge Jones received his judicial commission on March 3, 2011).

6419. Interview with Judge Steve C. Jones, Jan. 28, 2013.

6420. *United States v. Georgia* Transcript, *supra* note 6418, at 3.

6421. *United States v. Georgia*, 892 F. Supp. 2d at 1378–81; United States v. Georgia, 952 F. Supp. 2d 1318, 1324 (N.D. Ga. 2013); *see It's Déjà Vu Again with Order Extending Georgia's Overseas Ballot Time*, Marietta Daily J., July 9, 2012; *Judge Tells Georgia to Extend Its Absentee Deadline*, Waycross J.-Herald, July 6, 2012, at 1.

6422. *United States v. Georgia*, 952 F. Supp. 2d 1318.

ifying an election calendar for Georgia: for example, primary elections would be held twenty-two weeks before general elections (June 3 in 2014) and runoff elections would be held nine weeks after general elections (January 6, 2015, if necessary).[6423] Later, the primary elections were moved to two weeks earlier so that advance voting would not occur during Memorial Day weekend.[6424]

In light of January 21, 2014, changes to Georgia's election laws bringing them into compliance with UOCAVA, the court of appeals, on February 24, 2015, dismissed as moot an appeal from Judge Jones's rulings.[6425]

Timely Overseas Ballots in Alabama

United States v. Alabama (Myron H. Thompson, M.D. Ala. 2:12-cv-179)

> The U.S. Department of Justice alleged violations by Alabama of the Uniformed and Overseas Citizens Absentee Voting Act of 1986 (UOCAVA), as amended by the Military and Overseas Voter Empowerment Act of 2009 (MOVE Act), respecting timely distribution of absentee ballots for a March 2012 primary election. A weekend and two court days later, the district judge ordered the parties to submit a remedy plan within four days. A few days before the election, the judge extended the deadline for casting overseas ballots and ordered publication of the revised overseas absentee-voting procedures. The judge ordered permanent changes to the election timetable in 2014 and closed the case in 2017.
>
> *Topics:* Absentee ballots; Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA); primary election; instant runoff.

The U.S. Department of Justice filed a federal complaint in the Middle District of Alabama on Friday, February 24, 2012, alleging violations of the Uniformed and Overseas Citizens Absentee Voting Act of 1986 (UOCAVA),[6426]as amended by the Military and Overseas Voter Empow-

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6423. Opinion, *United States v. Georgia*, No. 1:12-cv-2230 (N.D. Ga. July 11, 2013), D.E. 38; *see* Reagan, *supra* note 6411, at 10-11; Kristina Torres, *Federal Elections*, Atlanta J.-Const., July 13, 2013, at A1.

6424. Order, *United States v. Georgia*, No. 1:12-cv-2230 (N.D. Ga. Aug. 21, 2013), D.E. 44.

6425. United States v. Georgia, 778 F.3d 1202 (11th Cir. 2015); *see* Order, *United States v. Georgia*, No. 1:12-cv-2230 (N.D. Ga. Feb. 27, 2015), D.E. 62 (dismissing the original case for lack of subject-matter jurisdiction in light of changes to Georgia's election laws); *see also* Aaron Gould Sheinin, *Legislature 2014 Primary Date*, Atlanta J.-Const., Jan. 18, 2014, at B1.

6426. Pub. L. No. 99-410, 100 Stat. 924, *as amended*, 52 U.S.C. §§ 20301–20311. *See*

erment Act of 2009 (MOVE Act),[6427] respecting timely distribution of absentee ballots for the March 13 primary election.[6428] On Monday, the department filed a motion for a temporary restraining order and a preliminary injunction.[6429] Judge Myron H. Thompson scheduled a telephone conference for 7:00 the following morning.[6430]

At a hearing on Tuesday, Judge Thompson concluded that Alabama had failed to meet the requirement of sending absentee ballots overseas at least forty-five days before a federal election.[6431] He ordered the parties to submit to the court within four days a remedy plan.[6432] On March 7, he issued a preliminary injunction extending the deadline for submission of overseas absentee ballots, requiring Alabama to issue a press release notifying overseas voters about ways of receiving absentee ballots other than through the mail—including electronically—and requiring from Alabama an accounting of when and how many absentee ballots would be received from overseas voters.[6433] He issued a published opinion five days later.[6434] Among his legal rulings, Judge Thompson concluded, "Alabama's contention that it is not its responsibility to ensure compliance with UOCAVA,

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generally Robert Timothy Reagan, Overseas Voting: The Uniformed and Overseas Citizens Absentee Voting Act (Federal Judicial Center 2016).

6427. National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, 123 Stat. 2190, 2318–35.

6428. Complaint, United States v. Alabama, No. 2:12-cv-179 (M.D. Ala. Feb. 24, 2012), D.E. 1; United States v. Alabama, 778 F.3d 926, 928, 930–31 (11th Cir. 2015); United States v. Alabama, 998 F. Supp. 2d 1283, 1287 (M.D. Ala. 2014); United States v. Alabama, 857 F. Supp. 2d 1236, 1237–38 (M.D. Ala. 2012); *see Feds Sue Alabama Over Absentee Ballot Issues*, Mobile Press-Register, Feb. 25, 2012, at A6; Scott Johnson, *US Sues Ala. Over Military, Overseas Ballots Sent Late*, Montgomery Advertiser, Feb. 27, 2012.

6429. Motion, *United States v. Alabama*, No. 2:12-cv-179 (M.D. Ala. Feb. 27, 2012), D.E. 5.

6430. Docket Sheet, *id.* (Feb. 24, 2012); *see* Transcript, *id.* (Feb. 28, 2012, filed Feb. 11, 2013), D.E. 56.

6431. Opinion, *id.* (Feb. 28, 2012), D.E. 8, 2012 WL 642312.

6432. *Id.* at 11; *United States v. Alabama*, 857 F. Supp. 2d at 1238; *see* Jeremy Gran, *Judge Orders State to Report Details on Overseas Ballots*, Birmingham News, Feb. 29, 2012, at 2; *Judge Issues Restraining Order Over Late Ballots*, Montgomery Advertiser, Feb. 29, 2012.

6433. Preliminary Injunction, *United States v. Alabama*, No. 2:12-cv-179 (M.D. Ala. Mar. 7, 2012), D.E. 21; *United States v. Alabama*, 857 F. Supp. 2d at 1238; *see* Scott Johnson, *Judge Extends Absentee Ballot Deadline*, Montgomery Advertiser, Mar. 8, 2012.

6434. *United States v. Alabama*, 857 F. Supp. 2d 1236; Order, *United States v. Alabama*, No. 2:12-cv-179 (M.D. Ala. Mar. 9, 2012), D.E. 22 (announcing the forthcoming opinion).

especially where local county officials transmit ballots and administer an election, is meritless."[6435]

Because of a resignation from Congress effective August 2, 2013, Alabama strove to establish a special-election schedule to fill the seat that would have the replacement seated by January 2014.[6436] The dates set for the special election—September 24 for a primary election, November 5 for a runoff primary election, and December 17 for the general election—were separated by only forty-two days, intervals not long enough to send overseas voters their ballots forty-five days before each election without judicial modification of procedures.[6437] Judge Thompson resolved the difficulty by ordering instant-runoff ballots.[6438] He also ordered Alabama's secretary of state to assume the counties' responsibilities for transmitting, receiving, and counting overseas ballots.[6439]

(1) Overseas voters would receive for the primary election ballots that permitted them to rank-order their choices so that their preferences for any runoff elections would be known.[6440] (2) Overseas voters would also receive standard runoff ballots, although not as timely as otherwise required by law, which they could use to override their instant-runoff ballots or use if they did not vote in the initial primary election.[6441] Alabama would provide for express delivery.[6442] (3) Overseas voters would receive timely absentee ballots for the general election, but the ballots would contain all candidates certified for the general election as well as all candidates certified for the runoff primary election; for parties with more than one candidate in the runoff election, voters could vote by party.[6443] (4) In addi-

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6435. *United States v. Alabama*, 857 F. Supp. 2d at 1238; *see* United States v. Alabama, 998 F. Supp. 2d 1283, 1286 (M.D. Ala. 2014); *see also* Scott Johnson, *State, County Officials Blame Each Other for Absentee Ballot Fiasco*, Montgomery Advertiser, Mar. 1, 2012.

6436. Opinion at 1–6, *United States v. Alabama*, No. 2:12-cv-179 (M.D. Ala. July 26, 2013), D.E. 71 [hereinafter July 26, 2013, *United States v. Alabama* Opinion]; *see* George Talbot, *Bonner Moves Up Resignation to Aug. 2*, Mobile Press-Register, July 24, 2013, at A8.

6437. July 26, 2013, *United States v. Alabama* Opinion, *supra* note 6436, at 1–3.

6438. *Id.* at 2, 6.

6439. *Id.* at 5–6, 8–12.

6440. *Id.* at 6.

It turned out that only two candidates ran for the Democratic nomination, so a runoff election for the Democratic primary election would not be necessary. Notice, *United States v. Alabama*, No. 2:12-cv-179 (M.D. Ala. Aug. 6, 2013), D.E. 72; *see* Order, *id.* (Aug. 8, 2013), D.E. 74.

6441. July 26, 2013, *United States v. Alabama* Opinion, *supra* note 6436, at 6–7.

6442. *Id.*

6443. *Id.* at 7–8.

tion, overseas voters would receive standard absentee ballots, although not as timely as otherwise required by law.[6444]

On Friday, January 14, 2014, not quite five months before the June 3 primary election, the parties submitted to Judge Thompson a negotiated proposed order permanently establishing deadlines consistent with UOCAVA.[6445] The proposed order moved the ballot-qualifying deadline from April 4 to February 7, three weeks after the filing of the proposed order.[6446] Although Judge Thompson was "deeply troubled by the last-minute nature of this proposed remedy," he was "firmly convinced that, absent the proposed remedial changes, including the qualifying-date change, the rights of UOCAVA voters would almost certainly be seriously and substantially compromised."[6447] He signed the remedial order on Monday, January 17.[6448]

On February 11, Judge Thompson resolved the case's one remaining claim by holding that Alabama's provision for runoff elections forty-two days after a primary election violated UOCAVA, because the schedule did not allow for absentee ballots to be sent to overseas voters at least forty-five days before the election.[6449] On March 14, Judge Thompson ordered that beginning with the 2016 election cycle primary elections for federal offices must allow for runoff elections nine weeks later.[6450] For 2014, because election officials had not yet provided for that timing, overseas voters in the one federal primary election that might require a runoff would receive instant-runoff ballots, in which voters rank order their preferences.[6451] The court of appeals affirmed Judge Thompson's summary judgment on February 12, 2015.[6452]

6444. *Id.* at 8.

6445. Joint Motion, *United States v. Alabama*, No. 2:12-cv-179 (M.D. Ala. Jan. 14, 2014), D.E. 110; *see* Transcript, *id.* (Jan. 15, 2014, filed Apr. 24, 2014), D.E. 136.

6446. Opinion at 4, *id.* (Jan. 17, 2014), D.E. 117, 2014 WL 200668.

6447. *Id.* at 7.

6448. Order, *id.* (Jan. 17, 2014), D.E. 119; United States v. Alabama, 998 F. Supp. 2d 1283, 1287 (M.D. Ala. 2014); *see* Order, *United States v. Alabama*, No. 2:12-cv-179 (M.D. Ala. Nov. 25, 2015), D.E. 168 (modifying deadlines to accommodate Martin Luther King's birthday holiday in 2016).

6449. *United States v. Alabama*, 998 F. Supp. 2d 1283; United States v. Alabama, 778 F.3d 926, 931 (11th Cir. 2015).

6450. Consent Order, *United States v. Alabama*, No. 2:12-cv-179 (M.D. Ala. Mar. 14, 2014), D.E. 127.

6451. *Id.*

6452. *United States v. Alabama*, 778 F.3d 926.

On October 5, 2015, Judge Thompson granted Alabama a partial modification of injunctive requirements in light of a statute signed on August 14 providing for ranked voting, also known as instant runoffs, in federal primary elections for overseas voters.[6453] Upon the parties' notice that no dispute remained, Judge Thompson closed the case on February 21, 2017.[6454]

Mailing Nevada's Overseas Ballots on Time

Doe v. Miller (Gloria M. Navarro, D. Nev. 2:10-cv-1753)

> On October 8, 2010, the Republican candidate for Nevada's secretary of state filed a pro se federal complaint seeking relief from a county's failure to mail absentee ballots to some overseas voters on time. The district judge dismissed the complaint as moot because of efforts election officials had already undertaken to remedy the error.
>
> *Topics:* Absentee ballots; Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA); pro se party.

On Friday, October 8, 2010, the Republican candidate for Nevada's secretary of state filed a pro se federal complaint against the incumbent and the state seeking relief from Elko County's failure to mail absentee ballots to some overseas voters on time.[6455] Also a plaintiff in the complaint was a soldier deployed to Iraq identified as Officer John Doe.[6456] With their complaint, the plaintiffs filed a motion to expedite consideration of the case.[6457]

The court assigned the case to Judge Gloria M. Navarro, whose practice was to take note of all cases assigned to her on the day that they were filed.[6458] On Tuesday, her courtroom clerk ordered service of the motions on the defendants within five days.[6459] On October 21, on behalf of Judge

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6453. Judgment, *United States v. Alabama*, No. 2:12-cv-179 (M.D. Ala. Oct. 5, 2015), D.E. 164; *see* Ala. Code 1975 § 17-13-8.1 (codifying Ala. Act No. 2015-518).

6454. Judgment, *United States v. Alabama*, No. 2:12-cv-179 (M.D. Ala. Feb. 21, 2017), D.E. 183; *see* Notice, *id.* (Feb. 27, 2017), D.E. 182.

6455. Complaint, Doe v. Miller, No. 2:10-cv-1753 (D. Nev. Oct. 8, 2010), D.E. 1 [hereinafter *Doe* Complaint]; *see* Ed Vogel, *Challenger Files Lawsuit Against Miller*, Las Vegas Rev.-J., Oct. 12, 2010, at 3B.

6456. *Doe* Complaint, *supra* note 6455.

6457. Motion, *Doe*, No. 2:10-cv-1753 (D. Nev. Oct. 8, 2010), D.E. 2; *see* Amended Motion, *id.* (Oct. 12, 2010), D.E. 3.

6458. Interview with Judge Gloria M. Navarro, Mar. 19, 2013.

Tim Reagan interviewed Judge Navarro for this report by telephone.

6459. Order, *Doe*, No. 2:10-cv-1753 (D. Nev. Oct. 12, 2010), D.E. 5; Interview with Judge Gloria M. Navarro, Mar. 19, 2013.

Navarro, the clerk ordered the defendants to file a response by October 26 and set the matter for hearing on October 28.[6460]

On October 27, Judge Navarro dismissed the complaint as moot without the need for a hearing.[6461]

> This lawsuit arose when Elko County, Nevada missed [a] deadline and sent out thirty-four (34) absentee ballots up to five days late, apparently due to a printing error on the part of a private contractor. . . .
>
> . . . [E]ven before Plaintiffs filed this suit on October 8, 2010, Defendants were aware of the issue and began working toward a solution that would ensure that the affected voters would have the full statutorily required forty-five (45) days in which to receive, complete, and return their ballots for the November 2010 election.
>
> On October 6, 2010, Nevada Secretary of State Miller promulgated emergency regulations requiring, *inter alia*, that the affected voters' ballots shall be counted for the purposes of the November election as long as they are received by 5:00 p.m. on November 8, 2010, which is six days after the November 2, 2010 date on which absentee ballots would normally be due.[6462]

Judge Navarro found that this short case required the balancing of many considerations.[6463] On the one hand, she had some familiarity with the plaintiff's candidacy from news accounts; on the other hand, she made sure that her considerations in the case relied only on the case's record.[6464] Pro se plaintiffs typically require a balancing of efficient resolution of the case with considerations of the plaintiffs' inexperience.[6465] Cases with time pressure often have special needs for prompt and fair resolutions.[6466]

Prompt Delivery of Absentee Ballots by Guam

United States v. Guam (Frances M. Tydingco-Gatewood, D. Guam 1:10-cv-25)

> On October 6, 2010, the Justice Department filed a federal action to enforce Guam's compliance with the Uniformed and Overseas Citizens Absentee Voting Act. Guam filed a notice that it would

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6460. Docket Sheet, *Doe*, No. 2:10-cv-1753 (D. Nev. Oct. 8, 2010) (D.E. 10).

6461. Opinion, *id.* (Oct. 27, 2010), D.E. 16 [hereinafter *Doe* Opinion], 2010 WL 4340804; *see* Robert Timothy Reagan, Overseas Voting: The Uniformed and Overseas Citizens Absentee Voting Act 12–13 (Federal Judicial Center 2016); Ed Vogel, *Court Tables Bid to Block Military Vote*, Las Vegas Rev.-J., Oct. 29, 2010, at 2B.

6462. *Doe* Opinion, *supra* note 6461, at 3.

6463. Interview with Judge Gloria M. Navarro, Mar. 19, 2013.

6464. *Id.*

6465. *Id.*

6466. *Id.*

> not oppose the action, and after an October 13 hearing the district court ordered compliance. For elections in 2012, the district court issued a stipulated order of compliance, because Guam had not yet achieved compliance legislatively.
>
> *Topics:* Absentee ballots; Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA).

The U.S. Department of Justice filed a federal complaint[6467] against Guam in the district court in Hagåtña on October 6, 2010, to enforce the federal requirement that absentee ballots be sent to overseas voters at least forty-five days before a federal election,[6468] as provided by the 2009 Military and Overseas Voter Empowerment (MOVE) Act's[6469] amendment to the 1986 Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA).[6470] With its complaint, the department filed a motion for a temporary restraining order and a preliminary injunction.[6471]

On the following day, Judge Frances M. Tydingco-Gatewood issued an order to show cause on October 13 why the court should not grant the department injunctive relief.[6472] On the third day, Guam filed a notice that it would not oppose the department's motion for injunctive relief,[6473] so Judge Tydingco-Gatewood ordered that the October 13 hearing resolve the merits of the action.[6474] Judge Tydingco-Gatewood's management of this case was greatly facilitated by the parties' cooperation.[6475]

After the October 13 proceeding,[6476] Judge Tydingco-Gatewood (1) ordered compliance with UOCAVA, (2) ordered that cast absentee bal-

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6467. Complaint, United States v. Guam, No. 1:10-cv-25 (D. Guam Oct. 6, 2010), D.E. 1.

6468. 52 U.S.C. § 20302(a)(8)(A).

6469. Pub. L. No. 111-84 § 579(a), 123 Stat. 2318, 2322 (part of the National Defense Authorization Act for Fiscal Year 2010, 123 Stat. 2189).

6470. Pub. L. No. 99-410, 100 Stat. 924, *as amended*, 52 U.S.C. §§ 20301–20311; *see* Erin Thompson, *GEC Holds Special Meeting*, Pac. Daily News, Sept. 30, 2010 (reporting that Guam missed the September 18 deadline for sending out absentee ballots). *See generally* Robert Timothy Reagan, Overseas Voting: The Uniformed and Overseas Citizens Absentee Voting Act (Federal Judicial Center 2016).

6471. Motion, *United States v. Guam*, No. 1:10-cv-25 (D. Guam Oct. 6, 2010), D.E. 2.

6472. Order, *id.* (Oct. 7, 2010), D.E. 9.

Tim Reagan interviewed Judge Tydingco-Gatewood for this report by telephone on November 16, 2012.

6473. Notice, *United States v. Guam*, No. 1:10-cv-25 (D. Guam Oct. 8, 2010), D.E. 12.

6474. Order, *id.* (Oct. 8, 2010), D.E. 15.

6475. Interview with Judge Frances M. Tydingco-Gatewood, Nov. 16, 2012.

6476. Minutes, *United States v. Guam*, No. 1:10-cv-25 (D. Guam Oct. 13, 2010), D.E. 18.

lots sent by November 2 and received by November 15 be counted for the congressional delegate race, and (3) ordered Guam to provide the court with reports on its compliance efforts.[6477]

For the 2012 elections—a September 1 primary election and the November 6 general election—Guam had still not enacted legislation that was compliant with UOCAVA.[6478] Judge Tydingco-Gatewood, therefore, issued a stipulated order on July 13 requiring Guam to provide UOCAVA voters with email as an electronic option for absentee voting.[6479]

Timely Overseas Ballots for State Elections in Maryland

Doe v. Walker (Roger W. Titus, D. Md. 8:10-cv-2646)

> A federal complaint filed forty days before the 2010 general election alleged that absentee ballots had not been sent to overseas voters in time. It turned out that ballots listing only federal offices had already been sent out. The district judge extended the deadline for the state to receive ballots for state offices by ten days to preserve overseas voters' fundamental rights to vote.
>
> *Topics:* Absentee ballots; military ballots; Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA).

Forty days before the November 2, 2010, general election, a military voters' rights group and Officer John Doe, who used a pseudonym "to protect his military mission,"[6480] filed a federal complaint[6481] in the District of Maryland seeking enforcement of the Uniformed and Overseas Citizens Absentee Voting Act of 1986 (UOCAVA),[6482] as amended by the Military and Overseas Voter Empowerment Act of 2009 (MOVE Act),[6483] which re-

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6477. Order, *id.* (Oct. 13, 2010), D.E. 19; *see Election Commission to Manually Count Absentee Ballots Today*, Pac. Daily News, Nov. 16, 2010, B.

6478. Order at 2, *United States v. Guam*, No. 1:10-cv-25 (D. Guam July 13, 2012), D.E. 27.

6479. *Id.* at 2–5; *see* Status Update, *id.* (Aug. 1, 2013), D.E. 30 (confirming Guam's compliance with the order); *see also* Reagan, *supra* note 6470, at 21.

6480. Doe v. Walker, 746 F. Supp. 2d 667, 671 n.2 (D. Md. 2010).

6481. Complaint, Doe v. Walker, No. 8:10-cv-2646 (D. Md. Sept. 23, 2010), D.E. 1 [hereinafter *Doe* Complaint]; *Doe*, 746 F. Supp. 2d at 672; *see* Andrea F. Siegel, *Guardsman Sues Over Validity of Maryland's Absentee Ballots*, Balt. Sun, Sept. 27, 2010, at 2A.

6482. Pub. L. No. 99-410, 100 Stat. 924, *as amended*, 52 U.S.C. §§ 20301–20311. *See generally* Robert Timothy Reagan, Overseas Voting: The Uniformed and Overseas Citizens Absentee Voting Act (Federal Judicial Center 2016).

6483. National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, 123 Stat. 2190, 2318–35.

quires the sending of absentee ballots to overseas voters forty-five days before an election.[6484]

Although the complaint sought preliminary injunctive relief,[6485] the plaintiffs did not file a motion for a temporary restraining order or a preliminary injunction.[6486] Maryland election officials filed a motion to dismiss the action or for summary judgment on October 9, two weeks and two days after the complaint was filed.[6487] On October 13, Judge Roger W. Titus set the case for hearing on October 22.[6488] The plaintiffs filed a motion for a temporary restraining order and a preliminary injunction on October 18.[6489]

At the hearing, it was established that the federal statutory claim was moot, because Maryland had sent timely absentee ballots to overseas voters on September 18 listing only federal offices up for election and then sent absentee ballots with all offices later, which overseas voters could cast as replacement ballots.[6490] The pressing question was how long after election day did Maryland have to accept the return of absentee ballots to preserve overseas voters' constitutional voting rights.[6491]

On October 29, Judge Titus issued a preliminary injunction requiring Maryland to count overseas absentee ballots received by November 22 if sent by election day.[6492]

Judge Titus granted a stipulated dismissal of the case on January 3, 2011.[6493]

6484. *See Doe*, 746 F. Supp. 2d at 671.

6485. *Doe* Complaint, *supra* note 6481, at 15.

6486. Scheduling Order, *Doe*, No. 8:10-cv-2646 (D. Md. Oct. 13, 2010), D.E. 7 [hereinafter *Doe* Scheduling Order].

6487. Motion, *id.* (Oct. 9, 2010), D.E. 6.

6488. *Doe* Scheduling Order, *supra* note 6486; *see* Transcript at 38, *Doe*, No. 8:10-cv-2646 (D. Md. Oct. 22, 2010, filed Nov. 9, 2010), D.E. 25 [hereinafter *Doe* Transcript] ("THE COURT: . . . I didn't even know about this case until I saw [the] motion to dismiss and I said, whoops, there's a prayer and that's all for preliminary injunctive relief. If they want it, we've got to get something in front of me.").

Judge Titus died on March 3, 2019. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges; *see* Bart Barnes, *Leggett's Attorney in Lurid Lawsuit*, Wash. Post, Mar. 8, 2019, at B5.

6489. Motion, *Doe*, No. 8:10-cv-2646 (D. Md. Oct. 18, 2010), D.E. 9.

6490. *Doe* Transcript, *supra* note 6488; *see* Doe v. Walker, 746 F. Supp. 2d 667, 672 (D. Md. 2010).

6491. *Doe* Transcript, *supra* note 6488.

6492. *Doe*, 746 F. Supp. 2d 667; *see* Reagan, *supra* note 6482, at 25–26.

6493. Dismissal, *Doe*, No. 8:10-cv-2646 (D. Md. Jan. 3, 2011), D.E. 34.

County Differences in Providing Absentee Ballots

Vanzant v. Brunner (Susan J. Dlott, S.D. Ohio 1:10-cv-596)

> A federal complaint filed two months before the 2010 general election alleged an equal-protection violation because some counties were more generous than others in facilitating absentee voting. The district judge denied relief.
>
> *Topics:* Absentee ballots; equal protection.

Two months before the 2010 general election, four Ohio voters sued Ohio's secretary of state in the Southern District of Ohio, alleging an equal-protection violation because some counties were more proactive than others in sending voters applications for absentee ballots, and some counties were more generous than others in paying the postage for absentee applications and ballots.[6494] In a nutshell, the larger counties with urban populations had more resources to facilitate absentee voting.[6495] The plaintiffs sought a temporary restraining order and a preliminary injunction.[6496]

The court assigned the case to Judge Susan J. Dlott, who held a conference with the parties on the following day.[6497] At the conference, the parties agreed that the motions could be decided on the briefs alone.[6498]

On September 27, Judge Dlott denied the motions.[6499] In the summer of 2011, the parties stipulated dismissal of the action.[6500]

Right to Vote Absentee

Cunningham v. Leigh (W. Allen Pepper, Jr., N.D. Miss. 1:10-cv-49)

> A federal complaint, which was filed four days before a meeting of voters to select trustees for a school district, sought an injunction requiring absentee ballots for the meeting. After a telephonic hearing two days after the complaint was filed, the district judge determined that voters do not have a fundamental right to absentee ballots, the plaintiffs had shown no discriminatory intent, and

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6494. Complaint, Vanzant v. Brunner, No. 1:10-cv-596 (S.D. Ohio Sept. 1, 2010), D.E. 1; *see* Mark Niquette, *Suit Challenges Ohio's Absentee-Vote Process*, Columbus Dispatch, Sept. 3, 2010, at 3B (identifying the plaintiffs as registered Republicans).

6495. Interview with Judge Susan J. Dlott and her law clerk Sarah Fairweather, July 30, 2012.

Tim Reagan interviewed Judge Dlott and Sarah Fairweather for this report by telephone.

6496. Motion, *Vanzant*, No. 1:10-cv-596 (S.D. Ohio Sept. 1, 2010), D.E. 3.

6497. Docket Sheet, *id.* (Sept. 1, 2010); *see* Niquette, *supra* note 6494.

6498. Interview with Judge Susan J. Dlott and her law clerk Sarah Fairweather, July 30, 2012.

6499. Order, *Vanzant*, No. 1:10-cv-596 (S.D. Ohio Sept. 27, 2010), D.E. 10.

6500. Stipulation, *id.* (Aug. 9, 2011), D.E. 16.

> the plaintiffs' evidence of discriminatory impact was weak, so the judge denied immediate relief.
>
> *Topic:* Absentee ballots.

On Tuesday, March 2, 2010, three voters filed a federal complaint in the Northern District of Mississippi's Eastern Division seeking an injunction requiring absentee ballots for a March 6 meeting of voters to select trustees for Aberdeen's school district.[6501] On March 3, the plaintiffs filed a motion for a preliminary injunction.[6502]

After a fifty-minute telephonic hearing on March 4,[6503] Judge W. Allen Pepper, Jr., denied the plaintiffs injunctive relief.[6504] He determined that voters do not have a fundamental right to absentee ballots, the plaintiffs had shown no discriminatory intent, and the plaintiffs' evidence of discriminatory impact was weak.[6505]

Post-Election Verification of a Disabled Voter's Absentee Ballot

Ray v. Franklin County Board of Elections (George C. Smith, S.D. Ohio 2:08-cv-1086)

> A voter bedridden and homebound because of diabetes and panic attacks filed a federal action against the county board of elections, claiming that the board had improperly required her to visit the board by the previous day to protect the validity of her absentee ballot. The district judge enjoined the board to make reasonable accommodations to the plaintiff's disabilities and awarded the plaintiff $16,139.50 in attorney fees and costs.
>
> *Topics:* Absentee ballots; attorney fees; case assignment.

On Saturday, November 15, 2008, a voter filed a federal action in the Southern District of Ohio against Franklin County's board of elections, claiming that the board had improperly required her to visit it by the previous day to protect the validity of her absentee vote for the November 4 general election.[6506] According to the complaint, the voter was bedridden

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6501. Complaint, Cunningham v. Leigh, No. 1:10-cv-49 (N.D. Miss. Mar. 2, 2010), D.E. 1.

6502. Preliminary-Injunction Motion, *id.* (Mar. 3, 2010), D.E. 4; *see* Amended Preliminary-Injunction Motion, *id.* (Mar. 4, 2010), D.E. 5.

6503. Minutes, *id.* (Mar. 4, 2010), D.E. 7.

6504. Order, *id.* (Mar. 5, 2010), D.E. 8 [hereinafter *Cunningham* Order].

Judge Pepper died on January 24, 2012. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

6505. *Cunningham* Order, *supra* note 6504.

6506. Complaint, Ray v. Franklin Cty. Bd. of Elections, No. 2:08-cv-1086 (S.D. Ohio

and homebound because of diabetes and panic attacks.[6507] With her complaint, the plaintiff filed a motion for a temporary restraining order[6508] and a motion to consolidate her action with election cases pending before Judge Algenon L. Marbley.[6509]

The court assigned the case to Judge George C. Smith, who denied the consolidation motion: "The cases consolidated before Judge Marbley involve the counting of provisional ballots and do not raise any issues regarding the incomplete absentee ballots."[6510]

Judge Smith held a hearing on Monday,[6511] after which he issued a temporary restraining order.[6512] He determined that the board had to make reasonable accommodations to permit disabled absentee voters to cure ballot deficiencies, such as visiting the voter at home or permitting a family member to bring the defective ballot to the voter for cure; Judge Smith set a deadline of November 21 for completion of accommodations.[6513] He decided that under these circumstances the plaintiff was also entitled to a preliminary injunction and a permanent injunction with the same terms.[6514]

On June 2, 2009, Judge Smith awarded the plaintiff $16,139.50 in attorney fees and costs.[6515]

Military Absentee Ballots 2008

McCain-Palin 2008 v. Cunningham (Richard L. Williams, E.D. Va. 3:08-cv-709)

> On the day before the 2008 presidential election, one party's campaign filed a federal lawsuit alleging that Virginia had not sent absentee ballots to military personnel overseas in time for the voters to return the ballots in time to be counted. The district

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Nov. 15, 2008), D.E. 1.

6507. *Id.* at 1–2.

6508. Temporary-Restraining-Order Motion, *id.* (Nov. 15, 2008), D.E. 7.

6509. Consolidation Motion, *id.* (Nov. 15, 2008), D.E. 2.

6510. Order, *id.* (Nov. 15, 2008), D.E. 4, 2008 WL 4966761.

Judge Smith died on April 15, 2020. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

6511. Minutes, *Ray*, No. 2:08-cv-1086 (S.D. Ohio Nov. 17, 2008), D.E. 10.

6512. Opinion, *id.* (Nov. 17, 2008), D.E. 11 [hereinafter *Ray* Opinion], 2008 WL 4966759.

6513. *Id.* at 12; *see* Mark Niquette & Jodi Andes, *Ballot Fight Staying in Federal Court*, Columbus Dispatch, Nov. 18, 2009, at 3B.

6514. Injunction, *Ray*, No. 2:08-cv-1086 (S.D. Ohio Nov. 17, 2008), D.E. 12; *Ray* Opinion, *supra* note 6512, at 1 n.1.

6515. Order, *Ray*, No. 2:08-cv-1086 (S.D. Ohio June 2, 2009), D.E. 20.

court ordered an extension of time for accepting absentee ballots from overseas so long as they were cast before the polls closed.

Topics: Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA); military ballots; absentee ballots; intervention.

On November 3, 2008, the day before the presidential election, candidate John McCain filed a federal action in the Eastern District of Virginia to ensure that his Virginia votes by overseas military personnel would be properly counted.[6516] McCain claimed that many Virginia jurisdictions, in violation of the Uniformed and Overseas Citizens Absentee Voting Act of 1986 (UOCAVA),[6517] had not sent absentee ballots to military personnel with sufficient time for them to be returned by the November 4 closing of the polls.[6518] With the complaint, McCain filed motions for a temporary restraining order and a preliminary injunction.[6519] The court set hearing on the motion for the temporary restraining order for 2:00 p.m. on election day before Judge Richard L. Williams.[6520]

At the hearing, Judge Williams ordered Virginia to preserve for possible counting all absentee ballots received after the polls close.[6521] A written order followed that day.[6522]

On Friday, November 14, the Justice Department moved to intervene in the case, seeking more comprehensive enforcement of UOCAVA than the plaintiff was seeking.[6523] On Monday afternoon, Judge Williams held a hearing[6524] on the Justice Department's motion to intervene, as well its motion for a temporary restraining order and a preliminary injunction.[6525] By

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6516. Complaint, McCain-Palin 2008, Inc. v. Cunningham, No. 3:08-cv-709 (E.D. Va. Nov. 3, 2008), D.E. 1 [hereinafter *McCain-Palin 2008, Inc.* Complaint].

6517. Pub. L. No. 99-410, 100 Stat. 924, *as amended*, 52 U.S.C. §§ 20301–20311. *See generally* Robert Timothy Reagan, Overseas Voting: The Uniformed and Overseas Citizens Absentee Voting Act (Federal Judicial Center 2016).

6518. *McCain-Palin 2008, Inc.* Complaint, *supra* note 6516.

6519. Motion Brief, *McCain-Palin 2008, Inc.*, No. 3:08-cv-709 (E.D. Va. Nov. 3, 2008), D.E. 4; Preliminary-Injunction Motion, *id.* (Nov. 3, 2008), D.E. 3; Temporary-Restraining-Order Motion, *id.* (Nov. 3, 2008), D.E. 2.

6520. Docket Sheet, *id.* (Nov. 3, 2008).

Judge Williams died on February 19, 2011. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

6521. Minute Entry, *McCain-Palin 2008, Inc.*, No. 3:08-cv-709 (E.D. Va. Nov. 4, 2008), D.E. 9.

6522. Temporary Restraining Order, *id.* (Nov. 4, 2008), D.E. 10.

6523 Intervenor Complaint, *id.* (Nov. 14, 2008), D.E. 17; Intervention Motion, *id.* (Nov. 14, 2008), D.E. 16.

6524. Minute Entry, *id.* (Nov. 17, 2008), D.E. 32.

6525. Government Injunction Motion, *id.* (Nov. 14, 2008), D.E. 19.

written order that day, Judge Williams granted the Justice Department's motion to intervene as a plaintiff, dismissed McCain as a plaintiff, and denied the motion for additional immediate injunctive relief.[6526]

On December 9, Judge Williams denied Virginia's motion to dismiss the action and referred the matter to Magistrate Judge Dennis W. Dohnal for settlement.[6527]

On October 15, 2009, Judge Williams granted summary judgment to the Justice Department.[6528] He held that Virginia had violated UOCAVA by mailing out absentee ballots too late.[6529] He ordered Virginia to count for the 2008 election all absentee ballots received within thirty days of the polls' closing so long as they were timely requested but sent late by Virginia.[6530]

A December 14, 2010, consent decree brought the case to its final resolution; Virginia agreed to adopt various procedures to ensure its compliance with UOCAVA.[6531]

Accusations of Voter Fraud

Escobedo v. Rogers (William P. Johnson, D.N.M. 1:08-cv-1002)

> A federal complaint alleged aggressive and harassing investigations into the plaintiffs' rights to vote. The district judge denied the plaintiffs immediate relief because the evidence showed that both had voted in the 2008 general election. After the election, the judge dismissed the complaint because there was no imminent threat of further injury to the plaintiffs by the defendants.
>
> *Topics:* Absentee ballots; recusal; case assignment; registration challenges; citizenship; primary election.

On October 27, 2008, two Latina voters filed a federal complaint in the District of New Mexico against a lawyer and an investigator whom the

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6526. Order, *id.* (Nov. 17, 2008), D.E. 31; *see* Frank Green, *McCain-Palin Out of Va. Lawsuit*, Richmond Times-Dispatch, Nov. 18, 2008, at A3.

6527. Order, United States v. Cunningham, No. 3:08-cv-709 (E.D. Va. Dec. 9, 2008), D.E. 39; *see* Transcript at 13, *id.* (Dec. 8, 2008, filed Oct. 26, 2010), D.E. 72 ("this situation cries out for a solution created by the parties rather than crafted by The Court").

Judge Dohnal died on May 10, 2015. Judicial Milestones, www.uscourts.gov/judicial-milestones/dennis-w-dohnal.

6528. Opinion, *id.* (Oct. 15, 2009), D.E. 57 [hereinafter *Cunningham* Opinion], 2009 WL 3350028; *see* Reagan, *supra* note 6517, at 13; Tyler Whitley, *Va. Violated Voting Law, U.S. Judge Rules Again*, Richmond Times-Dispatch, Oct. 17, 2009, at B1.

6529. *Cunningham* Opinion, *supra* note 6528, at 8–16.

6530. *Id.* at 16–20.

6531. Consent Decree, *Cunningham*, No. 3:08-cv-709 (E.D. Va. Dec. 14, 2010), D.E. 75.

plaintiffs alleged had engaged in public accusations—accompanied by harassing visits to the plaintiffs' homes—that the plaintiffs and a few others may have voted fraudulently in the June primary election.[6532] Three days later, the plaintiffs sought a temporary restraining order against the defendants' challenging voter eligibility for the primary or general elections in 2008.[6533]

The court initially assigned the case to Judge Martha Vázquez; after recusals by Judge Vázquez and Judge M. Christina Armijo, the court reassigned the case to Judge James O. Browning.[6534] At a November 3 proceeding, Judge Browning informed the parties of his association with one of the defendants and invited requests for reassignment.[6535] The court reassigned the case to Judge William P. Johnson.[6536]

When presented with a motion for a temporary restraining order, Judge Johnson found it useful to quickly identify the defendants' lawyers, ensure that they received notice, and convert the motion into one for a preliminary injunction.[6537]

He heard testimony on November 3 and 4.[6538] The two plaintiffs had already cast absentee ballots; their attorney argued that they were concerned about whether they would be counted, so Judge Johnson wanted to hear testimony on that issue from the county clerk, recognizing how busy her office would be the day before the election.[6539] Judge Johnson offered to

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6532. Complaint, Escobedo v. Rogers, No. 1:08-cv-1002 (D.N.M. Oct. 27, 2008), D.E. 1; *see* Heather Clark, *Civil Rights Groups File Suits on Voter Harassment*, Santa Fe New Mexican, Oct. 28, 2008, at C2; Dan McKay, *Lawsuits Claim Voter Intimidation*, Albuquerque J., Oct. 28, 2008, at D1.

6533. Temporary-Restraining-Order Motion, *Escobedo*, No. 1:08-cv-1002 (D.N.M. Oct. 30, 2008), D.E. 7.

6534. Transcript at 4, *id.* (Nov. 3, 2008, filed Dec. 3, 2008), D.E. 29 [hereinafter *Escobedo* Transcript]; Minutes, *id.* (Nov. 3, 2008), D.E. 19; Docket Sheet, *id.* (Oct. 27, 2008).

6535. Minutes, *id.* (Nov. 3, 2008), D.E. 28.

6536. Minutes, *id.* (Nov. 3, 2008), D.E. 20.

Tim Reagan interviewed Judge Johnson for this report by telephone on January 29, 2013.

Judge Johnson observed that a duty system might have resulted in a more prompt designation of a judge available to hear the case. Interview with Judge William P. Johnson, Jan. 29, 2013.

6537. Interview with Judge William P. Johnson, Jan. 29, 2013; *see Escobedo* Transcript, *supra* note 6534, at 4–5.

6538. Minutes, *Escobedo*, No. 1:08-cv-1002 (D.N.M. Nov. 3, 2008), D.E. 23; *see* Dan McKay, *GOP Lawyer Says Intent Was to Investigate ACORN, Not Scare Voters*, Albuquerque J., Nov. 4, 2008, at D1.

6539. *Escobedo* Transcript, *supra* note 6534, at 8–9, 28; Interview with Judge William

take her testimony by telephone, but someone from her office was able to testify in court, a short distance from the county clerk's office, and Judge Johnson took—out of order—testimony from one of two election judges responsible for overseeing absentee ballots.[6540] The witness testified that one plaintiff's absentee ballot had been received and processed normally, and the other plaintiff's absentee ballot had not yet been received.[6541]

On election day, Judge Johnson denied the plaintiffs immediate injunctive relief.[6542] It was undisputed that they had voted in the general election.[6543]

On February 6, 2009, Judge Johnson granted the defendants' motion for a more definite statement.[6544] An amended complaint followed on March 2.[6545] On April 3, Judge Johnson granted the defendants dismissal because the election was over and there was no imminent threat of further injury to the plaintiffs by the defendants.[6546]

Early-Voting Locations in Lake County

Curley v. Lake County Board of Elections and Registration (Joseph S. Van Bokkelen, N.D. Ind. 2:08-cv-287)

> The central question in this case was whether a majority vote or a unanimous vote by members of an election board was required to open satellite locations for early voting. A state-court judge issued an injunction favoring the unanimity requirement shortly after the case was removed to federal court. After the parties agreed to maintain the status quo until the federal judge could rule, some of their attorneys filed a similar action in another state court and got a conflicting state-court injunction. Employing the All Writs Act, the federal judge vacated the second injunction, but he later determined that his case was not removable.
>
> *Topics:* Early voting; poll locations; matters for state courts; removal; enforcing orders; intervention.

On October 2, 2008, two voters, who held additional positions of authority, filed a civil action in Indiana's superior court for Lake County to enjoin

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P. Johnson, Jan. 29, 2013.

6540. *Escobedo* Transcript, *supra* note 6534, at 28–29, 70–81; Interview with Judge William P. Johnson, Jan. 29, 2013.

6541. *Escobedo* Transcript, *supra* note 6534, at 76–77.

6542. Order, *Escobedo*, No. 1:08-cv-1002 (D.N.M. Nov. 4, 2008), D.E. 21.

6543. Opinion at 3, *id.* (Feb. 6, 2009), D.E. 34.

6544. *Id.* at 5.

6545. Amended Complaint, *id.* (Mar. 2, 2009), D.E. 41.

6546. Opinion, *id.* (Apr. 30, 2009), D.E. 54.

the county's board of elections and registration from establishing, on October 6, additional locations for absentee voting in East Chicago, Gary, and Hammond.[6547] The plaintiffs were a member of the board who opposed the additional locations and the chair of the county's Republican Central Committee.[6548] According to the complaint, the board had unanimously approved electronic voting by absentee ballot at its office in Crown Point, but the vote for the three additional locations was three in favor and two opposed, and a unanimous vote was required.[6549]

After an evidentiary hearing,[6550] the state judge issued a temporary restraining order on October 3.[6551] Earlier on October 3, the board removed the action to the federal court's Hammond courthouse in the Northern District of Indiana, stating that the board's actions in dispute were motivated by compliance with section 2 of the Voting Rights Act.[6552] The superior court's order was regarded as void because of the earlier removal.[6553]

Three voters and two organizations moved to intervene in the federal action to support the board's allowances for early voting.[6554]

6547. Complaint, Curley v. Lake Cty. Bd. of Elections & Registration, No. 45D02-0810-PL-00190 (Ind. Sup. Ct. Lake Cty. Oct. 2, 2008) [hereinafter Sup. Ct. *Curley* Complaint], *filed as* Complaint, Curley v. Lake Cty. Bd. of Elections & Registration, No. 2:08-cv-287 (N.D. Ind. Oct. 2, 2008), D.E. 1; State *ex rel.* Curley v. Lake Cir. Ct., 899 N.E. 2d 1271, 1271 (Ind. 2008).

6548. Sup. Ct. *Curley* Complaint, *supra* note 6547; *Curley*, 899 N.E.2d at 1271.

6549. Sup. Ct. *Curley* Complaint, *supra* note 6547; *see* John Byrne, *Early Vote Sites Await Court OK*, Merrillville Post-Trib., Oct. 4, 2008, at A4 [hereinafter *Early Vote Sites*]; John Byrne, *Satellite Voting Fight Now in Lake County Courtroom*, Merrillville Post-Trib., Oct. 3, 2008, at A5 ("The three Democratic members of the county Election Board voted last week to institute the in-person absentee voting at the Clerk's Offices in the three cities—over the objections of two GOP board members.").

6550. Transcript, *Curley*, No. 45D02-0810-PL-00190 (Ind. Sup. Ct. Lake Cty. Oct. 3, 2008), *filed as* Transcript, *Curley*, No. 2:08-cv-287 (N.D. Ind. Oct. 3, 2008, filed Oct. 7, 2008), D.E. 21.

6551. Temporary Restraining Order, *Curley*, No. 45D02-0810-PL-00190 (Ind. Sup. Ct. Lake Cty. Oct. 3, 2008), *filed as* Vacated Temporary Restraining Order, *Curley*, No. 2:08-cv-287 (N.D. Ind. Oct. 3, 2008), D.E. 13; *Curley*, 899 N.E.2d at 1272.

6552. Notice of Removal at 2, *Curley*, No. 2:08-cv-287 (N.D. Ind. Oct. 3, 2008), D.E. 2; *see* Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437, *as amended*, 52 U.S.C. § 10301; *Curley*, 899 N.E.2d at 1272.

6553. *See Curley*, 899 N.E.2d at 1272; Motion to Vacate at 2 n.1, *Curley*, No. 2:08-cv-287 (N.D. Ind. Oct. 3, 2008), D.E. 32; *see also* Byrne, *Early Vote Sites*, *supra* note 6549 ("'There is no state temporary restraining order,' Van Bokkelen declared as the federal proceedings got under way.").

6554. Intervention Motion, *Curley*, No. 2:08-cv-287 (N.D. Ind. Oct. 3, 2008), D.E. 5.

Judge Joseph S. Van Bokkelen held a hearing at 2:00 p.m. on the day the case was removed.[6555] He granted the intervention motion.[6556] He and the parties agreed that additional voting locations would not be established before October 10 and that briefing on the court's jurisdiction and other matters would be due on October 8.[6557]

On October 6, two voters and two unions filed a civil action in Indiana's circuit court for Lake County[6558] and obtained that day from the circuit judge a temporary restraining order requiring establishment of the additional absentee-voting locations,[6559] an order in conflict with the superior-court order. The filing of this action was in conflict with agreements among the judge and attorneys in Judge Van Bokkelen's case to maintain the status quo until October 10; there was an overlap of lawyers in the two cases.[6560]

Judge Van Bokkelen held a telephone conference at noon on the following day,[6561] at which he granted the motion to remand the case.[6562] Employing the All Writs Act,[6563] Judge Van Bokkelen vacated the circuit court's order, because it contradicted agreement of the parties and interfered with Judge Van Bokkelen's jurisdiction over the matter.[6564]

6555. Docket Sheet, *id.* (N.D. Ind. Oct. 3, 2008) [hereinafter N.D. Ind. *Curley* Docket Sheet] (D.E. 3, 14); *see* Byrne, *Early Vote Sites*, *supra* note 6549.

Tim Reagan interviewed Judge Van Bokkelen for this report by telephone on August 2, 2012.

6556. Interview with Judge Joseph S. Van Bokkelen, Aug. 2, 2012.

6557. N.D. Ind. *Curley* Docket Sheet, *supra* note 6555 (D.E. 14); *see* Byrne, *Early Vote Sites*, *supra* note 6549.

6558. Complaint, United Steelworkers Dist. 7 v. Lake Cty. Bd. of Elections & Registration, No. 45C01-0810-PL-00256 (Ind. Cir. Ct. Lake Cty. Oct. 6, 2008), *attached to* Emergency Motion, *Curley*, No. 2:08-cv-287 (N.D. Ind. Oct. 7, 2008), D.E. 18 [hereinafter N.D. Ind. *Curley* Emergency Motion]; *Curley*, 899 N.E.2d at 1271–72.

6559. Temporary Restraining Order, *United Steelworkers Dist. 7*, No. 45C01-0810-PL-00256 (Ind. Cir. Ct. Lake Cty. Oct. 6, 2008), *attached to* N.D. Ind. *Curley* Emergency Motion, *supra* note 6558; *Curley*, 899 N.E.2d at 1272; *see* Piet Levy, *Judge Orders Opening of Early Voting Sites Despite Hearing*, Merrillville Post-Trib., Oct. 7, 2008, at A7.

6560. Interview with Judge Joseph S. Van Bokkelen, Aug. 2, 2012.

6561. N.D. Ind. *Curley* Docket Sheet, *supra* note 6555 (D.E. 17, 19).

6562. *Id.* (D.E. 19).

6563. 28 U.S.C. § 1651.

6564. Order, Curley v. Lake Cty. Bd. of Elections & Registration, No. 2:08-cv-287 (N.D. Ind. Oct. 7, 2008), D.E. 20; *see Curley*, 899 N.E.2d at 1272; *see also* John Byrne, *Unions Join Early-Voting Battle*, Merrillville Post-Trib., Oct. 8, 2008, at A3.

On October 13, Judge Van Bokkelen remanded the case back to state court.[6565] The case turned on the number of votes required to open satellite early-voting sites under Indiana law; it did not really include a federal question.[6566] Judge Van Bokkelen determined that the case was not removable under the refusal clause for civil-rights cases,[6567] "for refusing to do any act on the ground that it would be inconsistent with [any law providing for equal rights]."[6568]

> The Defendants' claim that they are being brought to court for refusing to abide by Indiana law requiring a unanimous board vote before opening satellite offices is a stretch, for the alleged wrong here is ultimately in their action (trying to open the satellite offices), not refusal to act in accordance with state law (ignoring voting requirements).[6569]

While the case was on its way back to the superior court, the additional voting locations opened on October 14 in compliance with the circuit-court judge's renewed order.[6570]

The dissenter from additional early-voting locations filed an original action in Indiana's supreme court to resolve the conflicting state cases, and the supreme court ordered that same day that they be consolidated in the superior court.[6571] Because the parties could not agree on a superior-court judge to hear the case, the supreme court appointed one.[6572] On October 22, the new superior-court judge enjoined the board from terminating the early voting that had begun in East Chicago, Gary, and Hammond.[6573] Indiana's court of appeals affirmed the injunction on October 31.[6574]

6565. Opinion, *Curley*, No. 2:08-cv-287 (N.D. Ind. Oct. 13, 2008), D.E. 47 [hereinafter N.D. Ind. *Curley* Opinion]; *Curley*, 899 N.E.2d at 1272; *see* John Byrne, *Satellite Voting Fight Not a Federal Case Bokkelen Says*, Merrillville Post-Trib., Oct. 14, 2008, at A3.

6566. Interview with Judge Joseph S. Van Bokkelen, Aug. 2, 2012.

6567. N.D. Ind. *Curley* Opinion, *supra* note 6565, at 3–5.

6568. 28 U.S.C. § 1443(2).

6569. N.D. Ind. *Curley* Opinion, *supra* note 6565, at 4.

6570. *Curley*, 899 N.E.2d at 1272; *see* John Byrne, *Judge Opens Voting Sites*, Merrillville Post-Trib., Oct. 15, 2008, at A3.

6571. *Curley*, 899 N.E.2d 1271; Curley v. Lake Cty. Bd. of Elections & Registration, 896 N.E.2d 24, 27 (Ind. Ct. App. 2008).

6572. *Curley*, 896 N.E.2d at 28; *see* John Byrne, *Vote Fight Takes New Turn*, Merrillville Post-Trib., Oct. 16, 2008, at A5.

6573. *Curley*, 896 N.E.2d at 32; *see* John Byrne, *Remote Voting Fight Off to Indianapolis*, Merrillville Post-Trib., Oct. 23, 2008, at A3.

6574. *Curley*, 896 N.E.2d at 40–41; *see* John Byrne, *Early NWI Vote Program Gets Court's Support*, Merrillville Post-Trib., Nov. 1, 2008, at A3.

Same-Day Registration and Absentee Voting

Project Vote v. Madison County Board of Elections (James S. Gwin, N.D. Ohio 1:08-cv-2266) and Ohio Republican Party v. Brunner (George C. Smith, S.D. Ohio 2:08-cv-913)

> Absentee voting began in Ohio thirty-five days before the 2008 general election; state election law required voters to be registered at least thirty days before the election. Could new voters both register and vote on the same day if they did so after absentee voting began and before the deadline for new voter registrations? On a Wednesday, three public-interest organizations and two voters filed a federal complaint in the Northern District against a county in the Southern District that interpreted the law as requiring registration thirty days before voting instead of thirty days before the election. The district judge set the matter for hearing on Monday midday. On Friday, the Republican Party and a voter filed a federal action in the Southern District to force Ohio's secretary of state to require voters to be registered for thirty days before voting. Over the weekend, defendants in each case moved to transfer their case to the other district. Both judges denied these motions, and both judges moved up their Monday hearings. On Monday, the Northern District judge ruled that the statute required registration thirty days before the election, not thirty days before voting. That same day, Ohio's supreme court reached the same result. Later that day, the Southern District judge deferred to the state court on the issue. Other issues in the Southern District case received expedited review by another district judge, the court of appeals, and the Supreme Court.
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> *Topics:* Absentee ballots; case assignment; Help America Vote Act (HAVA); registration procedures.

At dispute in this litigation was whether Ohio citizens could both register to vote and vote absentee from September 30 to October 6, 2008.[6575] For the 2008 general election, absentee voting in Ohio was to begin on September 30, which was thirty-five days before the election.[6576] Voters had to be registered at least thirty days before the election, but because that day fell on a Sunday voters had until October 6 to register.[6577]

6575. Ohio Republican Party v. Brunner, 543 F.3d 357, 359 (6th Cir. 2008).

6576. Ohio Rev. Code § 3509.01 (2008).

6577. *Id.* § 3503.06; Opinion at 4, Ohio Republican Party v. Brunner, No. 2:08-cv-913 (S.D. Ohio Sept. 26, 2008), D.E. 27 [hereinafter *Ohio Republican Party* Temporary-Restraining-Order Opinion], 2008 WL 4445193.

On Wednesday, September 24, three public-interest organizations and two voters filed a federal challenge, in the Cleveland courthouse for the Northern District of Ohio, to a requirement of Ohio's Madison County that voters be registered for thirty days before they can receive an absentee ballot.[6578] The plaintiffs sought a temporary restraining order.[6579] The court assigned the case to Judge James S. Gwin, who set a hearing on the motion for Monday at 12:30 p.m.[6580]

On Friday, the Ohio Republican Party and a voter filed an action in the Columbus courthouse of the Southern District complaining that the secretary of state was permitting county boards of elections to issue absentee ballots to voters who had not yet been registered for thirty days.[6581] The court assigned the case to Judge George C. Smith, who scheduled a hearing for Monday at 2:00 p.m.[6582]

Among the papers that defendants filed over the weekend was a motion to dismiss or transfer the Northern District case because Madison County is in the Southern District[6583] and a motion to transfer the Southern District case to the Northern District because it was related to the case that was filed there first.[6584]

On Sunday, Judge Smith denied the motion to transfer the Southern District case to the Northern District, noting that the Northern District defendants were located in the Southern District and suggesting that the

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6578. Complaint, Project Vote v. Madison Cty. Bd. of Elections, No. 1:08-cv-2266 (N.D. Ohio Sept. 24, 2008), D.E. 1; *Ohio Republican Party*, 543 F.3d at 359–60; *see* Mark Niquette, *Lawsuit Backs "Same-Day" Voting*, Columbus Dispatch, Sept. 26, 2008, at 3B.

6579. Temporary-Restraining-Order Motion, *Project Vote*, No. 1:08-cv-2266 (N.D. Ohio Sept. 26, 2008), D.E. 7.

6580. Order, *id.* (Sept. 26, 2008), D.E. 8.

Tim Reagan interviewed Judge Gwin for this report by telephone on October 24, 2012.

6581. Temporary-Restraining-Order Motion, *Ohio Republican Party*, No. 2:08-cv-913 (S.D. Ohio Sept. 26, 2008), D.E. 3; Complaint, *id.* (Sept. 26, 2008), D.E. 2; *Ohio Republican Party*, 543 F.3d at 360; Ohio Republican Party v. Brunner, 582 F. Supp. 2d 957, 959 (S.D. Ohio 2008); *see* Mark Niquette, *GOP Sues in Federal Court Over Absentee Voting*, Columbus Dispatch, Sept. 27, 2008, at 3B; *see also* Richard L. Hasen, The Voting Wars 110 (2012) (reporting on the secretary's directive).

6582. Docket Sheet, *Ohio Republican Party*, No. 2:08-cv-913 (S.D. Ohio Sept. 26, 2008) [hereinafter *Ohio Republican Party* Docket Sheet].

Judge Smith died on April 15, 2020. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

6583. Motion, *Project Vote*, No. 1:08-cv-2266 (N.D. Ohio Sept. 28, 2008), D.E. 11.

6584. Motion, *Ohio Republican Party*, No. 2:08-cv-913 (S.D. Ohio Sept. 27, 2008), D.E. 7; *Ohio Republican Party*, 543 F.3d at 360.

Northern District case was filed first to obtain a more favorable forum for the Northern District plaintiffs.[6585]

Judge Smith also rescheduled Monday's hearing for 11:00 a.m.[6586] The secretary of state, who was a defendant in both actions, asked Judge Gwin to move up the hearing in his case to 11:30 a.m., at which time she expected her attorney to arrive at the Cleveland courthouse.[6587] Judge Gwin agreed to commence the hearing as soon as the parties arrived.[6588]

On Monday, Judge Gwin determined that Madison County's violation of a directive by the secretary of state also violated both Ohio and federal law, and he issued a temporary restraining order.[6589] His twenty-two-page opinion was an effort to make a thorough record of his resolution of the motion while resolving the motion as quickly as possible.[6590]

Also on Monday, Ohio's supreme court determined that Ohio law required a newly registered voter to be registered for thirty days before the date of the election, not for thirty days before receiving an absentee ballot:

> [W]e hold that respondent, the secretary of state, correctly instructed boards of elections that an otherwise qualified citizen must be registered to vote for 30 days as of the date of the election at which the citizen offers to vote in order to be a qualified elector entitled to apply for and vote an absentee ballot at the election, and that the citizen need not be registered for 30 days before applying for, receiving, or completing an absentee ballot for the election.[6591]

Judge Smith's Monday ruling had the benefit of Ohio's supreme court's ruling, to which he deferred.[6592] There was another issue not re-

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6585. Order, *Ohio Republican Party*, No. 2:08-cv-913 (S.D. Ohio Sept. 28, 2008), D.E. 12, 2008 WL 4445192; Transcript at 4–6, *id.* (Sept. 29, 2008, filed Sept. 30, 2008), D.E. 31 [hereinafter Sept. 29, 2008, *Ohio Republican Party* Transcript]; *Ohio Republican Party*, 543 F.3d at 360.

6586. *Ohio Republican Party* Docket Sheet, *supra* note 6582.

6587. Motion, *Project Vote*, No. 1:08-cv-2266 (N.D. Ohio Sept. 29, 2008), D.E. 22.

6588. Order, *id.* (Sept. 29, 2008), D.E. 24.

6589. Opinion, *id.* (Sept. 29, 2008), D.E. 25, 2008 WL 4445176; Temporary Restraining Order, *id.* (Sept. 29, 2008), D.E. 26; *Ohio Republican Party*, 543 F.3d at 360; *see* Sept. 29, 2008, *Ohio Republican Party* Transcript, *supra* note 6585, at 4–6; *see also* Peter Krouse, *Courts Back Brunner on 30 Days to Cast Their Absentee Ballots*, Cleveland Plain Dealer, Sept. 30, 2008, at B1; Mark Niquette & Tim Doulin, *Three Courts Rule on Absentee Issue*, Columbus Dispatch, Sept. 30, 2008, at 1B.

6590. Interview with Judge James S. Gwin, Oct. 24, 2012.

6591. Ohio *ex rel.* Colvin v. Brunner, 896 N.E.2d 979, 982 (Ohio 2008); *see Ohio Republican Party*, 543 F.3d at 360; *see also* Hasen, *supra* note 6581, at 110; Krouse, *supra* note 6589; Niquette & Doulin, *supra* note 6589.

6592. *Ohio Republican Party* Temporary-Restraining-Order Opinion, *supra* note

solved by Ohio's supreme court, and Judge Smith enjoined the secretary of state's directive that county boards of elections are not required to allow election observers during the thirty-five days of absentee voting.[6593] On Tuesday, over a dissent, the federal court of appeals stayed Judge Smith's order because "federal courts lack jurisdiction to enjoin state officials on the basis of state law"[6594] and it was unlikely that the plaintiffs would succeed in proving a federal claim.[6595]

On October 9, Judge Smith granted a renewed motion for a temporary restraining order on an issue that had not yet been addressed; he ordered the secretary of state to comply with the Help America Vote Act (HAVA)[6596] by matching new voter registrations with information in the Ohio Bureau of Motor Vehicles and Social Security Administration databases so that possible voter fraud could be investigated.[6597]

On the next day, by the same two-to-one vote as before, a panel of the court of appeals stayed Judge Smith's order.[6598] Four days later, the full court of appeals vacated the panel's stay.[6599] Three days after that, the Su-

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6577, at 6; *Ohio Republican Party*, 543 F.3d at 360; *see* Sept. 29, 2008, *Ohio Republican Party* Transcript, *supra* note 6585, at 56–57; *see also* Krouse, *supra* note 6589; Niquette & Doulin, *supra* note 6589.

6593. *Ohio Republican Party* Temporary-Restraining-Order Opinion, *supra* note 6577, at 8; Temporary Restraining Order, Ohio Republican Party v. Brunner, No. 2:08-cv-913 (S.D. Ohio Sept. 29, 2008), D.E. 29; Sept. 29, 2008, *Ohio Republican Party* Transcript, *supra* note 6585, at 60; *Ohio Republican Party*, 543 F.3d at 360; Ohio Republican Party v. Brunner, 582 F. Supp. 2d 957, 959 (S.D. Ohio 2008); *see* Krouse, *supra* note 6589; Niquette & Doulin, *supra* note 6589.

6594. *Ohio Republican Party*, 543 F.3d at 360–61 (citing Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 124–25 (1984)).

6595. *Id.* at 361–62.

6596. Pub. L. No. 107-252, 116 Stat. 1666 (2002), *as amended*, 52 U.S.C. §§ 20901–21145. *See generally* Marie Leary & Robert Timothy Reagan, The Help America Vote Act (Federal Judicial Center 2012); Symposium, *HAVA @ 10*, 12 Election L.J. 111 (2013).

6597. *Ohio Republican Party*, 582 F. Supp. 2d at 966; Temporary Restraining Order, *Ohio Republican Party*, No. 2:08-cv-913 (S.D. Ohio Oct. 10, 2008), D.E. 55; *see* Transcript, *id.* (Oct. 9, 2008, filed Oct. 10, 2008), D.E. 57; *see also* Hasen, *supra* note 6581, at 113; Darrel Rowland & Mark Niquette, *Brunner Loses Lawsuit to GOP*, Columbus Dispatch, Oct. 10, 2008, at 1B; *see* Daniel P. Tokaji, *HAVA in Court: A Summary and Analysis of Litigation*, 12 Election L.J. 203, 210 (2013). *See generally* Richard L. Hasen, *What to Expect When You're Electing*, Fed. Law., June 2012, at 39 (summarizing litigation over the HAVA issue).

6598. Opinion, Ohio Republican Party v. Brunner, No. 08-4322 (6th Cir. Oct. 10, 2008); *see* Hasen, *supra* note 6581, at 113; Mark Niquette, *Brunner Won't Need to Change Voter Lists*, Columbus Dispatch, Oct. 11, 2008, at 1A; *see* Tokaji, *supra* note 6597, at 210.

6599. Ohio Republican Party v. Brunner, 544 F.3d 711, 712 (6th Cir. 2008); *see* Hasen,

preme Court overturned the court of appeals and vacated Judge Smith's order, determining that the plaintiffs would be unlikely to prevail on whether they had a private right of action to pursue their HAVA claim.[6600]

On November 4, the secretary of state moved to consolidate Judge Smith's case with a case on voter identification that had been pending before Judge Algenon L. Marbley since October 24.[6601] On November 6, Judge Marbley granted the motion.[6602] On November 24, the Ohio Republican Party stipulated dismissal of its action.[6603] Ohio's legislature passed legislation on December 17 that would have reduced early voting from thirty-five days to twenty days,[6604] but the governor vetoed the legislation as too partisan for lame-duck election legislation.[6605]

On December 24, Judge Gwin granted to the plaintiffs in his case a voluntary dismissal without prejudice.[6606]

Accommodating Overseas Voters in a Special Election

DuPage County Board of Election Commissioners v. Illinois State Board of Elections (Ruben Castillo, N.D. Ill. 1:08-cv-232)

> Election officials filed a federal complaint seeking relief from the time constraints imposed by a special election to fill a seat in the U.S. House of Representatives set to coincide with a presidential

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supra note 6581, at 114; Mark Niquette, *Court Nullifies Brunner Ruling*, Columbus Dispatch, Oct. 17, 2008, at 1B; *see* Tokaji, *supra* note 6597, at 210; Daniel P. Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws*, 44 Ind. L. Rev. 113, 118, 152–54 (2010).

6600. Brunner v. Ohio Republican Party, 555 U.S. 5 (2008); *see* Hasen, *supra* note 6581, at 116; Adam Liptak & Ian Urbina, *Justices Block Effort to Challenge Ohio Voters*, N.Y. Times, Oct. 18, 2008, at A10; Mark Niquette, *Voter Suit Goes to Ohio Justices*, Columbus Dispatch, Oct. 18, 2008, at 1A; *see also* Tokaji, *supra* note 6597, at 210–13.

6601. Consolidation Motion, *Ohio Republican Party*, No. 2:08-cv-913 (S.D. Ohio Nov. 4, 2008), D.E. 66; *see* NEOCH v. Brunner, 652 F. Supp. 2d 871, 876 (S.D. Ohio 2009), *as reported in* "Ohio's Voter-Identification Law," *infra* page 923.

6602. Consolidation Order, *Ohio Republican Party*, No. 2:08-cv-913 (S.D. Ohio Nov. 6, 2008), D.E. 73; *see* Ohio *ex rel.* Skaggs v. Brunner, 588 F. Supp. 2d 819, 821–22 (S.D. Ohio 2008).

6603. Stipulation, *Ohio Republican Party*, No. 2:08-cv-913 (S.D. Ohio Nov. 24, 2008), D.E. 78.

6604. *See* Aaron Marshall, *House GOP Acts to Shorten Early Voting Period*, Cleveland Plain Dealer, Dec. 17, 2008, at B3; Jim Siegel, *House Oks Elections Bill*, Columbus Dispatch, Dec. 17, 2008, at 1A.

6605. *See* Jon Craig, *Strickland Vetoes Three Bills Passed Last Year by GOP*, Cincinnati Enquirer, Jan. 7, 2009, at B2.

6606. Order, Project Vote v. Madison Cty. Bd. of Elections, No. 1:08-cv-2266 (N.D. Ohio Dec. 24, 2008), D.E. 43.

> primary election, because the schedule did not give them enough time to provide overseas voters with their ballots on time. The district judge granted the officials departures from statutory deadlines to accommodate the special-election dates. The judge modified time deadlines for overseas voters and authorized the use of blank absentee ballots.
>
> *Topics:* Absentee ballots; Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA); intervention.

Election officials for seven northern Illinois counties and the City of Aurora filed a federal complaint in the Northern District of Illinois on Thursday, January 10, 2008, seeking relief from time requirements for a special election to fill a vacancy created by the resignation of U.S. Representative Dennis Hastert.[6607] They claimed that a March 8 election with a February 5 primary election—the day of Illinois's Super Tuesday presidential primary election—did not give the election officials enough time to comply with various state time requirements or the federal Uniformed and Overseas Citizens Absentee Voting Act of 1986 (UOCAVA).[6608] On the following day, the plaintiffs filed a motion for an emergency hearing.[6609]

Illinois law required a special election within 115 days of a writ issued by the governor within five days of the congressional vacancy.[6610] The March 8 date was ninety-six days after the writ was issued and thirty-two days after the primary election.[6611]

On Monday, January 14, the federal government sought permission to participate in the case as an amicus curiae to protect the federal rights of overseas voters.[6612]

6607. Complaint, DuPage Cty. Bd. of Election Comm'rs v. Ill. State Bd. of Elections, No. 1:08-cv-232 (N.D. Ill. Jan. 10, 2008), D.E. 1 [hereinafter *DuPage Cty. Bd. of Election Comm'rs* Complaint]; *see* Steve Lord, *Election Dates Cause Worries*, Chi. Sun-Times, Jan. 14, 2008, at 18; Lisa Smith, *Special Election Will Be Headache for Officials*, Chi. Daily Herald, Dec. 1, 2007, at 4.

6608. *DuPage Cty. Bd. of Election Comm'rs* Complaint, *supra* note 6607; *see* Pub. L. No. 99-410, 100 Stat. 924, *as amended*, 52 U.S.C. §§ 20301–20311. *See generally* Robert Timothy Reagan, Overseas Voting: The Uniformed and Overseas Citizens Absentee Voting Act (Federal Judicial Center 2016).

6609. Emergency Motion, *DuPage Cty. Bd. of Election Comm'rs*, No. 1:08-cv-232 (N.D. Ill. Jan. 11, 2008), D.E. 13.

6610. 10 Ill. Comp. Stat. 5/25-7; *see* Calendar Order at 2, *DuPage Cty. Bd. of Election Comm'rs*, No. 1:08-cv-232 (N.D. Ill. Jan. 18, 2008), D.E. 32 [hereinafter *DuPage Cty. Bd. of Election Comm'rs* Calendar Order].

6611. *See DuPage Cty. Bd. of Election Comm'rs* Calendar Order, *supra* note 6610, at 5.

6612. Amicus Curiae Motion, *DuPage Cty. Bd. of Election Comm'rs*, No. 1:08-cv-232 (N.D. Ill. Jan. 14, 2008), D.E. 10.

Judge Ruben Castillo heard the case on Wednesday.[6613] He granted the federal government's motion to participate and continued the plaintiff's motion until two days later.[6614] On January 18, Judge Castillo issued an order specifying a calendar of time requirements, including departures from normal statutory deadlines, to accommodate the scheduled election dates.[6615]

With respect to overseas ballots, Judge Castillo ordered that they be counted for the primary election if postmarked by February 4 and received by February 8.[6616] Overseas ballots for the March 8 election would be accepted if postmarked by March 7 and received by March 29.[6617] An important difficulty in providing overseas voters with timely ballots was the short time between the two elections, so Judge Castillo authorized the use of blank absentee ballots.[6618]

Pro Se Suit to Nullify All Absentee Ballots

Freeman v. McKnight (Gary L. Sharpe, N.D.N.Y. 1:07-cv-1123)

> A candidate who earned more voting-booth votes than his opponent, but who trailed after absentee ballots were counted, filed a pro se action to nullify absentee ballots because their mailing envelopes had been discarded so timely mailing could not be verified. The judge determined that the plaintiff had not provided the defendants with proper notice or shown entitlement to immediate injunctive relief.
>
> *Topics:* Absentee ballots; pro se party; enjoining certification.

On October 24, 2007, a candidate for the Democratic primary election for a seat in Albany County's legislature filed a pro se federal complaint in the Northern District of New York, seeking the invalidation of all absentee ballots so that he would be declared the winner of the primary election.[6619]

6613. Minutes, *id.* (Jan. 16, 2008), D.E. 27 [hereinafter *DuPage Cty. Bd. of Election Comm'rs* Minutes].

Judge Castillo retired on September 27, 2019. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

6614. *DuPage Cty. Bd. of Election Comm'rs* Minutes, *supra* note 6613.

6615. *DuPage Cty. Bd. of Election Comm'rs* Calendar Order, *supra* note 6610; *see* Reagan, *supra* note 6608, at 4–5.

6616. *DuPage Cty. Bd. of Election Comm'rs* Calendar Order, *supra* note 6610, at 17.

6617. *Id.* at 18.

6618. *Id.* at 18–20.

6619. Complaint, Freeman v. McKnight, No. 1:07-cv-1123 (N.D.N.Y. Oct. 24, 2007), D.E. 1 [hereinafter *Freeman* Complaint].

There are thirty-nine seats in Albany's legislature.[6620] The plaintiff was four votes ahead of the incumbent after the September-18-election-day votes were counted.[6621] After absentee ballots were counted, however, the incumbent was ahead 282 to 278.[6622] Before he filed the federal action, the candidate plaintiff filed an action in state court to nullify all of the absentee ballots because their mailing envelopes had been discarded so mailing by the required deadline could not be verified.[6623]

On October 30, the plaintiff filed a motion for an order to show cause.[6624] On November 2, Judge Gary L. Sharpe denied the motion because the plaintiff had neither provided the defendants with proper notice nor shown entitlement to immediate injunctive relief.[6625] On February 7, 2008, Judge Sharpe granted the defendants summary judgment.[6626]

Adding a Weekend Day to Early Voting

LULAC v. Texas (Xavier Rodriguez, W.D. Tex. 5:06-cv-1046)

> A federal complaint challenged the exclusion of weekend days from an early-voting period for a special congressional runoff election, and the district judge ordered that counties that included parts of the congressional district would have the discretion to extend the early voting period by one day to include a Saturday.
>
> *Topics:* Early voting; case assignment; attorney fees; malapportionment; three-judge court.

The League of Latin American Citizens (LULAC) and three voters filed a federal complaint in the Western District of Texas on December 1, 2006, challenging the elimination of weekend early voting for a runoff special congressional election to be held on December 12, the holiday celebrating the Virgin of Guadalupe, "a feast of special significance to the Mexican American population of the United States."[6627] With their complaint, the plaintiffs filed a motion for a temporary injunction.[6628]

6620. Albany County Legislature, www.albanycounty.com/government/departments/county-legislature.

6621. *See* Jordan Carleo-Evangelist, *Party Backing No Sure Thing*, Albany Times Union, Sept. 20, 2007, at D1.

6622. *See* Carol DeMare, *Loser in Primary Challenges Results*, Albany Times Union, Oct. 3, 2007, at D6.

6623. *See Freeman* Complaint, *supra* note 6619; DeMare, *supra* note 6622.

6624. Motion, *Freeman*, No. 1:07-cv-1123 (N.D.N.Y. Oct. 30, 2007), D.E. 4.

6625. Order, *id.* (Nov. 2, 2007), D.E. 5.

6626. Order, *id.* (Feb. 7, 2008), D.E. 10.

6627. Complaint, LULAC v. Texas, No. 5:06-cv-1046 (W.D. Tex. Dec. 1, 2006), D.E. 1.

6628. Motion, *id.* (Dec. 1, 2006), D.E. 2.

The runoff election was for district 23, which the Supreme Court held on June 28 violated section 2 of the Voting Rights Act.[6629] On remand, because primary elections had already been held for the districts that the Supreme Court decided were improperly drawn, a three-judge district court in the Eastern District of Texas ordered special open elections for newly court-drawn districts to be held at the same time as the November 7 general election.[6630] Because candidates would not have been winnowed by a primary election, the court ordered that Texas hold a runoff election for any special congressional race in which no candidate received a majority of votes.[6631]

Western District of Texas Judge Xavier Rodriguez transferred the December 1 case to the Eastern District of Texas three-judge court on the day that the case was filed.[6632] Four days later, Judge Rodriguez reconsidered and accepted the case back.[6633] On that same day, he ordered that counties including parts of district 23 have the discretion to extend early voting by one day to include Saturday, December 9.[6634]

On December 5, Judge Rodriguez dismissed the case as settled.[6635] On May 22, 2007, he awarded the plaintiffs $19,562.50 in attorney fees and costs.[6636]

Excluding an Office from Absentee Ballots

Price v. Albany County Board of Elections (Gary L. Sharpe, N.D.N.Y. 1:06-cv-1083)

> The complaint alleged that New York's excluding county party-committee positions from absentee ballots in a primary election, to be held in four days, violated the First Amendment. The judge issued as limited a temporary restraining order as possible: he ordered absentee ballots prepared for the party positions, but he ordered them segregated so that a determination of whether to count them could be made after the election. The court of ap-

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6629. LULAC v. Perry, 548 U.S. 399 (2006).

6630. Order, LULAC v. Perry, No. 2:03-cv-354 (E.D. Tex. Aug. 4, 2006), D.E. 336 [hereinafter *LULAC v. Perry* Special-Election Order], 2006 WL 3069542; *see* LULAC v. Perry, 457 F. Supp. 2d 716 (E.D. Tex. 2006).

6631. *LULAC v. Perry* Special-Election Order, *supra* note 6630, at 2; *see* Carlos Guerra, *Stunning Election Results Are Product of a Convoluted Contest*, San Antonio Express-News, Dec. 14, 2006, at 1B.

6632. Order, *LULAC*, No. 5:06-cv-1046 (W.D. Tex. Dec. 1, 2006), D.E. 3.

6633. Order, *id.* (Dec. 5, 2006), D.E. 7.

6634. Order, *id.* (Dec. 5, 2006), D.E. 8.

6635. Order, *id.* (Dec. 5, 2006), D.E. 9.

6636. Opinion, *id.* (May 22, 2007), D.E. 15.

> peals ruled that excluding county-committee positions from absentee ballots was unconstitutional.
>
> *Topics:* Absentee ballots; party procedures; ballot segregation; primary election; attorney fees.

Four days before New York's September 12, 2006, primary election, the Albany County Republican Committee, a committee candidate, and two voters filed a federal complaint in the Northern District of New York's Albany courthouse alleging that New York's excluding county party-committee positions from absentee ballots violated the First Amendment.[6637] With their complaint, the plaintiffs filed a motion for a temporary restraining order.[6638]

In New York, each political party had a county committee in each county.[6639] An important committee function was the selection of party nominees when vacancies arose between early July and early November in an election year for that office.[6640] Committee members were elected at the time of primaries in even years, the years of election for federal and state offices, rather than odd years, the years of election for local offices.[6641] Terms expired immediately upon the holding of elections for committee positions; candidates usually run unopposed.[6642] New York argued that allowing absentee votes for committee positions could result in a prolonged vacancy if the absentee votes decided an election.[6643]

The lead plaintiff was one of three candidates for two positions in an election with approximately twenty-seven eligible voters.[6644]

On September 11, Judge Gary L. Sharpe held a hearing and decided to "grant a temporary restraining order as limited as is possible."[6645] He ordered absentee ballots prepared for Albany County party committees, but

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6637. Complaint, Price v. Albany Cty. Bd. of Elections, No. 1:06-cv-1083 (N.D.N.Y. Sept. 8, 2006), D.E. 1; Price v. N.Y. State Bd. of Elections, 540 F.3d 101, 104–05 (2d Cir. 2008); *see* Amended Complaint, *Price*, No. 1:06-cv-1083 (N.D.N.Y. Sept. 28, 2006), D.E. 9.

6638. Temporary-Restraining-Order Motion, *Price*, No. 1:06-cv-1083 (N.D.N.Y. Sept. 8, 2006), D.E. 3; *Price*, 540 F.3d at 105.

6639. *Price*, 540 F.3d at 104.

6640. *Id.* at 104.

6641. *Id.* at 104, 111.

6642. *Id.* at 105 & n.2, 111.

6643. *Id.* at 110.

6644. Opinion, Price v. Albany Cty. Bd. of Elections, No. 1:06-cv-1083 (N.D.N.Y. Oct. 22, 2007), D.E. 32 [hereinafter Oct. 22, 2007, *Price* Opinion], 2007 WL 3104327.

6645. Transcript at 41, *id.* (Sept. 11, 2006, filed Jan. 24, 2007), D.E. 19; *see* Minutes, *id.* (Sept. 11, 2006), D.E. 4.

ordered that the ballots be segregated so that it could be determined after the election whether they would be counted.[6646]

Not counting the votes of the two plaintiffs who voted absentee, the lead plaintiff received ten votes and each of the other two candidates received seven votes.[6647]

On October 22, 2007, after full briefing and argument, Judge Sharpe determined that exclusion of county-committee positions from absentee ballots passed constitutional muster.[6648] The parties and the judge agreed that the two absentee votes would not be counted and the committee-position election would remain uncertified.[6649]

On August 22, 2008, the court of appeals determined that excluding county-committee positions from absentee ballots did not pass constitutional muster.[6650] The appellate court found justifications for excluding the offices contrived and unpersuasive.[6651] On December 4, 2009, Judge Sharpe awarded the plaintiffs $105,695.74 in attorney fees and costs.[6652]

Equal Provision of Early Voting in Cook County

Gustafson v. Illinois State Board of Elections (David H. Coar, N.D. Ill. 1:06-cv-1159)

> A federal complaint charged a city and its county with unequal provision of early voting. The district judge found that the inconsistencies among the jurisdictions were not so serious as to merit federal-court intervention.
>
> *Topics:* Early voting; poll locations; primary election.

Eleven voters filed a federal complaint in the Northern District of Illinois on March 3, 2006, charging Illinois, Cook County, and the City of Chicago with unequal provision of early voting for the March 21 primary elections.[6653] With their complaint, the plaintiffs filed a motion for a temporary

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6646. Order, *id.* (Sept. 11, 2006), D.E. 6.

6647. Oct. 22, 2007, *Price* Opinion, *supra* note 6644, at 9; *see* Brian Nearing, *Legal Threat Called Tool for Ending County GOP Dispute*, Albany Times Union, Sept. 19, 2006, at B7 (reporting that the lead plaintiff won a seat on the committee).

6648. Oct. 22, 2007, *Price* Opinion, *supra* note 6644.

6649. Order, *Price*, No. 1:06-cv-1083 (N.D.N.Y. Nov. 21, 2007), D.E. 36.

6650. Price v. N.Y. State Bd. of Elections, 540 F.3d 101 (2d Cir. 2008).

6651. *Id.* at 110–12.

6652. Order, *Price*, No. 1:06-cv-1083 (N.D.N.Y. Dec. 4, 2009), D.E. 63, 2009 WL 4730698.

6653. Complaint, Gustafson v. Ill. State Bd. of Elections, No. 1:06-cv-1159 (N.D. Ill. Mar. 3, 2006), D.E. 1; *see Suit Charges Early-Voting Sites Are Unfair*, Chi. Trib., Mar. 4, 2006, at 11.

restraining order and a preliminary injunction.[6654] The plaintiffs also filed a notice that their motion would be heard by Judge David H. Coar at 9:00 a.m. on March 6.[6655]

At the hearing, Judge Coar asked the parties to take an additional two days to try to resolve their differences.[6656] On March 8, he continued the hearing for another day.[6657] On March 9, he denied the plaintiffs a temporary restraining order.[6658]

> I'm going to—I want everybody to understand the basis for the opinion. I'm going to impose a sliding scale here. As Mr. Scanlon noted, we're not talking about ultimately the right to vote. We're talking about the right to vote early. I don't believe—as I've said, I don't believe that mere inconvenience can never constitute a constitutional violation. I can hypothesize a set of facts where inconvenience could rise to a constitutional dimension. I don't think that's what we have here.[6659]

The parties were able to come to some agreement on modifications to the locations of early voting sites and their hours of operation, but the plaintiffs continued to seek additional judicial relief.[6660]

Reviewing a second amended complaint,[6661] Judge Coar granted the defendants summary judgment on September 30, 2007:

> There is no doubt that there are some differences in the manner in which [early voting] is being applied in different districts. At this point, however, Plaintiffs have advanced insufficient evidence from which a reasonable factfinder could find that the inconsistencies from one juris-

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6654. Motion, *Gustafson*, No. 1:06-cv-1159 (N.D. Ill. Mar. 3, 2006), D.E. 5.

6655. Notice, *id.* (Mar. 6, 2006), D.E. 6.

Judge Coar retired on December 31, 2010. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

6656. Transcript at 22–23, *id.* (Mar. 6, 2006, filed Mar. 17, 2006), D.E. 49 [hereinafter Mar. 6, 2006, *Gustafson* Transcript]; Minutes, *id.* (Mar. 6, 2006), D.E. 11; *see* Mar. 6, 2006, *Gustafson* Transcript, *supra*, at 4 ("I don't think this is a situation where there truly is an emergency.").

6657. Minutes, *Gustafson*, No. 1:06-cv-1159 (N.D. Ill. Mar. 8, 2006), D.E. 44.

6658. Minutes, *id.* (Mar. 9, 2006), D.E. 45; *see Claypool Backers Lose Bid for More Early Voting Sites*, Chi. Trib., Mar. 10, 2006, at 3.

6659. Transcript at 162, *Gustafson*, No. 1:06-cv-1159 (N.D. Ill. Mar. 9, 2006, filed Sept. 29, 2006), D.E. 79-2 [hereinafter Mar. 9, 2006, *Gustafson* Transcript].

6660. Status Report, *id.* (Mar. 10, 2006), D.E. 46; *see* Mar. 9, 2006, *Gustafson* Transcript, *supra* note 6659, at 100–03 (discussion of agreements between the plaintiffs and several jurisdictions); Transcript at 6–18, *Gustafson*, No. 1:06-cv-1159 (N.D. Ill. Mar. 8, 2006, filed Sept. 29, 2006), D.E. 79-1 (same).

6661. Second Amended Complaint, *Gustafson*, No. 1:06-cv-1159 (N.D. Ill. Oct. 17, 2006), D.E. 84; *see* Amended Complaint, *id.* (July 20, 2006), D.E. 61.

diction to the next are so great that the Federal judiciary must intervene and force the state Board to reconsider how it applies duly considered state election law.[6662]

Rejecting Absentee Ballots Without Notice and an Opportunity to Be Heard

Zessar v. Helander (David H. Coar, N.D. Ill. 1:05-cv-1917)

> A 2005 federal class action filed four days before a scheduled election charged that the state's absentee-voting system did not comply with due-process requirements; an absentee vote cast in 2004 was not counted because of an erroneous conclusion that the ballot signature did not match the registration signature. The district judge initially heard a motion for emergency relief on election day, but set the matter for hearing two days later when defendants could participate after the plaintiff's attorney acknowledged difficulties arising from his filing the case so close to an election. Because the plaintiff voted in person on election day, the district judge denied him immediate relief at the second hearing. After certifying both plaintiff and defendant classes, the district judge determined that state procedures violated due process.
>
> *Topics:* Absentee ballots; signature matching; laches; class action; attorney fees.

A Lake County voter filed a federal class-action complaint in the Northern District of Illinois on April 1, 2005, four days before a scheduled election, charging that Illinois's absentee voting system did not comply with the Fourth Amendment's due-process requirements.[6663] The plaintiff's absentee vote in the 2004 general election had not been counted because of an erroneous conclusion that his signature on the ballot did not match his voter-registration signature.[6664] The plaintiff filed a motion for an emergency injunction on April 4.[6665]

6662. Opinion at 23–24, *id.* (Sept. 30, 2007), D.E. 117, 2007 WL 2892667.

6663. Complaint, Zessar v. Helander, No. 1:05-cv-1917 (N.D. Ill. Apr. 1, 2005), D.E. 1, *filed as* Ex. A, Preliminary-Injunction Motion, *id.* (Apr. 4, 2005), D.E. 6 [hereinafter *Zessar* Preliminary-Injunction Motion]; Zessar v. Keith, 536 F.3d 788, 790–91 (7th Cir. 2008).

6664. *Zessar*, 536 F.3d at 790; Summary-Judgment Opinion at 2, *Zessar*, No. 1:05-cv-1917 (N.D. Ill. Mar. 13, 2006), D.E. 87 [hereinafter *Zessar* Summary-Judgment Opinion], 2006 WL 642646.

6665. *Zessar* Preliminary-Injunction Motion, *supra* note 6663.

Judge David H. Coar heard the plaintiff's motion on election day.[6666] When asked why the case had been filed so close to an election, the plaintiff's attorney said that he had been preparing the complaint when he realized a by-election was at hand, so he promptly filed the case.[6667] The attorney agreed that his motion could be heard two days later when the defendants would be available to attend.[6668]

At the second hearing, Judge Coar denied the plaintiff emergency relief.[6669] Because he voted in person two days previously, he was not in need of emergency relief.[6670]

The case proceeded, and Judge Coar certified both plaintiff and defendant classes on March 7, 2006.[6671] On March 13, Judge Coar determined that Illinois's procedures violated due process.[6672] He ordered the parties to "submit proposed procedures for providing timely notice and pre-deprivation hearing to absentee voters whose ballots have been rejected."[6673]

Judge Coar decided on October 10 that July 3 amendments to Illinois's election code did not moot the case.[6674] On June 11, 2007, he determined that the preamendment statute was unconstitutional and the plaintiff was a prevailing party entitled to attorney fees on that issue.[6675] The court of appeals, however, decided that litigation on the preamendment statute had been mooted by the amendments.[6676]

6666. Transcript, *Zessar*, No. 1:05-cv-1917 (N.D. Ill. Apr. 5, 2005, filed June 3, 2005), D.E. 19 [hereinafter Apr. 5, 2005, *Zessar* Transcript]; Minutes, *id.* (Apr. 5, 2005), D.E. 8.

Judge Coar retired on December 31, 2010. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

6667. Apr. 5, 2005, *Zessar* Transcript, *supra* note 6666, at 3–4.

6668. *Id.* at 2, 4.

6669. Transcript, *Zessar*, No. 1:05-cv-1917 (N.D. Ill. Apr. 7, 2005, filed June 3, 2005), D.E. 19 [hereinafter Apr. 7, 2005, *Zessar* Transcript]; Minutes, *id.* (Apr. 7, 2005), D.E. 9.

6670. Apr. 7, 2005, *Zessar* Transcript, *supra* note 6669, at 5–6, 9.

6671. Opinion, *Zessar*, No. 1:05-cv-1917 (N.D. Ill. Mar. 7, 2006), D.E. 85, 2006 WL 573889.

6672. *Zessar* Summary-Judgment Opinion, *supra* note 6664; Zessar v. Keith, 536 F.3d 788, 791 (7th Cir. 2008); *see* Abdon M. Pallasch, *Judge: Nixed Absentee Votes Due Appeal*, Chi. Sun-Times, Mar. 14, 2006, at 36.

6673. *Zessar* Summary-Judgment Opinion, *supra* note 6664, at 19; *Zessar*, 536 F.3d at 791.

6674. Opinion, *Zessar*, No. 1:05-cv-1917 (N.D. Ill. Oct. 10, 2006), D.E. 124, 2006 WL 2916825; *Zessar*, 536 F.3d at 791.

6675. Opinion, *Zessar*, No. 1:05-cv-1917 (N.D. Ill. June 11, 2007), D.E. 157, 2007 WL 1703915; *Zessar*, 536 F.3d at 792.

6676. *Zessar*, 536 F.3d 788, *cert. denied*, 556 U.S. 1268 (2009).

Illinois's election code later provided that rejecting an absentee ballot required notice to the voter "within 2 days after the rejection but in all cases before the close of the period of counting provisional ballots" with an opportunity to be heard within fourteen days of the election.[6677]

Late Absentee Ballots in Florida

Friedman v. Snipes (Patricia A. Seitz and Alan S. Gold, S.D. Fla. 1:04-cv-22787)

> On the day of the 2004 general election, three voters filed a federal complaint claiming that although they requested absentee ballots on time they did not receive them in time to cast them without a risk that the ballots would not be counted. The district judge assigned to the case set a status hearing for the following morning, but on the day of the hearing she recused herself at the request of the state's secretary of state because of her husband's legal work for one of the major political parties. The judge to whom the case was reassigned reset the hearing for later that day. The second judge granted a temporary restraining order segregating the ballots in question, but he ultimately denied the plaintiffs a preliminary injunction after an evidentiary hearing.
>
> *Topics:* Absentee ballots; ballot segregation; recusal; case assignment.

On the day of the 2004 general election, three Florida voters filed a federal complaint in the Southern District of Florida's Miami courthouse claiming that although they requested absentee ballots on time they did not receive them in time to cast them without a risk that the ballots would not be counted.[6678] With their complaint, at 4:45 p.m.,[6679] the plaintiffs filed a motion for an emergency hearing on a temporary restraining order or a preliminary injunction.[6680]

6677. *Id.* at 792 (quoting the statute); *see* 10 ILCS 5/19-8(g-5).

6678. Complaint, Friedman v. Snipes, No. 1:04-cv-22787 (S.D. Fla. Nov. 2, 2004), D.E. 1; Friedman v. Snipes, 345 F. Supp. 2d 1356, 1358–59 (S.D. Fla. 2004); *see* Amended Complaint, *Friedman*, No. 1:04-cv-22787 (S.D. Fla. Nov. 4, 2004), D.E. 18; *see also* Alan Gomez, *Suit Seeks to Extend Voting Period for Absentees*, Palm Beach Post, Nov. 3, 2004, at 3B; Ann W. O'Neill & Brittany Wallman, *Unlike 2000, a Slow Day for Challenges*, S. Fla. Sun-Sentinel, Nov. 3, 2004, at 2B.

6679. Order, *Friedman*, No. 1:04-cv-22787 (S.D. Fla. Nov. 3, 2004), D.E. 11 [hereinafter Judge Gold's First *Friedman* Order].

6680. Motion, *id.* (Nov. 2, 2004), D.E. 2; *Friedman*, 345 F. Supp. 2d at 1358–59.

On the day that the case was filed, Judge Patricia A. Seitz set a status hearing for 9:30 a.m. on the following morning and ordered service of the complaint and motion on all defendants by 9:00 p.m. on election day.[6681]

After the election-litigation challenges in Florida of 2000, the court became additionally sensitive to the possibility of emergency filings at election time.[6682] Judges were notified promptly of cases assigned to them, and the court maintained contact information for election officials' attorneys.[6683] It was the responsibility of plaintiffs to serve defendants promptly, but chambers or clerk's office staff would typically contact defense counsel to give them a heads up as a way to make sure that the case could progress promptly.[6684]

On the day of hearing, Judge Seitz recused herself at the request of Florida's secretary of state; Judge Seitz's husband had provided legal work for the Democratic Party.[6685] The court reassigned the case to Judge Alan S. Gold,[6686] who reset the hearing for 12:30 p.m.[6687]

After the first hearing, Judge Gold issued a temporary restraining order requiring the defendants to "segregate and preserve any and all absentee ballots which were postmarked by November 2, 2004 and which were received by their respective offices between 7 p.m. on November 2, 2004 and midnight on November 12, 2004."[6688] Judge Gold set a preliminary-injunction evidentiary hearing for the following day and further oral arguments for Monday of the following week.[6689] At the November 4 eviden-

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6681. Order, *Friedman*, No. 1:04-cv-22787 (S.D. Fla. Nov. 2, 2004), D.E. 7; *see* Gomez, *supra* note 6678; O'Neill & Wallman, *supra* note 6678.

Tim Reagan interviewed Judge Seitz for this report by telephone on October 2, 2012.

6682. Interview with Judge Patricia A. Seitz, Oct. 2, 2012.

6683. *Id.* (noting that the court was blessed with a clerk's office of steady rocks and gifted problem solvers).

6684. *Id.*

6685. Recusal Order, *Friedman*, No. 1:04-cv-22787 (S.D. Fla. Nov. 3, 2004), D.E. 10 [hereinafter *Friedman* Recusal Order]; Minutes, *id.* (Nov. 4, 2004), D.E. 25; *see* Ann O'Neill, *Judge Orders 2 Counties Not to Destroy Absentee Ballots*, S. Fla. Sun-Sentinel, Nov. 4, 2004, at 7B.

6686. *Friedman* Recusal Order, *supra* note 6685.

6687. Judge Gold's First *Friedman* Order, *supra* note 6679.

6688. Order, *Friedman*, No. 1:04-cv-22787 (S.D. Fla. Nov. 3, 2004), D.E. 15; Minutes, *id.* (Nov. 3, 2004), D.E. 16 (noting that the hearing began fifty minutes late); Friedman v. Snipes, 345 F. Supp. 2d 1356, 1358 & n.1 (S.D. Fla. 2004); *see* O'Neill, *supra* note 6685.

6689. Order, *Friedman*, No. 1:04-cv-22787 (S.D. Fla. Nov. 3, 2004), D.E. 13; Order, *id.* (Nov. 4, 2004), D.E. 21.

tiary hearing, the plaintiffs and most of the witnesses testified by telephone.[6690]

On November 9, Judge Gold determined that the plaintiffs were not entitled to preliminary injunctive relief; the statutory deadline for receipt of cast absentee ballots was sufficiently reasonable.[6691] On November 22, Judge Gold closed the case on the plaintiffs' voluntary dismissal.[6692]

Casting a Provisional Ballot Because the Absentee Ballot Never Arrived

White v. Blackwell (David A. Katz, N.D. Ohio 3:04-cv-7689)

> On the morning of a general election, a voter who never received the absentee ballot she applied for filed an action to compel the state to accept her provisional ballot cast on election day. The court determined that the Help America Vote Act compelled relief for the plaintiff, and the judge ordered that all counties in the state accept provisional ballots from voters who did not receive absentee ballots that they applied for. A year later, for a special election, the judge was called upon to provide the same relief. He determined that the plaintiff was entitled to attorney fees, and the parties settled on an amount of $225,000.
>
> *Topics:* Absentee ballots; provisional ballots; Help America Vote Act (HAVA); 42 U.S.C. § 1983; enforcing orders; attorney fees.

At 10:37 a.m. on the day of the 2004 general election, a voter in Lucas County, Ohio, filed a federal action in the Northern District of Ohio's Toledo courthouse against the county's board of elections and Ohio's secretary of state, complaining that the plaintiff was denied the right to cast a provisional ballot although she never received the absentee ballot she had requested.[6693] The plaintiff also filed a motion for a temporary restraining order and a preliminary injunction.[6694]

6690. Transcript, *id.* (Nov. 4, 2004, filed Nov. 9, 2004), D.E. 38.

6691. *Friedman*, 345 F. Supp. 2d 1356; *see* Robert Timothy Reagan, Overseas Voting: The Uniformed and Overseas Citizens Absentee Voting Act 23 (Federal Judicial Center 2016); Ann W. O'Neill, *Federal Judge Rules Against Counting Late Absentee Ballots*, S. Fla. Sun-Sentinel, Nov. 10, 2004, at 2B.

6692. Order, *Friedman*, No. 1:04-cv-22787 (S.D. Fla. Nov. 22, 2004), D.E. 42.

6693. Complaint, White v. Blackwell, No. 3:04-cv-7689 (N.D. Ohio Nov. 2, 2004), D.E. 1 [hereinafter *White* Complaint]; White v. Blackwell, 418 F. Supp. 2d 988, 989–90 (N.D. Ohio 2006).

6694. Motion, *White*, No. 3:04-cv-7689 (N.D. Ohio Nov. 2, 2004), D.E. 2.

The complaint was signed by a Toledo attorney, listing two other attorneys at his firm as co-counsel.[6695] Also listed as co-counsel, with pending motions to appear pro hac vice, were five California attorneys, two of whom worked at the Lawyers' Committee for Civil Rights of the San Francisco Bay Area.[6696]

The court assigned the case to Judge David A. Katz,[6697] whose chambers had the clerk's office send up the plaintiffs' attorneys.[6698] Judge Katz wanted the state represented at the table as well, so he called the local office for the attorney general and asked that the office be represented in chambers in five minutes' time, ten minutes at the most.[6699] They arrived approximately one hour later.[6700]

Judge Katz recalled considerable disapproval of the plaintiff's large and multistate legal team waiting until the morning of the election to bring the action.[6701] After hearing from both sides,[6702] Judge Katz issued a temporary restraining order at 3:01 p.m.[6703] He held that pursuant to the Help America Vote Act (HAVA),[6704] "all those who appear at a polling place and assert their eligibility to vote irrespective of the fact that their eligibility may be subject to question by the people at the polling place or by the Board of

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6695. *White* Complaint, *supra* note 6693.

6696. *Id.*; *see* Lawyers' Committee for Civil Rights of the San Francisco Bay Area, www.lccr.com/index.php.

6697. Docket Sheet, *White*, No. 3:04-cv-7689 (N.D. Ohio Nov. 2, 2004).

Tim Reagan interviewed Judge Katz for this report by telephone on July 20, 2012. Judge Katz died on July 26, 2016. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

6698. Interview with Judge David A. Katz, July 20, 2012.

6699. *Id.*

6700. *Id.*

6701. *Id.*

6702. Minutes, *White*, No. 3:04-cv-7689 (N.D. Ohio Nov. 2, 2004), D.E. 5.

6703. Temporary Restraining Order, *id.* (Nov. 2, 2004), D.E. 4 [hereinafter *White* Temporary Restraining Order]; White v. Blackwell, 418 F. Supp. 2d 988, 990 (N.D. Ohio 2006); *see* Brief at 2, *White*, No. 3:04-cv-7689 (N.D. Ohio Nov. 18, 2004), D.E. 12 [hereinafter *White* Brief Supporting Motion to Amend Complaint] (stating the time of the order); *see also* Mark Niquette, *Lawsuits Focus on Provisional Balloting*, Columbus Dispatch, Nov. 3, 2004, at 9A; *Voting Issues Keep Courts Busy Up to Last Minute*, Cleveland Plain Dealer, Nov. 2, 2004, at S9.

6704. Pub. L. No. 107-252, 116 Stat. 1666 (2002), *as amended*, 52 U.S.C. §§ 20901–21145. *See generally* Marie Leary & Robert Timothy Reagan, The Help America Vote Act (Federal Judicial Center 2012); Symposium, *HAVA @ 10*, 12 Election L.J. 111 (2013).

Elections, shall be issued a provisional ballot."[6705] He ordered Lucas County's board of elections to

> immediately advise all precincts to issue provisional ballots to those voters who appear at the voting place and assert their eligibility to vote, including that the voter is a registered voter in the precinct in which he or she desires to vote, and that the voter is eligible to vote in an election for Federal office.[6706]

Judge Katz ordered Ohio's secretary of state to issue a similar order to all other county boards of elections within thirty minutes of his receiving Judge Katz's order.[6707]

Ohio continued to violate HAVA for a special election on August 2, 2005, to fill a seat in the U.S. House of Representatives.[6708] On January 19, 2006, Judge Katz determined that the plaintiff was entitled to a permanent injunction and, pursuant to 42 U.S.C. § 1983, attorney fees.[6709]

On October 27, 2005, Ohio's governor signed legislation that mooted the case by specifying the right of a voter to cast a provisional ballot when the voter requested but did not cast an absentee ballot,[6710] but the plaintiff was still entitled to attorney fees.[6711] The parties agreed to a payment of $225,000.[6712]

Public List of Absentee Voters

Meehan v. Philadelphia County Board of Commissioners (William H. Yohn, Jr., E.D. Pa. 2:04-cv-5123)

> Relying on a 1994 opinion by the U.S. Court of Appeals for the Third Circuit, Republican committees filed a federal action on election day 2004 complaining that the committees had wrongfully been denied a list of persons who had received absentee bal-

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6705. *White* Temporary Restraining Order, *supra* note 6703, at 3–4; *see* Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 Geo. Wash. L. Rev. 1206, 1230–31 (2005); Daniel P. Tokaji, *HAVA in Court: A Summary and Analysis of Litigation*, 12 Election L.J. 203, 207–08 & n.45 (2013).

6706. *White* Temporary Restraining Order, *supra* note 6703, at 4.

6707. *Id.*; *see White* Brief Supporting Motion to Amend Complaint, *supra* note 6703, at 2 (stating that the secretary issued his order seventy-nine minutes after Judge Katz issued his order).

6708. White v. Blackwell, 409 F. Supp. 2d 919, 921 (N.D. Ohio 2006).

6709. *Id.* at 922–25.

6710. Ohio Rev. Code § 3509.09; White v. Blackwell, 418 F. Supp. 2d 988, 990–91 (N.D. Ohio 2006).

6711. *White*, 418 F. Supp. 2d at 991–93.

6712. Order, White v. Blackwell, No. 3:04-cv-7689 (N.D. Ohio Dec. 27, 2006), D.E. 76.

> lots so that the committees could initiate challenges to absentee votes. After proceedings late on election day and on the following morning, the district judge signed consent decrees delaying by a few days the counting of absentee ballots. At the end of the week, the plaintiffs voluntarily dismissed their action.
>
> *Topics:* Absentee ballots; recusal; case assignment.

In 1994, the U.S. Court of Appeals for the Third Circuit affirmed a district court's injunction against certification of an election in which the campaign for the apparently winning candidate had improperly encouraged a large number of voters to vote absentee without valid excuses.[6713] On the day of the 2004 general election, the Republican committees of Philadelphia and Pennsylvania and the city committee's chair filed an action against the board of commissioners for Philadelphia County complaining that the board had failed to provide the committee chair with a list of persons who had received absentee ballots so that the committees could initiate challenges to absentee votes.[6714] With their complaint, the plaintiffs filed a motion for a preliminary injunction.[6715]

The case was assigned at first to Judge James McGirr Kelly, but following his recusal it was reassigned that same day to Judge William H. Yohn, Jr.[6716] Beginning at approximately 5:00 p.m. on election day, Judge Yohn heard arguments from both sides in court and signed a consent order requiring the board to provide the plaintiffs with a list of absentee voters, forbidding the board from counting absentee ballots until further order of the court, and scheduling a hearing for the following morning.[6717]

On Wednesday, Judge Yohn heard arguments in court and substituted his earlier order with a new consent order enjoining the counting of bal-

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6713. Marks v. Stinson, 19 F.3d 873 (3d Cir. 1994).

6714. Complaint, Meehan v. Phila. Cty. Bd. of Comm'rs, No. 2:04-cv-5123 (E.D. Pa. Nov. 2, 2004), D.E. 1; *see* Joseph Tanfani, Joseph A. Slobodzian & Mark Fazlollah, *Stacks of Absentee Ballots in Philadelphia Put on Hold*, Phila. Inquirer, Nov. 3, 2004, at A24.

6715. Preliminary-Injunction Motion, *Meehan*, No. 2:04-cv-5123 (E.D. Pa. Nov. 2, 2004), D.E. 2.

6716. Order, *id.* (Nov. 2, 2004), D.E. 3; Interview with Judge William H. Yohn, Jr., Oct. 18, 2012 (noting that both assignments were at random).

Tim Reagan interviewed Judge Yohn for this report by telephone. Judge Kelly died on March 5, 2005. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

6717. Order, *Meehan*, No. 2:04-cv-5123 (E.D. Pa. Nov. 3, 2004), D.E. 4; Docket Sheet, *id.* (Nov. 2, 2004) [hereinafter *Meehan* Docket Sheet]; *see* Jeff Gammage, *Both Parties' Weapon of Choice: Lawyers*, Phila. Inquirer, Nov. 3, 2004, at B9 (reporting that the hearing lasted forty minutes).

lots until Friday morning.[6718] On Friday, the plaintiffs voluntarily dismissed the case.[6719]

Early-Voting Locations in Duval County

Jacksonville Coalition for Voter Protection v. Hood (Harvey E. Schlesinger, M.D. Fla. 3:04-cv-1123)

> On a Tuesday, the day after early voting started, three voters' rights organizations and two voters filed a federal complaint seeking to compel the county to provide more early-voting locations. While the suit was pending, the county agreed to provide a few more sites, but not as many as the plaintiffs sought. The court heard the matter on Friday and issued its opinion on the following Monday. The court denied the plaintiffs immediate relief because they had not shown that the number and locations of early-voting sites discriminated against African American voters.
>
> *Topics:* Poll locations; early voting.

Three voters' rights organizations and two voters filed a federal complaint in the Middle District of Florida's Jacksonville courthouse on October 19, 2004, seeking to compel Duval County to provide more than one early-voting site for the 2004 general election.[6720] On the following day, the plaintiffs moved for a preliminary injunction and an expedited hearing.[6721] Early voting had begun on October 18 and was to continue until November 1, the day before the election.[6722] Before the plaintiffs filed their complaint, they sought to achieve their goals through local governmental bodies.[6723] After the plaintiffs filed their suit, Duval agreed to increase the number of early voting sites from one to five.[6724]

6718. Order, *Meehan*, No. 2:04-cv-5123 (E.D. Pa. Nov. 3, 2004), D.E. 5; *Meehan* Docket Sheet, *supra* note 6717.

6719. Notice, *Meehan*, No. 2:04-cv-5123 (E.D. Pa. Nov. 5, 2004), D.E. 8; *see* Joseph A. Slobodzian, *Phila. Officials to Tally Absentee Ballots*, Phila. Inquirer, Nov. 4, 2004, at B11 (reporting that the dispute "lost steam as it became clear that the ballots would not change the outcomes of any races").

6720. Complaint, Jacksonville Coal. for Voter Prot. v. Hood, No. 3:04-cv-1123 (M.D. Fla. Oct. 19, 2004), D.E. 1.

6721. Motion, *id.* (Oct. 20, 2004), D.E. 3.

6722. Order at 3, *id.* (Oct. 25, 2004), D.E. 13 [hereinafter Oct. 25, 2004, *Jacksonville Coal. for Voter Prot.* Order].

6723. *Id.* at 8–9.

6724. *Id.* at 4; *see* Ron Word, *More Duval Voting Sites Sought*, S. Fla. Sun-Sentinel, Oct. 23, 2004, at 6B.

Judge Harvey E. Schlesinger set the matter for a hearing on Friday, October 22.[6725] The defendants could respond to the plaintiffs' filings promptly because the controversy had already been brewing for some time.[6726] It was all hands on deck for Judge Schlesinger and his law clerks over the weekend.[6727] On Monday, Judge Schlesinger denied the plaintiffs immediate injunctive relief.[6728] He found that they had not shown how the number and location of early-voting sites in Duval County had discriminated against African American voters.[6729]

On January 6, 2005, Judge Schlesinger granted the plaintiffs a voluntary dismissal.[6730]

Early-Voting Locations in Volusia County

NAACP v. Lowe (G. Kendall Sharp, M.D. Fla. 6:04-cv-1469)

> On October 7, 2004, African American voters filed a federal action complaining that the county's only early-voting location was not convenient for African American voters on the county's east side. On the following day, the plaintiffs filed a motion for a preliminary injunction and expedited discovery, and the district judge set a hearing on the motion for eleven days later. Before the hearing occurred, however, the county agreed to open additional early-voting locations, so the parties stipulated dismissal of the action. The judge ruled that no more than one location was legally required, but the opening of additional sites mooted the case.
>
> *Topics:* Poll locations; early voting.

The Volusia County branch of the NAACP and three Volusia County African American voters filed a federal complaint on October 7, 2004, in the Middle District of Florida's Orlando courthouse against Volusia County's supervisor of elections, complaining that the county had opened an early-voting site only on the county's west side, which was too inconvenient for

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6725. Notice, *Jacksonville Coal. for Voter Prot.*, No. 3:04-cv-1123 (M.D. Fla. Oct. 21, 2004), D.E. 7; *see* Ron Word, *More Early Voting Sites Are Requested*, Miami Herald, Oct. 23, 2004, at 3B.

Tim Reagan interviewed Judge Schlesinger for this report by telephone on October 2, 2012.

6726. Interview with Judge Harvey E. Schlesinger, Oct. 2, 2012.

6727. *Id.*

6728. Oct. 25, 2004, *Jacksonville Coal. for Voter Prot.* Order, *supra* note 6722; *see* Ruth Morris, *Judge Oks Paperless Voting*, Orlando Sentinel, Oct. 26, 2004, at B1.

6729. Oct. 25, 2004, *Jacksonville Coal. for Voter Prot.* Order, *supra* note 6722, at 10–18.

6730. Order, *Jacksonville Coal. for Voter Prot.*, No. 3:04-cv-1123 (M.D. Fla. Jan. 6, 2005), D.E. 20.

the Daytona Beach African American voters on the east side.[6731] On the following day, the plaintiffs filed a motion for a preliminary injunction and expedited consideration.[6732] That day, Judge G. Kendall Sharp set a hearing on the motion for the morning of October 19.[6733]

By October 12, Volusia County had agreed to open additional early-voting locations, including two in Daytona Beach,[6734] so the parties stipulated dismissal of the action on October 15.[6735] On October 19, Judge Sharp ruled that the county was only required to open a single early-voting site at the department of elections' main office, but that it was free to open additional sites, and its promise to open additional sites in Daytona Beach mooted the case.[6736]

Mailing Overseas Absentee Ballots on Time in Georgia in 2004

United States v. Georgia (Charles A. Pannell, Jr., N.D. Ga. 1:04-cv-2040)

The Justice Department filed a federal complaint against Georgia for mailing primary-election ballots to overseas voters late. The district judge ordered Georgia to (1) accept faxed ballots, (2) accept internet-based write-in absentee ballots, (3) pay for express delivery of absentee ballots, and (4) accept absentee ballots until three days after the election if mailed by election day.

6731. Complaint, NAACP v. Lowe, No. 6:04-cv-1469 (M.D. Fla. Oct. 7, 2004), D.E. 1; *see* Kevin P. Connolly, *Suit Aims for Early-Voting Site in Daytona Beach*, Orlando Sentinel, Oct. 8, 2004, at B1; James Miller, *Volusia Sued Over Vote Sites*, Daytona News-J., Oct. 8, 2004, at 1A.

6732. Motion, *NAACP*, No. 6:04-cv-1469 (M.D. Fla. Oct. 8, 2004), D.E. 2.

6733. Amended Notice, *id.* (Oct. 12, 2004), D.E. 4 (granting each side one hour); Notice, *id.* (Oct. 8, 2004), D.E. 3 (granting each side thirty minutes); *see* James Miller, *Judge Sets Hearing Date for Suit on Early Voting*, Daytona News-J., Oct. 9, 2004, at 1C (noting that early voting was to begin on the day before the hearing).

Judge Sharp died on March 24, 2022. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

6734. *See* Kevin P. Connolly, *Volusia Changes Tune on Voting Sites*, Orlando Sentinel, Oct. 13, 2004, at B1; James Miller, *3 More Locations for Early Voting Set*, Daytona News-J., Oct. 13, 2004, at 1A; *Volusia Will Add 3 Election Sites*, Miami Herald, Oct. 14, 2004, at 8B; *see also* James Miller, *Early-Voting Option Explored*, Daytona News-J., Oct. 12, 2004, at 1A (reporting on the county's developing plans to open additional sites if the court ordered it to do so).

6735. Stipulation, *NAACP*, No. 6:04-cv-1469 (M.D. Fla. Oct. 15, 2004), D.E. 5; *see NAACP Settles Early-Voting Site Dispute*, Orlando Sentinel, Oct. 16, 2004, at B3; *NAACP Settles Suit*, Daytona News-J., Oct. 16, 2004, at 1C.

6736. Order, *NAACP*, No. 6:04-cv-1469 (M.D. Fla. Oct. 19, 2004), D.E. 6.

Topics: Absentee ballots; Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA); case assignment.

On July 13, 2004, the Justice Department filed a federal complaint against Georgia in the Northern District of Georgia claiming that several counties had failed to mail overseas voters their absentee ballots in time to be returned by the day of July 20 primary elections, and the planned runoff-election date of August 10 did not allow for enough time to mail overseas voters absentee ballots, as required by the Uniformed and Overseas Citizens Absentee Voting Act of 1986 (UOCAVA).[6737] With its complaint, the department filed a motion for a temporary restraining order and a preliminary injunction.[6738]

On the same day, Georgia's secretary of state filed a motion seeking similar relief in a 2003 case that resulted in court-ordered redistricting for Georgia's legislature.[6739]

Judge Charles A. Pannell, Jr., who had been assigned the 2003 case, heard the motions in court on July 14 and agreed to grant immediate injunctive relief.[6740] On July 15, he issued written orders providing the following relief for overseas voters: (1) Georgia would accept faxed ballots, (2) Georgia would accept internet-based write-in absentee ballots, (3) Georgia would pay for express delivery of absentee ballots, and (4) Georgia would accept absentee ballots until three days after the election if mailed by election day.[6741]

The 2004 action was dismissed by stipulation on July 25, 2005.[6742]

6737. Complaint, United States v. Georgia, No. 1:04-cv-2040 (N.D. Ga. July 13, 2004), D.E. 1; *see* Pub. L. No. 99-410, 100 Stat. 924, *as amended*, 52 U.S.C. §§ 20301–20311. *See generally* Robert Timothy Reagan, Overseas Voting: The Uniformed and Overseas Citizens Absentee Voting Act (Federal Judicial Center 2016).

6738. Motion, *United States v. Georgia*, No. 1:04-cv-2040 (N.D. Ga. July 13, 2004), D.E. 2.

6739. Motion, Larios v. Cox, No. 1:03-cv-693 (N.D. Ga. July 13, 2004), D.E. 259; *see* Larios v. Cox, 314 F. Supp. 2d 1357 (N.D. Ga. 2004) (approving a plan by a special master); Larios v. Cox, 300 F. Supp. 2d 1320 (N.D. Ga.) (determining that legislative districts violated the principle of one person one vote), *summarily aff'd*, 542 U.S. 947 (2004); *see also Cox Asks Feds for Help Counting Overseas Votes*, Macon Telegraph, July 14, 2004, at B6.

6740. Minutes, *United States v. Georgia*, No. 1:04-cv-2040 (N.D. Ga. July 14, 2004), D.E. 3; Minutes, *Larios*, No. 1:03-cv-693 (N.D. Ga. July 14, 2004), D.E. 260.

6741. Order, *United States v. Georgia*, No. 1:04-cv-2040 (N.D. Ga. July 16, 2004), D.E. 4; Order, *Larios*, No. 1:03-cv-693 (N.D. Ga. July 16, 2004), D.E. 261; *see* United States v. Georgia, 892 F. Supp. 2d 1367 (N.D. Ga. 2012) (providing similar injunctive relief eight years later); *see also* Reagan, *supra* note 6737, at 4–5.

6742. Stipulated Dismissal, *United States v. Georgia*, No. 1:04-cv-2040 (N.D. Ga. July

Military Absentee Ballots 2004

United States v. Pennsylvania (1:04-cv-830) and Reitz v. Rendell (1:04-cv-2360) (Yvette Kane, M.D. Pa.)

> The Justice Department sued to require Pennsylvania to send out absentee ballots to military personnel overseas in time for them to come back and be counted for a primary election. The judge ordered an extension of the ballots' due date. The judge also ordered an extension for military absentee ballots in the general election on a complaint by parents of two soldiers.
>
> *Topics:* Absentee ballots; military ballots.

Two Thursdays before the Tuesday, April 27, 2004, primary election in Pennsylvania, the U.S. Department of Justice filed an action in the Middle District of Pennsylvania's Harrisburg courthouse to ensure that absentee ballots cast by Pennsylvania citizens in the military would be counted.[6743] The department alleged, and was able to prove, that in many of Pennsylvania's sixty-seven counties election officials had violated the Uniformed and Overseas Citizens Absentee Voting Act of 1986 (UOCAVA)[6744] by mailing out ballots with insufficient time for them to be returned by the state's deadline of Friday before the election.[6745]

Pennsylvania responded to the action on Friday, the day after it was filed.[6746] District Judge Yvette Kane heard the matter that same Friday, at 2:48 p.m.,[6747] and granted the department injunctive relief that day.[6748] She was very careful to take testimony in the case and clearly explain her reasoning in her opinion.[6749]

25, 2005), D.E. 7.

6743. Complaint, United States v. Pennsylvania, No. 1:04-cv-830 (M.D. Pa. Apr. 15, 2004), D.E. 1 [hereinafter *United States v. Pennsylvania* Complaint].

6744. Pub. L. No. 99-410, 100 Stat. 924, *as amended*, 52 U.S.C. §§ 20301–20311. *See generally* Robert Timothy Reagan, Overseas Voting: The Uniformed and Overseas Citizens Absentee Voting Act (Federal Judicial Center 2016).

6745. Preliminary Injunction at 3, *United States v. Pennsylvania*, No. 1:04-cv-830 (M.D. Pa. Apr. 16, 2004), D.E. 7 [hereinafter *United States v. Pennsylvania* Preliminary Injunction]; *United States v. Pennsylvania* Complaint, *supra* note 6743, at 3–5.

6746. Government Brief, *United States v. Pennsylvania*, No. 1:04-cv-830 (M.D. Pa. Apr. 16, 2004), D.E. 5.

6747. Transcript, *id.* (Apr. 16, 2004, filed Feb. 10, 2005), D.E. 35.

Tim Reagan interviewed Judge Kane for this report by telephone on February 13, 2012.

6748. *United States v. Pennsylvania* Preliminary Injunction, *supra* note 6745.

6749. Interview with Judge Yvette Kane, Feb. 13, 2012.

One of three active judges in Harrisburg, Judge Kane received the case by random assignment.[6750] In deciding the case, she had the benefit of her previous experience overseeing Pennsylvania's elections as secretary of the commonwealth from 1995 until her appointment as a federal judge in 1998.[6751]

The matter was fraught with political tension and demonstrations on the courthouse steps.[6752] Senator Arlen Specter, who was receiving a strong primary-election challenge from Pat Toomey,[6753] the man who succeeded him as senator six years later,[6754] came to the courthouse and asked to address the judge, a request that Judge Kane denied.[6755]

Judge Kane declined to order that Pennsylvania accept military absentee ballots by fax or email,[6756] but she extended the deadline for their receipt by twenty-four days, to May 17, 2004, so long as the ballots were actually cast before the polls closed on election day.[6757] A state judge had granted the same extension a few days before the federal action was filed.[6758]

Judge Kane conducted an evidentiary proceeding on October 19 and 20, two weeks before the general election.[6759] Legal challenges in state court over whether Ralph Nader was entitled to a position on the general-election ballot were not resolved until October 19.[6760] Pennsylvania's su-

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6750. *Id.*

Had Judge Kane been unavailable, such as because she was on vacation or presiding over a jury trial, the case would have been randomly assigned to one of the other judges. *Id.* Senior judges in the district, which numbered about twice as many as active judges, usually were not assigned time-sensitive injunction cases. *Id.*

6751. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges; Interview with Judge Yvette Kane, Feb. 13, 2012.

6752. Interview with Judge Yvette Kane, Feb. 13, 2012.

6753. *See* James Dao, *Moderates Aid Senator Specter In a Close Race*, N.Y. Times, Apr. 14, 2004, at A23.

6754. *See* Thomas Fitzgerald, Jeff Gammage & Mari Schaefer, *Toomey Beats Sestak*, Phila. Inquirer, Nov. 3, 2010, at A1.

6755. Interview with Judge Yvette Kane, Feb. 13, 2012.

6756. *United States v. Pennsylvania* Preliminary Injunction, *supra* note 6745, at 4–5.

6757. *Id.* at 5–6.

6758. *See* Mark Scolforo, *Judge Extends Deadline for Absentee Ballots from Overseas*, Lancaster Intelligencer J., Apr. 22, 2004, at 1.

6759. Docket Sheet, United States v. Pennsylvania, No. 1:04-cv-830 (M.D. Pa. Apr. 15, 2004); *see* Joseph A. Slobodzian, *U.S. to Get a Hearing on Ballot Extension*, Phila. Inquirer, Oct. 14, 2004, at A20.

6760. Opinion, *United States v. Pennsylvania*, No. 1:04-cv-830 (M.D. Pa. Oct. 20, 2004), D.E. 33 [hereinafter *United States v. Pennsylvania* Opinion Denying Injunction],

preme court determined that Nader should be excluded, but absentee ballots including him had already been sent overseas.[6761] Judge Kane determined on October 20 that the Justice Department's proposed remedies would do more harm than good.[6762]

Acting pursuant to powers of attorney, parents of two soldiers—one in Iraq and one in Kuwait—filed a federal complaint in the Middle District on October 27, complaining that the soldiers were not sent absentee ballots on time.[6763] With their complaint, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction.[6764]

Judge Kane heard the motion on October 29.[6765] After discussions in chambers, she met with the parties in court to put terms of settlement on the record.[6766] The parties agreed to an order extending the deadline until eight days after the election for returned absentee ballots for federal offices, so long as the ballots were actually cast before the polls closed.[6767] Judge Kane signed a stipulated dismissal of the case on November 17.[6768]

The Justice Department's case was stayed on February 22, 2005, by agreement of the parties.[6769] On July 1, 2006, a new Pennsylvania law went into effect extending the deadline until seven days after an election.[6770] In light of the statutory change, the parties agreed to dismissal of the action subject to continued monitoring by the department.[6771]

2004 WL 2384999.

6761. *Id.* at 1–2; *see* Mario F. Cattabiani, *Election Offices Don't Have to Send New Ballots Abroad*, Phila. Inquirer, Oct. 21, 2004, at B4.

6762. *United States v. Pennsylvania* Opinion Denying Injunction, *supra* note 6760; *see* Reagan, *supra* note 6744, at 14; Cattabiani, *supra* note 6761.

6763. Complaint, Reitz v. Rendell, No. 1:04-cv-2360 (M.D. Pa. Oct. 27, 2004), D.E. 1.

6764. Motion, *id.* (Oct. 27, 2004), D.E. 2.

6765. Transcript, *id.* (Oct. 29, 2004, filed Oct. 29, 2004), D.E. 18 [hereinafter *Reitz* Transcript].

6766. *Id.*

6767. Order, *id.* (Oct. 29, 2004), D.E. 17, 2004 WL 2451454; *see Reitz* Transcript, *supra* note 6765, at 3–4; *see also* Chris Brennan, *Guv, GOP Agree on Extending Time to Count Military Votes*, Philadelphia Daily News, Oct. 30, 2004, at 2; Mario F. Cattabiani, *Vote Deadline Extended*, Phila. Inquirer, Oct. 30, 2004, at A1; Daniel P. Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws*, 44 Ind. L. Rev. 113, 118, 144 n.246 (2010).

6768. Order, *Reitz*, No. 1:04-cv-2360 (M.D. Pa. Nov. 17, 2004), D.E. 20.

6769. Order, United States v. Pennsylvania, No. 1:04-cv-830 (M.D. Pa. Feb. 22, 2005), 39.

6770. Memorandum of Understanding at 1–2, *id.* (July 28, 2006), D.E. 65 [hereinafter *United States v. Pennsylvania* Memorandum of Understanding].

6771. Dismissal Order, *id.* (July 31, 2006), D.E. 66; *United States v. Pennsylvania*

Court Supervision Over Absentee-Ballot Procedures

Willingham v. County of Albany (Norman A. Mordue, 1:04-cv-369) and Hoblock v. Albany County Board of Elections (Lawrence E. Kahn, 1:04-cv-1205) (N.D.N.Y.)

> A federal complaint sought an emergency injunction against absentee-ballot fraud in an ongoing special-election cycle, but the district judge determined that the plaintiffs did not establish a need for immediate federal relief beyond the relief provided by the state court. At the end of approximately three years of litigation, the case was resolved by consent decrees. Meanwhile, a different federal judge in the same district resolved a dispute over the counting of some absentee ballots by overruling the state high court's rejection of absentee ballots cast by voters who received them because of errors by the election board.
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> *Topics:* Absentee ballots; matters for state courts; case assignment; primary election; enjoining certification; class action; attorney fees; intervention; malapportionment.

On April 2, 2004, three candidates, six other voters, and two organizations filed a federal complaint in the Northern District of New York challenging absentee-voting procedures in an ongoing election cycle for a special election made necessary by the redistricting of Albany County's legislature.[6772] An amended complaint filed four days later added one candidate and five other voters as plaintiffs.[6773] A primary election was held on March 2, a replacement primary election was scheduled for April 8 in one district, and the general special election was scheduled for April 27.[6774]

The special elections were ordered by federal courts to remedy voting rights violations for the thirty-nine-member legislature's districting after the 2000 census.[6775] The court reassigned the new case from Judge Freder-

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Memorandum of Understanding, *supra* note 6770, at 2–5.

6772. Complaint, Willingham v. County of Albany, No. 1:04-cv-369 (N.D.N.Y. Apr. 2, 2004), D.E. 1 [hereinafter *Willingham* Complaint]; *see* Cathy Woodruff, *Lawsuit Aims to Protect Ballots*, Albany Times Union, Apr. 2, 2004, at B1.

6773. Amended Complaint, *Willingham*, No. 1:04-cv-369 (N.D.N.Y. Apr. 6, 2004), D.E. 3.

6774. *See Willingham* Complaint, *supra* note 6772, at 7; Cathy Woodruff, *Vote to End Ballot Crisis*, Albany Times Union, Mar. 20, 2004, at A1 (reporting that the replacement primary election was agreed on by the two leading candidates in the very close original primary election in light of allegations of absentee-ballot fraud).

6775. Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany, 357 F.3d 260 (2d Cir. 2004); Order, Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany, No. 1:03-cv-502 (N.D.N.Y. Feb. 2, 2004), D.E. 81; *see* Arbor Hill Con-

ick J. Scullin, Jr., to Judge Norman A. Mordue, who was presiding over the earlier litigation.[6776]

On April 14, 2004, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction.[6777] At 3:00 p.m. that day, Judge Mordue conducted a telephonic conference.[6778] At a second conference two days later, he denied the plaintiffs immediate relief.[6779] The plaintiffs' concerns in some of the districts had already been remedied by a state-court settlement, and the plaintiffs had not submitted evidence of improprieties in other districts or demonstrated a federal question.[6780]

The litigation was resolved over the course of three years by consent decrees.[6781]

Meanwhile, the April 27, 2004, special general election resulted in two races only three or four votes apart and the validity of a few dozen absentee ballots in question.[6782] Following state court litigation, New York's

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cerned Citizens Neighborhood Ass'n v. County of Albany, 522 F.3d 182, 183–84 (2d Cir. 2008) ("the district court may adjust [the base hourly rate in a fee award] to account for a plaintiff's reasonable decision to retain out-of-district counsel"); Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany, 369 F.3d 91 (2d Cir. 2004) (determining that the plaintiffs were entitled to attorney fees on appeal, but at the market rate for attorneys in the Northern District of New York, not in Manhattan where the court of appeals typically sits); Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany, 419 F. Supp. 2d 206 (N.D.N.Y. 2005) (awarding the plaintiffs $160,763.07 in fees and costs).

6776. Order, *Willingham*, No. 1:04-cv-369 (N.D.N.Y. Apr. 8, 2004), D.E. 6.

Judge Mordue died on December 29, 2022. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

6777. Motion, *Willingham*, No. 1:04-cv-369 (N.D.N.Y. Apr. 14, 2004), D.E. 9.

6778. Minutes, *id.* (Apr. 14, 2004), D.E. 10.

6779. Opinion, *id.* (Apr. 16, 2004), D.E. 21 [hereinafter Apr. 16, 2004, *Willingham* Opinion]; Minutes, *id.* (Apr. 16, 2004), D.E. 20.

6780. Apr. 16, 2004, *Willingham* Opinion, *supra* note 6779.

6781. Consent Decrees, *Willingham*, No. 1:04-cv-369 (N.D.N.Y. Feb. 3, 2005, and Jan. 22, 2007), D.E. 55, 143 to 146; *see* Willingham v. County of Albany, 593 F. Supp. 2d 446 (N.D.N.Y. 2006) (magistrate judge opinion discussing allegations that one or more defendants filled out absentee ballots for voters or influenced absentee votes through intimidation); Magistrate Judge Opinion, *Willingham*, No. 1:04-cv-369 (N.D.N.Y. July 12, 2005), D.E. 85, 2005 WL 1660114 (same); *see also* Default Judgment, *id.* (May 11, 2005), D.E. 80 (enjoining five defendants from enumerated activities involving absentee ballots); Second Amended Complaint, *id.* (Mar. 15, 2005), D.E. 67.

6782. Hoblock v. Albany Cty. Bd. of Elections, 341 F. Supp. 2d 169, 172 & n.2 (N.D.N.Y. 2004) (noting twenty-seven absentee ballots at issue according to the plaintiffs and forty at issue according to the defendants); *see* Complaint at 8–9, Hoblock v. Albany Cty. Bd. of Elections, No. 1:04-cv-1205 (N.D.N.Y. Oct. 19, 2004), D.E. 1 [hereinafter *Hob-*

court of appeals ruled on October 14 that the county board of elections, apparently misinterpreting Judge Mordue's orders, wrongfully issued absentee ballots to voters who requested them for the canceled November 2003 election, even if the voters did not make a new request for the April 2004 election, and ballots cast by those voters should not be counted.[6783] Two candidates and seven voters filed a federal class-action complaint in the Northern District on October 19, 2004, challenging the state high court's decision.[6784]

With their complaint, the class action plaintiffs filed a motion for a temporary restraining order and a preliminary injunction.[6785] Judge Lawrence E. Kahn issued a temporary restraining order to preserve the status quo until the motion for the preliminary injunction could be heard.[6786]

On October 25, Judge Kahn dismissed the candidate plaintiffs pursuant to the *Rooker-Feldman* doctrine, which states that among federal courts only the Supreme Court has appellate jurisdiction over state-court proceedings.[6787] Because the voters, however, were not parties to the state-court proceedings, Judge Kahn granted them preliminary relief by enjoining certification of the election in the two districts at issue.[6788] "[B]y providing absentee ballots that voters rely upon in good faith to cast their vote, and then invalidating them, the Board has effectively taken away their guaranteed right to vote in the election. . . . The unfairness to the Plaintiff voters is unmistakenly clear . . . ."[6789]

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lock Complaint]; Carol DeMare, *Federal Court to Rule on Legislature Elections*, Albany Times Union, Sept. 28, 2005, at B8; *see also* Carol DeMare, *Legislature at Full Strength*, Albany Times Union, Nov. 9, 2004, at B1 (reporting that incumbents continued to serve until the elections were resolved).

6783. *In re* Gross v. Albany Cty. Bd. of Elections, 3 N.Y.3d 251, 819 N.E.2d 197, 785 N.Y.S.2d 729 (2004); Hoblock v. Albany Cty. Bd. of Elections, 422 F.3d 77, 81–82 (2d Cir. 2005); *Hoblock*, 341 F. Supp. 2d at 172; *see* Carol DeMare, *Court of Appeals Tosses Out Absentee Ballots*, Albany Times Union, Oct. 15, 2004, at B4.

6784. *Hoblock* Complaint, *supra* note 6782; *Hoblock*, 422 F.3d at 82–83; *Hoblock*, 341 F. Supp. 2d at 171–72.

6785. Injunction Brief, *Hoblock*, No. 1:04-cv-1205 (N.D.N.Y. Oct. 19, 2004), D.E. 10.

6786. *Hoblock*, 341 F. Supp. 2d at 172; *see* Carol DeMare, *Ballot Counting Halted in County Races*, Albany Times Union, Oct. 21, 2004, at B4.

6787. *Hoblock*, 341 F. Supp. 2d at 172–75; *see* D.C. Ct. App. v. Feldman, 460 U.S. 462 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923); *see also* Martin A. Schwartz, Section 1983 Litigation 21–24 (Federal Judicial Center 3d ed. 2014).

6788. *Hoblock*, 341 F. Supp. 2d at 175–78; *see* Carol DeMare, *Legislature Races Remain on Hold*, Albany Times Union, Nov. 2, 2004, at B4.

6789. *Hoblock*, 341 F. Supp. 2d at 176–77.

On September 2, 2005, the court of appeals reviewed Judge Kahn's injunction and ruled that the *Rooker-Feldman* doctrine did not apply to the voters' claims so long as the voter plaintiffs represented all voters who were similarly issued absentee ballots improperly and not just voters supporting and controlled by the candidate plaintiffs; so the court remanded the case to provide the voter plaintiffs with an opportunity to amend their complaint if their claims were really independent of the candidate plaintiffs'.[6790] The plaintiffs filed an amended complaint on September 9.[6791] On December 5, Judge Kahn determined that the candidate plaintiffs were entitled to intervene.[6792]

Judge Kahn granted the plaintiffs summary judgment on May 24, 2006.[6793] Following the June 12 counting of absentee ballots, one of the candidate plaintiffs prevailed by four votes.[6794] The other candidate plaintiff remained tied with his opponent, and two absentee ballots remained in dispute because they were faxed to the board.[6795] On June 14, Judge Kahn overruled the last-minute challenge to those two ballots and ordered them counted because they were covered by the terms of previous orders.[6796] The last two ballots in question went to the candidate plaintiff, who was certified the winner of the election.[6797]

On November 7, Judge Kahn awarded the voter plaintiffs $46,038.68 in attorney fees and costs and awarded the candidate plaintiffs $19,529.50.[6798]

In 2015, Judge Kahn found that the 2011 redistricting of the legislature impermissibly diluted the voting strength of Black voters and approved a substitute districting plan for use in 2015 elections.[6799]

6790. Hoblock v. Albany Cty. Bd. of Elections, 422 F.3d 77, 92, 98 (2d Cir. 2005).

6791. Amended Complaint, Hoblock v. Albany Cty. Bd. of Elections, No. 1:04-cv-1205 (N.D.N.Y. Sept. 9, 2005), D.E. 27.

6792. Hoblock v. Albany Cty. Bd. of Elections, 233 F.R.D. 95 (N.D.N.Y. 2005).

6793. Hoblock v. Albany Cty. Bd. of Elections, 487 F. Supp. 2d 90 (N.D.N.Y. 2006); *see* Carol DeMare, *Court Orders Ballots to Be Counted*, Albany Times Union, May 26, 2006, at B9.

6794. Hoblock v. Albany Cty. Bd. of Elections, 488 F. Supp. 2d 163, 164 (N.D.N.Y. 2006) (noting that the vote was 706 to 702); *see* Carol DeMare, *Elections Resolved After Two-Year Dispute*, Albany Times Union, June 13, 2006, at B1.

6795. *Hoblock*, 488 F. Supp. 2d at 164–65 (noting that the candidates had 508 votes each).

6796. *Id.* at 165–66; *see* Carol DeMare, *Judge Orders Ballots Opened in Deadlocked Election*, Albany Times Union, June 15, 2006, at B9.

6797. *See* Carol DeMare, *Years Later, Election Is Over*, Albany Times Union, June 17, 2006, at B1.

6798. Opinion, Hoblock v. Albany Cty. Bd. of Elections, No. 1:04-cv-1205 (N.D.N.Y. Nov. 7, 2006), D.E. 87, 2006 WL 3248402.

Absentee Ballots Delivered by Third Parties

Pierce v. Allegheny County Board of Elections (Joy Flowers Conti, W.D. Pa. 2:03-cv-1677)

> On the Friday before the November 2003 general election, two candidates filed a federal action to enjoin the counting of absentee ballots that were delivered to a board of elections by persons other than the voters. The district judge cleared her calendar and held a hearing that afternoon, after which she ordered the ballots in question segregated. She conducted a day-long hearing on Monday; on Tuesday, she ruled that the ballots should remain segregated and deemed challenged under state law. State officials and state courts eventually determined that some of the ballots in question were valid and some were not.
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> *Topics:* Absentee ballots; ballot segregation; matters for state courts.

On the Friday before the November 2003 general election in Pennsylvania, two Republican candidates for office in Allegheny County filed civil actions in both state and federal court to enjoin the counting of absentee ballots that were delivered to the Allegheny County's board of elections by persons other than the voters.[6800] There were 937 such ballots in question.[6801] The court assigned the case to Judge Joy Flowers Conti, who issued a temporary restraining order that day after a hearing in the afternoon.[6802] She ordered segregation of the 937 absentee ballots in question.[6803]

According to Pennsylvania law, when casting an absentee ballot, "the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to [the] county board of election."[6804] It was customary

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6799. Pope v. Cty. of Albany, 94 F. Supp. 3d 302 (N.D.N.Y. 2015); Docket Sheet, Pope v. County of Albany, No. 1:11-cv-736 (N.D.N.Y. June 29, 2011) (Apr. 21, 2015, D.E. 437).

6800. Docket Sheet, Pierce v. Allegheny Cty. Bd. of Elections, No. 2:03-cv-1677 (Oct. 31, 2003); Pierce v. Allegheny Cty. Bd. of Elections, 324 F. Supp. 2d 684, 688–89 (W.D. Pa. 2003); *In re* Canvass of Absentee Ballots, 577 Pa. 231, 843 A.2d 1223, 1227 (2004).

6801. *Pierce*, 324 F. Supp. 2d at 688–91, 693, 706–09.

6802. *Id.* at 689; *In re Canvass*, 577 Pa. 231, 843 A.2d at 1227 n.5.

Tim Reagan interviewed Judge Conti for this report by telephone on October 31, 2012.

6803. *Pierce*, 324 F. Supp. 2d at 689; *see* Mike Wereschagin, *Federal Judge to Decide on Absentee Ballots*, Pittsburgh Trib. Rev., Nov. 4, 2003.

6804. 25 Pa. Stat. § 3146.6(a); *Pierce*, 324 F. Supp. 2d at 689–91, 698–700, 705–06 & n.1; *In re Canvass*, 577 Pa. 231, 843 A.2d at 1226; *In re* Canvass of Absentee Ballots, 839 A.2d 451, 453 & nn.1–2 (Pa. Commw. 2003).

for the election board in Allegheny County to accept absentee ballots from third parties.[6805] In response to an inquiry from the Republican Party, the county board tightened its policy on October 22, 2003.[6806] There were concerns that the new policy prohibiting third-party delivery ran afoul of protections for disabled voters, so the policy was revised on October 27 to permit receipt of absentee ballots from third parties who submitted special certifications.[6807]

It was clear to Judge Conti that prompt segregation of the ballots was essential to preserving the issue for litigation, because otherwise the ballots would become commingled and relief would become infeasible.[6808] Granting the temporary restraining order enabled the status quo to be preserved without unduly interfering with state proceedings.[6809] She cleared her calendar for the Friday afternoon proceeding, which attracted some public interest.[6810] Her next hearing on Monday drew more interest, but not so much as to be a problem for the court.[6811]

On Monday, the plaintiffs dropped their state-court action, and Judge Conti presided over a day-long hearing.[6812] On the following day, she converted her order into a preliminary injunction, declaring that the 937 ballots in question were to be segregated and deemed challenged under Pennsylvania law.[6813]

The plaintiffs promptly paid the challenge fee of $10 per ballot to the elections division.[6814] They hired a private investigator to examine the ballots, and they decided to go ahead with challenges for approximately

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6805. *Pierce*, 324 F. Supp. 2d at 690; *In re Canvass*, 577 Pa. 231, 843 A.2d at 1226; *In re Canvass*, 839 A.2d at 453; *see* Jeffrey Cohan, *No Absentee Ballots Accepted from Third Parties*, Pittsburgh Post-Gazette, Oct. 24, 2003, at B22.

6806. *Pierce*, 324 F. Supp. 2d at 690; *In re Canvass*, 577 Pa. 231, 843 A.2d at 1226; *In re Canvass*, 839 A.2d at 453–54; *see* Cohan, *supra* note 6805.

6807. *Pierce*, 324 F. Supp. 2d at 690; *In re Canvass*, 577 Pa. 231, 843 A.2d at 1226–27; *In re Canvass*, 839 A.2d at 454; *see* Wereschagin, *supra* note 6803.

6808. Interview with Judge Joy Flowers Conti, Oct. 31, 2012.

6809. *Id.*

6810. *Id.*

6811. *Id.*

6812. *Pierce*, 324 F. Supp. 2d at 689.

6813. *Id.*; *In re* Canvass of Absentee Ballots, 577 Pa. 231, 843 A.2d 1223, 1227 & n.5 (2004); *In re* Canvass of Absentee Ballots, 839 A.2d 451, 454 & n.3 (Pa. Commw. 2003); *see* Robert Baird, *Absentee Challenge Proceeds*, Pittsburgh Trib. Rev., Nov. 5, 2003; Torsten Ove, *937 Ballots to Be Held for Possible Challenges*, Pittsburgh Post-Gazette, Nov. 5, 2003, at C8.

6814. *See* Baird, *supra* note 6813.

440.[6815] Each of those challenged voters was given notice of the challenge and hearing procedures.[6816] Some municipal races remained undetermined because of the challenged ballots.[6817]

In a published opinion issued on November 13, Judge Conti explained that the candidates did not have standing to bring their federal complaint as candidates, but they had standing to bring the complaint as voters, because their votes could be diluted by improperly cast ballots.[6818] Whether any of Allegheny County's three policies for absentee ballots in 2003 violated state law was a matter for Pennsylvania's state courts to resolve, but whether the different counties were applying Pennsylvania law equally was a matter of equal protection under the U.S. Constitution.[6819] An appeal was dismissed as settled in January 2004.[6820]

On November 14, 2003, the elections board determined that seventy-four ballots should be disqualified.[6821] These included ballots cast according to county policy at the time that was later determined to be too lenient.[6822] The wife of Senator John Kerry and the local U.S. Attorney were among the affected voters.[6823] Some valid votes were disqualified because they had been commingled with invalid votes.[6824] On November 26, a state judge ruled that the ballots should be counted after all,[6825] a decision that was affirmed on appeal.[6826] Pennsylvania's supreme court, however, de-

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6815. *See* Mike Wereschagin, *Some Races Hinge on Fate of Ballots*, Pittsburgh Trib. Rev., Nov. 12, 2003.

6816. *In re Canvass*, 839 A.2d at 454–55; *see* Wereschagin, *supra* note 6815.

6817. *See* Wereschagin, *supra* note 6815.

6818. Pierce v. Allegheny Cty. Bd. of Elections, 324 F. Supp. 2d 684, 692–93 (W.D. Pa. 2003).

6819. *Id.* at 695–99.

6820. Docket Sheet, Pierce v. Allegheny Cty. Bd. of Elections, No. 03-4667 (3d Cir. Dec. 11, 2003).

6821. *In re* Canvass of Absentee Ballots, 577 Pa. 231, 843 A.2d 1223, 1228 (2004); *In re Canvass*, 839 A.2d at 455; *see* Jeffrey Cohan, *County Throws Out 74 Absentee Ballots*, Pittsburgh Post-Gazette, Nov. 15, 2003, at A1.

6822. *See* Cohan, *supra* note 6821.

6823. *See id.*

6824. *In re Canvass*, 577 Pa. 231, 843 A.2d at 1228; *In re Canvass*, 839 A.2d at 454; *see* Cohan, *supra* note 6821.

6825. *In re Canvass*, 577 Pa. 231, 843 A.2d at 1228–29; *In re Canvass*, 839 A.2d at 455–56, 458; *see* Jeffrey Cohan, *Judge Validates Absentee Votes*, Pittsburgh Post-Gazette, Nov. 27, 2003, at C1; Mike Wereschagin, *75 Absentee Ballots Will Be Counted*, Pittsburgh Trib. Rev., Nov. 28, 2003.

6826. *In re Canvass*, 839 A.2d at 453, 460, *rev'd*, 577 Pa. 231, 843 A.2d 1223; *see* David M. Brown, *Validity of 75 Ballots Affirmed*, Pittsburgh Trib. Rev., Dec. 19, 2003.

termined that fifty-six ballots were invalid because they had not been delivered by the voter as required by state law.[6827]

Both of the federal plaintiffs lost their elections.[6828]

Preclearance Required for Reduction in Polling Locations

Miguel Hernandez Chapter of the American GI Forum v. Bexar County (Royal Furgeson, 5:03-cv-816) and American GI Forum v. Bexar County (Fred Biery, No. 5:04-cv-181) (W.D. Tex.)

> A federal complaint challenged a reduction in early-voting locations without preclearance pursuant to section 5 of the Voting Rights Act. The district judge issued a temporary restraining order requiring additional voting locations, and the county opened several more. A suit by the same plaintiff and others about seven months later respecting a primary election for political-party chairs resulted in a temporary restraining order from a different district judge ordering only one polling place reopened, but preclearance arrived later that day, and the judge dismissed the action except for jurisdiction to enforce the temporary restraining order. The court of appeals stayed the temporary restraining order pending appeal, and the appeal was voluntarily dismissed after the election.
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> *Topics:* Poll locations; section 5 preclearance; early voting; primary election; ballot measure; attorney fees.

An interest group filed a federal complaint[6829] in the Western District of Texas on August 26, 2003, alleging that the dearth of early-voting polling places in Bexar County—the county that includes San Antonio—for a September 13 constitutional-amendment election[6830] violated both section 2[6831] and section 5[6832] of the Voting Rights Act. With its complaint, the group

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6827. *In re Canvass*, 577 Pa. 231, 843 A.2d 1223; *see* Jeffrey Cohan, *Third-Party Delivery of Ballots Ruled Illegal*, Pittsburgh Post-Gazette, Mar. 11, 2004, at B2; *Gantman Won Judge's Seat with Wider Lead*, Phila. Inquirer, Mar. 9, 2004, at B7.

6828. *In re Canvass*, 577 Pa. 231, 843 A.2d 1223, 1225 & n.1.

6829. Complaint, Miguel Hernandez Chapter of the Am. GI Forum v. Bexar County, No. 5:03-cv-816 (W.D. Tex. Aug. 26, 2003), D.E. 1.

6830. "The election will cover 22 proposed state constitutional amendments ranging from funds for veteran housing to limitations on damages in civil lawsuits." Opinion at 2–3, *id.* (Aug. 28, 2003), D.E. 3 [hereinafter 2003 *Am. GI Forum* Opinion].

6831. Pub. L. No. 89-110, § 2, 79 Stat. 437, 437, *as amended*, 52 U.S.C. § 10301.

6832. *Id.*, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination).

filed a motion for a temporary restraining order.[6833]

In 2001, there were twenty early-voting sites; for 2003, eleven were planned, and none was to be located on San Antonio's west side.[6834] Preclearance of the reduction in polling locations was pending.[6835] Following an August 27 hearing, Judge Royal Furgeson issued a temporary restraining order on August 28.[6836] "In the absence of precelearance, Defendants have no legal authority—statutory or decisional—to implement the voting changes . . . ."[6837]

> Instead, Defendants are to resort to the previously-cleared early-voting polling places used during the November 6, 2001 Constitutional Amendment Election. . . . The Court recognizes that some of these locations are no longer available. As such, the Court will require Defendants to locate early-voting polling places in buildings adjacent to or very near the previous locations, or in the alternative, to erect mobile voting units in the vicinity of the old locations.[6838]

At a compliance hearing held on August 29, Judge Furgeson and the parties were satisfied that the county had established eighteen early-voting sites[6839] and granted a voluntary dismissal on November 14.[6840]

On March 3, 2004, the plaintiff, four voters, and another interest group filed a federal complaint and a motion for a temporary restraining order in the Western District against Bexar County election officials alleging again that consolidation and change in polling places violated section 5, this time in a March 9 primary election for political-party chairs.[6841] Judge Fred

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6833. Docket Sheet, *Am. GI Forum*, No. 5:03-cv-816 (W.D. Tex. Aug. 26, 2003) [hereinafter 2003 *Am. GI Forum* Docket Sheet] (D.E. 2).

6834. 2003 *Am. GI Forum* Opinion, *supra* note 6830, at 2.

6835. *Id.*

6836. *Id.* at 6–7.

Judge Furgeson retired on May 31, 2013. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

6837. 2003 *Am. GI Forum* Opinion, *supra* note 6830, at 5.

6838. *Id.* at 6.

6839. 2003 *Am. GI Forum* Docket Sheet, *supra* note 6833 (D.E. 5); *see* 2003 *Am. GI Forum* Opinion, *supra* note 6830, at 7; *see* Tom Bower, *Three More Polling Sites Opened*, San Antonio Express-News, Aug. 30, 2003, at 4B.

6840. Order, Miguel Hernandez Chapter of the Am. GI Forum v. Bexar County, No. 5:03-cv-816 (W.D. Tex. Nov. 14, 2003), D.E. 8.

6841. Complaint, Am. GI Forum v. Bexar County, No. 5:04-cv-181 (W.D. Tex. Mar. 3, 2004), D.E. 1; Docket Sheet, *id.* (Mar. 3, 2004) (D.E. 2); *see* Guillermo Contreras, *Minority Groups Sue in Pursuit of More Bexar Polling Places*, San Antonio Express-News, Mar. 4, 2004, at 2B.

Biery set the case for hearing on March 5.[6842]

At the hearing, Judge Biery ordered one traditional polling place reopened, and he ordered notices posted at other closed polls instructing voters where the new polls were.[6843] "After the conclusion of the hearing, the Court received by facsimile transmission official word from the Department of Justice indicating preclearance has been granted."[6844] So on March 8, Judge Biery dismissed the action without prejudice, "save and except for retention of jurisdiction to enforce the temporary restraining order."[6845]

The county appealed,[6846] and on March 8, the court of appeals granted the county a stay pending appeal.[6847] The court of appeals accepted a voluntary dismissal of the appeal on March 30.[6848] On January 26, 2005, Judge Biery denied the plaintiffs attorney fees.[6849]

Ordering the Use of the Federal Write-In Absentee Ballot in Texas

United States v. Texas (Sam Sparks, W.D. Tex. 1:02-cv-195)

> Eighteen days before a federal runoff primary election, the Justice Department sought a court order requiring a state to allow overseas voters to use the federal write-in absentee ballot, as provided by the Uniformed and Overseas Citizens Absentee Voting Act of 1986, and the district court granted the requested immediate relief three days later. After a little more than one year, state

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6842. Order, *Am. GI Forum*, No. 5:04-cv-181 (W.D. Tex. Mar. 3, 2004), D.E. 3.

6843. Opinion at 2, *id.* (Mar. 8, 2004), D.E. 9 [hereinafter 2004 *Am. GI Forum* Opinion]; *see* Guillermo Contreras, *Judge: Reopen East Side Poll Site*, San Antonio Express-News, Mar. 6, 2004, at 3B.

6844. 2004 *Am. GI Forum* Opinion, *supra* note 6843, at 3.

6845. *Id.*

6846. Notice of Appeal, *Am. GI Forum*, No. 5:04-cv-181 (W.D. Tex. Mar. 8, 2004), D.E. 10.

6847. Order, Am. GI Forum v. Bexar County, No. 04-50221 (5th Cir. Mar. 8, 2004), *filed as* Order, *Am. GI Forum*, No. 5:04-cv-181 (W.D. Tex. Mar. 8, 2004), D.E. 11; *see* Order, *Am. GI Forum*, No. 04-50221 (5th Cir. Mar. 9, 2004), *filed as* Order, *Am. GI Forum*, No. 5:04-cv-181 (W.D. Tex. Mar. 9, 2004), D.E. 12 (denying the plaintiff's motion to lift the stay); *see also* Guillermo Contreras, *Appeals Court Blocks Order on Opening Polling Place*, San Antonio Express-News, Mar. 9, 2004, at 5B (reporting that the court of appeals "temporarily halted a dispute over whether county cost-saving measures closed too many polling sites and moved others to places less accessible to elderly or minority voters").

6848. Order, *Am. GI Forum*, No. 04-50221 (5th Cir. Mar. 30, 2004), *filed as* Order, *Am. GI Forum*, No. 5:04-cv-181 (W.D. Tex. Apr. 5, 2004), D.E. 19.

6849. Opinion, *Am. GI Forum*, No. 5:04-cv-181 (W.D. Tex. Jan. 26, 2005), D.E. 22.

> legislation provided for use of the federal write-in absentee ballot.
>
> *Topics:* Absentee ballots; Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA); primary election; section 5 preclearance.

Eighteen days before the April 9, 2002, runoff primary election in Texas, the Justice Department filed a federal complaint in the Western District of Texas seeking an order that Texas allow overseas voters to use the federal write-in absentee ballot, as provided by the Uniformed and Overseas Citizens Absentee Voting Act of 1986, because the four-week interval between the first primary election and the runoff primary election did not allow enough time for absentee ballots to make the round trip for overseas voters.[6850] With its complaint, the Justice Department filed a motion for a temporary restraining order and a preliminary injunction.[6851]

On the day that the complaint was filed, Judge Sam Sparks set the case for hearing three days later, on Monday afternoon.[6852] He granted the requested immediate relief on March 25, the day of the hearing.[6853]

As 2002 wore on, Judge Sparks stayed the case pending efforts to persuade the legislature to provide for the use by overseas voters of the federal write-in absentee ballot.[6854] On July 1, 2003, the defendant secretary of state reported that the governor signed legislation on June 20, and the change in Texas's election laws would be submitted to the Justice Department for preclearance pursuant to section 5 of the Voting Rights Act.[6855] On November 14, the secretary reported that the legislation had been pre-

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6850. Complaint, United States v. Texas, No. 1:02-cv-195 (W.D. Tex. Mar. 22, 2002), D.E. 1; *see* UOCAVA, Pub. L. No. 99-410, 100 Stat. 924, *as amended*, 52 U.S.C. §§ 20301–20311; 52 U.S.C. § 20303 (requiring the creation of a blank absentee ballot for use in a federal election when an overseas voter has not received the state's absentee ballot in time). *See generally* Robert Timothy Reagan, Overseas Voting: The Uniformed and Overseas Citizens Absentee Voting Act (Federal Judicial Center 2016).

6851. Motion, *United States v. Texas*, No. 1:02-cv-195 (W.D. Tex. Mar. 22, 2002), D.E. 2.

6852. Order, *id.* (Mar. 22, 2002), D.E. 3.

6853. Order, *id.* (Mar. 25, 2002), D.E. 6.

6854. Status Report, *id.* (Nov. 26, 2002), D.E. 15; Order, *id.* (Aug. 2, 2002), D.E. 14.

6855. Status Report, *id.* (July 1, 2003), D.E. 23; *see* Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination).

cleared on August 27.[6856] Judge Sparks signed a stipulated dismissal on February 9, 2004.[6857]

A Consent Decree on Overseas Voting in Federal Elections Trumps State Law

Harris v. Florida Elections Canvassing Commission (4:00-cv-453) and Medina v. Florida Election Canvassing Commission (4:00-cv-459) (Maurice M. Paul, N.D. Fla.)

> Two removed cases challenged the validity of absentee ballots received from overseas voters after the date of a presidential election. Although one complaint had been amended before removal to omit federal claims, the district judge found that a well-pleaded complaint would have included federal issues. The judge found that a consent decree in previous federal litigation nullified the state's requirement that overseas ballots be received by election day in federal elections. The court of appeals affirmed this decision.
>
> *Topics:* Absentee ballots; enforcing orders; removal; matters for state courts; case assignment; recusal.

> [T]he overseas absentee votes received after November 7th resulted in a net gain to Bush/Cheney of 739 votes. Additionally, the parties agreed that the certified difference between the two candidates in the state as a whole was 537 votes, in favor of Bush/Cheney. Thus, if all the overseas absentee votes received after November 7th were excluded, the result would be that Gore/Lieberman would have an advantage over Bush/Cheney of 202 votes (not considering, of course, the outcomes of the myriad other [lawsuits] pending around the state and federal systems).[6858]

Florida's governor removed to the Northern District of Florida on December 4, 2000, a November 30 action filed in Leon County's state court to contest the counting of absentee ballots cast by overseas voters and received after 7:00 p.m. on the day of the November 7 presidential election.[6859]

6856. Status Report, *United States v. Texas*, No. 1:02-cv-195 (W.D. Tex. Nov. 14, 2003), D.E. 25.

6857. Order, *id.* (Feb. 9, 2004), D.E. 29.

6858. Harris v. Fla. Elections Canvassing Comm'n, 122 F. Supp. 2d 1317, 1320 (N.D. Fla. 2000).

6859. Notice of Removal, Harris v. Fla. Elections Canvassing Comm'n, No. 4:00-cv-453 (N.D. Fla. Dec. 4, 2000), D.E. 1 (noting filing at 1:41 a.m.); *Harris*, 122 F. Supp. 2d at 1318; *see* Shana Gruskin, *Absentee Ballot Lawsuits Pile Up*, Ft. Lauderdale Sun-Sentinel, Dec. 1, 2000, at 17A.

The court assigned the case to Judge William Stafford, who recused himself, so the court reassigned the case to Judge Maurice M. Paul.[6860] Judge Paul ordered briefing by 9:00 a.m. on December 5 on whether removal was proper in light of an amended complaint filed in state court an hour or so before the case was removed.[6861] The amended complaint alleged violations of state law only.[6862] Also on December 5, the governor filed the required notice that all other defendants—state and county election officials and the Republican nominees—consented to removal.[6863] Judge Paul forgave the tardy filing of this notice.[6864]

Following a December 6 hearing,[6865] Judge Paul decided that removal was proper because "the plaintiffs in this case have artfully pled their case to avoid the obviously federal character of the issues they claim."[6866] Anticipating the arrival of a related removed case, Judge Paul scheduled a second hearing for December 7.[6867] Indeed, on December 6, state election officials removed a second and similar Leon County action.[6868]

On December 9, Judge Paul determined that a consent decree arising from litigation in the 1980s protected overseas voters' federal rights to participate in federal elections by overriding Florida's election statutes on

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6860. Order, *Harris*, No. 4:00-cv-453 (N.D. Fla. Dec. 4, 2000), D.E. 3.

Judge Paul died on December 29, 2016. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

6861. Order, *Harris*, No. 4:00-cv-453 (N.D. Fla. Dec. 4, 2000), D.E. 4 (noting that an amended complaint was filed in state court at 7:48 a.m., the notice of removal was filed in state court at 9:33 a.m., and the notice of removal was filed in federal court at 10:41 a.m.); *Harris*, 122 F. Supp. 2d at 1319.

6862. *Harris*, 122 F. Supp. 2d at 1318.

6863. Docket Sheet, *Harris*, No. 4:00-cv-453 (N.D. Fla. Dec. 4, 2000) (D.E. 9).

6864. *Harris*, 122 F. Supp. 2d at 1318–19 n.1; *see* John Sevigny, *Gore Banking on Twin Trials*, Tallahassee Democrat, Dec. 6, 2000, at A1.

6865. Minutes, *Harris*, No. 4:00-cv-453 (N.D. Fla. Dec. 7, 2000), D.E. 28 [hereinafter *Harris* Minutes].

6866. *Harris*, 122 F. Supp. 2d at 1319 n.2; *see* Harris v. Fla. Elections Comm'n, 235 F.3d 578, 579 (11th Cir. 2000) ("the state defendants were being sued to stop them from complying with . . . the order of a federal court"); *see also* Karla Schuster, *Ballot Suit Moves to Federal Court*, Ft. Lauderdale Sun-Sentinel, Dec. 7, 2000, at 2A.

6867. *Harris*, 122 F. Supp. 2d at 1319; Transcript, *Harris*, No. 4:00-cv-453 (N.D. Fla. Dec. 7, 2000, filed Dec. 11, 2000), D.E. 10; *Harris* Minutes, *supra* note 6865; *see* Linda Kleindienst & Karla Schuster, *Bush, Gore Teams Put Through Paces*, Ft. Lauderdale Sun-Sentinel, Dec. 8, 2000, at 1A.

6868. Notice of Removal, Medina v. Fla. Election Canvassing Comm'n, No. 4:00-cv-459 (N.D. Fla. Dec. 6, 2000), D.E. 1.

when overseas absentee ballots had to be received.[6869] Judge Paul denied a motion by an Alabama lawyer to file an amicus curiae brief.[6870]

The court of appeals affirmed Judge Paul's ruling on December 11,[6871] and the Supreme Court denied the plaintiffs a writ of certiorari on January 5, 2001.[6872]

Counting Federal Write-In Ballots Even If Election Officials Did Not Receive Absentee-Ballot Applications

Bush v. Hillsborough County Canvassing Board (Lacey A. Collier, N.D. Fla. 3:00-cv-533)

> A district judge ruled that it was improper for counties to not count federal write-in ballots cast by overseas voters solely because the counties had no record of an application for an absentee ballot or solely because the ballots were not postmarked.
>
> *Topics:* Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA); military ballots; absentee ballots; write-in candidate; enforcing orders.

During a time of uncertainty over who had won Florida's electoral votes in the 2000 presidential election, George W. Bush, Richard Cheney, and Florida's Republican Party filed a federal complaint on Sunday, November 26, in the Northern District of Florida to challenge the rejection by seven counties—Collier, Hillsborough, Okaloosa, Orange, Pasco, Polk, and Walton—of some absentee ballots cast by overseas and military voters.[6873]

6869. *Harris*, 122 F. Supp. 2d at 1321–25. *See generally* Robert Timothy Reagan, Overseas Voting: The Uniformed and Overseas Citizens Absentee Voting Act (Federal Judicial Center 2016).

6870. *Harris* Minutes, *supra* note 6865; *see* Amicus Motion, *Harris*, No. 4:00-cv-453 (N.D. Fla. Dec. 5, 2000), D.E. 13.

6871. *Harris*, 235 F.3d 578.

6872. Harris v. Fla. Elections Canvassing Comm'n, 531 U.S. 1062 (2001).

6873. Complaint, Bush v. Hillsborough Cty. Canvassing Bd., No. 3:00-cv-533 (N.D. Fla. Nov. 26, 2000), D.E. 1; Bush v. Hillsborough Cty. Canvassing Bd., 123 F. Supp. 2d 1305, 1306 (N.D. Fla. 2000); *see also* Steve Bousquet & Phil Long, *GOP Pushes Harder to Find Votes*, Miami Herald, Nov. 26, 2000, at 1A (reporting on earlier related state-court challenges); Michael Cooper, *The Multipronged Strategy for Bush's Absentee Votes*, N.Y. Times, Nov. 27, 2000, at A14 (same); David Karp, *Suit Hinges on Overseas Ballots*, St. Petersburg Times, Nov. 28, 2000, at 1B (same); Jeff Kunerth & John Kennedy, *It's Not Over; We'll Get a Winner But Not a President*, Orlando Sentinel, Nov. 26, 2000, at A1 (same).

Okaloosa and Walton are in the Northern District; the other five counties are in the Middle District. 28 U.S.C. § 89.

On Friday, December 1, the plaintiffs moved for expedited hearing,[6874] and Judge Lacey A. Collier set the case for hearing on December 5.[6875] On December 8, Judge Collier granted the plaintiffs relief.[6876]

The Uniformed and Overseas Citizens Absentee Voting Act of 1986[6877] provided for the use of a federal blank absentee ballot by an overseas voter who had not received the state's absentee ballot in time, despite having requested it in time.[6878] The write-in ballot included an oath that the voter had made a timely application for an absentee ballot.[6879] Judge Collier ordered the counties to count federal write-in ballots even if the counties had no record of the voters' requesting absentee ballots.[6880] "We must presume, without evidence to the contrary, that if the election official does not have the application on record, it is because of a problem with the overseas mail system or their own clerical error."[6881]

Judge Collier also ordered the counties to count federal write-in ballots even if they were not postmarked, because the federal statute specified no postmark requirement and the ballot included an oath that the voter had timely submitted the ballot from outside the United States.[6882]

On December 9, the plaintiffs filed a motion with the court certifying that they had been only partially successful in notifying local election offi-

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6874. Motion, *Bush*, No. 3:00-cv-533 (N.D. Fla. Dec. 1, 2000), D.E. 5; *Bush*, 123 F. Supp. 2d at 1306.

6875. Order, *Bush*, No. 3:00-cv-533 (N.D. Fla. Dec. 1, 2000), D.E. 4; *Bush*, 123 F. Supp. 2d at 1306; *see* Minutes, *Bush*, No. 3:00-cv-533 (N.D. Fla. Dec. 5, 2000), D.E. 21; *see also* Louis Cooper, *Rejected Ballot Issue in Judge's Court*, Pensacola News J., Dec. 6, 2000, at 2A.

6876. *Bush*, 123 F. Supp. 2d 1305; *see* Marc Caputo, *U.S. Judge: Overseas Ballots Must Be Counted*, Palm Beach Post, Dec. 10, 2000, at 18A; Louis Cooper, *Some Overseas Ballots Ruled Valid*, Pensacola News J., Dec. 9, 2000, at 2A; Michael Cooper & Richard Pérez-Peña, *In a Shadow, Other Cases Go On*, N.Y. Times, Dec. 12, 2000, at A26 ("Judge Collier rejected several of the Bush camp's arguments for reinstating votes, but agreed in two areas."); William Yardley, Phil Long & Andres Viglucci, *GOP Fights Tossing of Undated Ballots*, Miami Herald, Dec. 6, 2000, at 21A. *See generally* Daniel P. Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws*, 44 Ind. L. Rev. 113, 143–44 (2010).

6877. Pub. L. No. 99-410, 100 Stat. 924, *as amended*, 52 U.S.C. §§ 20301–20311. *See generally* Robert Timothy Reagan, Overseas Voting: The Uniformed and Overseas Citizens Absentee Voting Act (Federal Judicial Center 2016).

6878. *Bush*, 123 F. Supp. 2d at 1310–12.

6879. *Id.* at 1317.

6880. *Id.*

6881. *Id.*; *see* Reagan, *supra* note 6877, at 15.

6882. *Bush*, 123 F. Supp. 2d at 1316–17.

cials of Judge Collier's ruling,[6883] and Judge Collier granted the plaintiffs a temporary restraining order requiring compliance with her ruling even without formal notice.[6884]

Political Party's Mailing Absentee Ballot Applications

Republican Party of New Mexico v. New Mexico (Dee Benson, D.N.M. 1:00-cv-1307)

> A federal complaint challenged a new state rule prohibiting political parties from mailing out absentee-ballot applications. The case was assigned to a visiting judge after all judges on the local bench recused themselves. The presiding judge denied the plaintiffs immediate injunctive relief, and the case subsequently settled.
>
> *Topics:* Absentee ballots; party procedures; recusal; case assignment.

On September 15, 2000, New Mexico's Republican Party and its chair filed a federal complaint challenging a new rule by New Mexico's secretary of state that prohibited political parties from mailing out absentee-ballot applications.[6885] With their complaint, the plaintiffs filed a motion for a preliminary injunction.[6886] On September 22, the plaintiffs filed a motion for a temporary restraining order.[6887]

Upon recusal by the local bench, the court assigned the case to visiting Judge Dee Benson of the District of Utah.[6888] On October 30, Judge Benson denied the plaintiffs immediate injunctive relief.[6889] The court then gave the state defendants an extension of time to respond to the complaint

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6883. Motion, Bush v. Hillsborough Cty. Canvassing Bd., No. 3:00-cv-533 (N.D. Fla. Dec. 9, 2000), D.E. 25.

6884. Temporary Restraining Order, *id.* (Dec. 9, 2000), D.E. 26; *see* Corrected Temporary Restraining Order, *id.* (Dec. 12, 2000), D.E. 27.

6885. Complaint, Republican Party of N.M. v. New Mexico, No. 1:00-cv-1307 (D.N.M. Sept. 15, 2000), D.E. 1; *see* Barry Massey, *Absentee Ballot Issue Before Judge*, Albuquerque J., Oct. 4, 2000, at B3.

6886. Preliminary-Injunction Motion, *Republican Party*, No. 1:00-cv-1307 (D.N.M. Sept. 15, 2000), D.E. 2.

6887. Temporary-Restraining-Order Motion, *id.* (Sept. 22, 2000), D.E. 13.

6888. Assignment Order, *id.* (Sept. 22, 2000), D.E. 9; *see* Richard Benke, *Absentee Voting Argument Rejected*, Albuquerque J., Oct. 11, 2000, at B3.

Judge Benson died on November 30, 2020. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

6889. Order, *Republican Party*, No. 1:00-cv-1307 (D.N.M. Oct. 30, 2000), D.E. 17; *see* Benke, *supra* note 6888.

while the parties negotiated a settlement.[6890] The case was voluntarily dismissed on September 17, 2001.[6891]

6890. Order, *Republican Party*, No. 1:00-cv-1307 (D.N.M. June 19, 2001), D.E. 21; Order, *id.* (Dec. 14, 2000), D.E. 19.

6891. Voluntary Dismissal, *id.* (Sept. 17, 2001), D.E. 22.

12. Voter Identification

In 2008, the Supreme Court held a photo-identification requirement for Indiana voters to not be facially unconstitutional.[6892] "[T]he interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process."[6893]

That does not mean that voter-identification laws are beyond scrutiny, but determining what the legal constraints are is not always a simple matter. Two weeks before the 2006 general election, a suit filed in the Southern District of Ohio challenged the state's new voter-identification law.[6894] Two days later, a district judge enjoined the new law, but the court of appeals stayed the injunction another five days after that.[6895] The emergency case was part of litigation that began in August 2006 and ended in March 2018, and it also concerned to what extent the elective franchise could be imperiled by poll-worker error.[6896]

Some states passed voter-identification laws that election officials conceded might be problematic, and so federal judges issued injunctions that state officials promised not to appeal. A district judge in Ohio enjoined a rule that required naturalized citizens to produce naturalization certificates at the polls if their citizenship was challenged.[6897]

In 2004, a district judge enjoined a Minnesota law that allowed tribal photo identification only for Native American voters living on reservations.[6898] Litigation in North Dakota from 2016 to 2020 resulted in a con-

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6892. Crawford v. Marion Cty. Election Bd., 553 U.S. 181 (2008).

6893. *Id.* at 196 (opinion by Justice Stevens, joined by Chief Justice Roberts and Justice Kennedy); *see id.* at 204 (opinion by Justice Scalia, joined by Justices Thomas and Alito) ("the burden at issue is minimal and justified").

6894. Complaint, NEOCH v. Brunner, No. 2:06-cv-896 (S.D. Ohio Oct. 24, 2006), D.E. 2.

6895. NEOCH v. Blackwell, 467 F.3d 999 (6th Cir. 2006).

6896. *See* "Ohio's Voter-Identification Law," *infra* page 923.

6897. Boustani v. Blackwell, 460 F. Supp. 2d 822, 824 (N.D. Ohio 2006), *as reported in* "Extra Proof of Citizenship for Naturalized Citizens," *infra* page 930.

6898. Temporary Restraining Order, ACLU of Minn. v. Kiffmeyer, No. 0:04-cv-4653 (D. Minn. Oct. 29, 2004), D.E. 13, *as reported in* "Native American Voter Identification," *infra* page 935.

sent decree specifying how residents of Indian reservations could prove their residential addresses.[6899]

A district judge in Massachusetts enjoined a new local requirement—which would have gone into effect with little notice to voters—that voters without identification sign their ballots.[6900] A judge in New York declined to order special identification rules for a minor party that complained of infiltration in advance of a primary election.[6901]

A suit in Tennessee challenged the exclusion of library cards from the list of identification documents that voters could use to vote, and the district judge determined that the exclusion was permitted because library cards were issued by a local government and approved identification documents were issued by state and federal authorities.[6902]

In Georgia, the legislature amended an identification law that a district judge enjoined,[6903] and the judge decided that the amended law passed muster.[6904] The court of appeals agreed.[6905]

Voter-Identification Challenge for Native Americans Without Recognized Residential Street Addresses

Spirit Lake Tribe v. Jaeger (Daniel L. Hovland, D.N.D. 1:18-cv-222)

> Although acknowledging that the plaintiffs' claims were not without merit, a district judge denied immediate relief in a 2018 suit challenging the application of a voter-identification requirement to residents of Indian reservations. The plaintiffs claimed that Native American voters often did not have recognized residential street addresses. But the complaint was filed only one week before the election. The case, and a related 2016 case, were resolved by a consent decree in 2020 that recognized tribal identification documents.

6899. *See* "Voter-Identification Challenge for Native Americans Without Recognized Residential Street Addresses," *infra* page 916.

6900. Preliminary Injunction, Morris v. City of Lawrence, No. 1:01-cv-11889 (D. Mass. Nov. 5, 2001), D.E. 6, *as reported in* "Voter Identification in Lawrence, Massachusetts," *infra* page 938.

6901. *See* "An Accusation of Widespread Fraudulent Registrations," *infra* page 937.

6902. Opinion, Turner-Golden v. Hargett, No. 3:12-cv-765 (M.D. Tenn. July 26, 2012), D.E. 10, 2012 WL 3202307, *as reported in* "Library Cards as Photo Identification," *infra* page 921.

6903. Common Cause/Ga. v. Billups, 406 F. Supp. 2d 1326 (N.D. Ga. 2005), *as reported in* "Voter Photo Identification," *infra* page 932.

6904. Common Cause/Ga. v. Billups, 504 F. Supp. 2d 1333 (N.D. Ga. 2007).

6905. Common Cause/Ga. v. Billups, 554 F.3d 1340 (11th Cir. 2009).

Topics: Voter identification; laches; interlocutory appeal; attorney fees.

North Dakota has no voter registration requirement, so a resident may appear at the polls on election day and cast a ballot without any previous expression of desire to vote. Election officials at the polls are charged with determining whether a person who appears is qualified to vote. Before 2013, voters could establish their qualifications by using certain forms of identification. If a voter could not present proper identification, the voter was nonetheless permitted to cast a ballot after swearing an affidavit or upon vouching by a poll worker.[6906]

An American Indian tribe and six members of American Indian tribes filed a federal complaint in the District of North Dakota one week before the 2018 general election to challenge a state requirement that voters show identification proving current residential addresses.[6907]

Many streets on the Spirit Lake Reservation do not have marked signs on them and many houses are not labeled with numbers. On parts of the Reservation, the residences do not have street addresses assigned. Many members who do have street addresses assigned by 911 do not know their address and have not been notified of their address. On parts of the Reservation, mail service does not exist and members often rely upon P.O. boxes to receive mail.[6908]

On the next day, the plaintiffs filed a motion for a temporary restraining order.[6909]

An Earlier Stayed Injunction

The case was filed after the court of appeals stayed, on September 24, an injunction issued in a 2016 case.[6910]

In its order granting injunctive relief, the district court highlighted its concern that under current state law, a resident who does not have a "current residential street address" will never be qualified to vote. No plaintiff in this case falls in that category. If any resident of North Dakota

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6906. Brakebill v. Jaeger, 932 F.3d 671, 674 (8th Cir. 2019).

6907. Complaint, Spirit Lake Tribe v. Jaeger, No. 1:18-cv-222 (D.N.D. Oct. 30, 2018), D.E. 1.

6908. *Id.* at 4–5.

6909. Temporary-Restraining-Order Motion, *id.* (Oct. 31, 2018), D.E. 8; *see* Amy Dalrymple, *Court Case Seeks Relief for Native Voters in N.D.*, Bismarck Trib., Nov. 1, 2018, at A1.

6910. Brakebill v. Jaeger, 905 F.3d 553 (8th Cir. 2018); *see* Second Preliminary Injunction, Brakebill v. Jaeger, No. 1:16-cv-8 (D.N.D. Apr. 3, 2018), D.E. 99 [hereinafter Second *Brakebill* Preliminary Injunction], 2018 WL 1612190.

> lacks a current residential street address and is denied an opportunity to vote on that basis, the courthouse doors remain open.[6911]

The earlier case began with a January 20, 2016, federal complaint in the District of North Dakota filed by seven Native American voters challenging recently enacted voter-identification laws.[6912] Judge Daniel L. Hovland issued a preliminary injunction on August 1.[6913]

> Until recently, North Dakota used a system of small voting precincts, whereby election boards and poll workers generally knew who were and who were not eligible voters in their precincts. If a poll clerk happened not to know a voter, they could ask that voter to produce one of many forms of an acceptable identification ("ID") showing the voter's residential address and birthday.[6914]

As a fail-safe, "the voter could execute an affidavit swearing under penalty of perjury that he or she was a qualified elector in the precinct."[6915] Subsequent legislation tightened voter-identification options and removed the fail-safe provision.[6916] Judge Hovland's injunction prohibited North Dakota from enforcing its voter-identification requirements without an adequate fail-safe provision.[6917]

Legislation following Judge Hovland's injunction provided for the set-aside of a ballot cast by a voter without sufficient identification so that the

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6911. *Brakebill*, 905 F.3d at 561.

6912. Complaint, *Brakebill*, No. 1:16-cv-8 (D.N.D. Jan. 20, 2016), D.E. 1; Spirit Lake Tribe v. Jaeger, 5 F.4th 848, 852 (8th Cir. 2021); *see* Amended Complaint, *Brakebill*, No. 1:16-cv-8 (D.N.D. Dec. 27, 2017), D.E. 77; *see also* James MacPherson, *Tribal Members Sue N.D. Over Voter ID*, Bismarck Trib., Jan. 22, 2016, at A1.

6913. First Preliminary Injunction, *Brakebill*, No. 1:16-cv-8 (D.N.D. Aug. 1, 2016), D.E. 50 [hereinafter First *Brakebill* Preliminary Injunction], 2016 WL 7118548; *Spirit Lake Tribe*, 5 F.4th at 852; *see* Robert Barnes, *Judge Rules N. Dakota's Voter-ID Law Unfair to Native Americans*, Wash. Post, Aug. 2, 2016, at A15; John Hageman, *N.D. Preps for Election After Ruling on Voter ID*, Bismarck Trib., Aug. 14, 2016, at A1; Mike Nowatzki, *Judge Blocks Elector ID Law*, Bismarck Trib., Aug. 2, 2016, at A1.

"North Dakota's secretary of state, Alvin Jaeger, indicated in an interview that the state would not appeal the decision and that November's election would revert to using less restrictive identification rules that were in force before the 2013 law was enacted." Michael Wines, *Judge Blocks North Dakota's Voter ID Law*, N.Y. Times, Aug. 2, 2016, at A16.

6914. First *Brakebill* Preliminary Injunction, *supra* note 6913, at 2.

6915. *Id.*

6916. *Id.* at 3–4.

6917. *Id.* at 28–29; *Spirit Lake Tribe*, 5 F.4th at 852.

voter could return with identification before the meeting of the canvassing board six days after the election.[6918]

On April 3, 2018, Judge Hovland concluded, "The current law completely disenfranchises anyone who does not have a 'current residential street address.'"[6919] He determined that "the Secretary of State shall allow a qualified voter to receive a ballot if they provide . . . identification that includes either a 'current residential street address' or a current mailing address (P.O. Box or other address) in North Dakota."[6920]

On September 24, the court of appeals, by a vote of two to one, stayed as too broad the injunction's allowance of a mailing address as proof of eligibility to vote.[6921] "[A]ssuming that some communities lack residential street addresses, that fact does not justify a statewide injunction that prevents the Secretary from requiring a form of identification with a residential street address from the vast majority of residents who have residential street addresses."[6922] Over a dissent by Justices Ginsburg and Kagan, the Supreme Court declined on October 9 to vacate the stay.[6923]

No Injunction for the Spirit Lake Tribe

Because of how close the complaint was filed before the election, Judge Hovland denied the Spirit Lake Tribe and the other plaintiffs in the new case immediate relief on Thursday, November 1.[6924]

> In this case, early voting has already begun. Election day is less than one week away. The allegations in the complaint, the motion for a temporary restraining order, and the attached affidavits give this Court great cause for concern. The allegations will require a detailed response from the Secretary of State as this case proceeds. The litany of problems identified in this new lawsuit were clearly predictable and certain to occur as the Court noted in its previous orders . . . . However, a further injunction

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6918. Second *Brakebill* Preliminary Injunction, *supra* note 6910; *Spirit Lake Tribe*, 5 F.4th at 852.

6919. Second *Brakebill* Preliminary Injunction, *supra* note 6910, at 13 (citation omitted).

6920. *Id.* at 15; *see Spirit Lake Tribe*, 5 F.4th at 852.

6921. Brakebill v. Jaeger, 905 F.3d 553, 561 (8th Cir. 2018); Brakebill v. Jaeger, 932 F.3d 671, 676 (8th Cir. 2019); *see* John Hageman, *Appeals Court Ruling a Setback*, Bismarck Trib., Sept. 25, 2018, at B1.

6922. *Brakebill*, 905 F.3d at 558; *see Brakebill*, 932 F.3d at 678 (coming to the same conclusion when finally resolving the appeal).

6923. Brakebill v. Jaeger, 586 U.S. ___, 139 S. Ct. 10 (2018).

6924. Opinion, Spirit Lake Tribe v. Jaeger, No. 1:18-cv-222 (D.N.D. Nov. 1, 2018), D.E. 33 [hereinafter *Spirit Lake Tribe* Injunction Denial Opinion], 2018 WL 5722665; *see* Amy Dalrymple, *Judge Denies Emergency Motion*, Bismarck Trib., Nov. 2, 2018, at A1.

> on the eve of the election will create as much confusion as it will alleviate, and is foreclosed by precedent which is hesitant to permit eleventh-hour changes to election laws.[6925]

On November 2, Judge Hovland adopted a negotiated stipulation by the parties confirming the individual plaintiffs' eligibility to vote in the November 6 general election.[6926] An amended complaint included a second tribe as a plaintiff.[6927] On June 17, 2019, Judge Hovland struck from the amended complaint incorporations by reference to the other case's complaint.[6928]

Resolution of the Earlier Appeal

With the same vote as issued the stay in 2018, the court of appeals vacated Judge Hovland's stayed injunction on July 31, 2019.[6929]

> The district court in this case enjoined entirely the statutory requirements concerning a residential street address, valid form of identification, and supplemental documents. If the court had rejected the request for statewide injunctive relief and required the plaintiffs to proceed with as-applied challenges based on their individual circumstances, then there may well have been time before the most recent election to consider whether narrower relief was justified.[6930]

Settlement

On February 10, 2020, Judge Hovland denied a motion to dismiss a second amended complaint in the 2018 case.[6931] A settlement awaited tribal council approval.[6932]

6925. *Spirit Lake Tribe* Injunction Denial Opinion, *supra* note 6924, at 2 (quotation marks omitted).

6926. Order, *Spirit Lake Tribe*, No. 1:18-cv-222 (D.N.D. Nov. 2, 2018), D.E. 35; *see* Stipulation, *id.* (Nov. 2, 2018), D.E. 34; *see also* Amy Dalrymple, *ID Law Challengers Allowed to Vote*, Bismarck Trib., Nov. 3, 2018, at B1.

6927. Amended Complaint, *Spirit Lake Tribe*, No. 1:18-cv-222 (D.N.D. Feb. 28, 2019), D.E. 43; *see* Blake Nicholson, *Tribe Joins in Challenge*, Bismarck Trib., Mar. 6, 2019, at B2.

6928. Opinion, *Spirit Lake Tribe*, No. 1:18-cv-222 (D.N.D. June 17, 2019), D.E. 50.

6929. Brakebill v. Jaeger, 932 F.3d 671 (8th Cir. 2019); Spirit Lake Tribe v. Jaeger, 5 F.4th 848, 852 (8th Cir. 2021).

6930. *Brakebill*, 932 F.3d at 680–81.

6931. Opinion, *Spirit Lake Tribe*, No. 1:18-cv-222 (D.N.D. Feb. 10, 2020), D.E. 79, 2020 WL 625279; *see* Second Amended Complaint, *id.* (June 20, 2019), D.E. 51.

6932. *See* Motion for Extension of Time to Answer Second Amended Complaint, *id.* (Feb. 19, 2020), D.E. 83 ("The parties are currently in the process of preparing and negotiating final settlement documents."); *see also* Maggie Astor, *Voting Rights Victory for N. Dakota Tribes*, N.Y. Times, Feb. 14, 2020, at A16.

> In this year's elections, Native American voters will be allowed to mark their homes on a map, and it will be the state's responsibility to use that information to verify their official addresses and make sure their ballots are counted. The state will also be required to provide the official addresses to the voters and their tribes, which could then issue tribal identification for use in future elections.
>
> This formalizes an arrangement that some tribes used in the 2018 midterms, when a federal court allowed the voter ID law to take effect less than two months before Election Day. Tribal officials were stationed at polling places on reservations to issue handwritten identification on the spot, using ad hoc addresses, to voters who pointed out their homes on a map.[6933]

On April 24, Judge Hovland consolidated the 2016 case and the 2018 case for purposes of an April 27 consent decree.[6934] Among the provisions of the decree were the following:

> 6. The Secretary of State shall recognize tribal IDs and supplemental documentation issued to tribal members and to non-member residents who are qualified electors living within the Tribal Government's jurisdiction.
>
> 7. The designation by a Tribal Government of a voter's current residential street address within the Tribal Government's jurisdiction is valid and conclusive for purposes of voting.[6935]

On May 7, Judge Hovland awarded the plaintiffs in the 2016 case $452,983.76 in attorney fees.[6936] The court of appeals affirmed the award on July 16, 2021.[6937]

Library Cards as Photo Identification

Turner-Golden v. Hargett (Aleta A. Trauger and Kevin H. Sharp, M.D. Tenn. 3:12-cv-765)

> A city and a voter filed a federal complaint seeking acceptance of library cards as photo identifications for voting. The emergency motions judge denied immediate relief. The assigned judge later

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6933. Astor, *supra* note 6932.

6934. Consent Decree, *Spirit Lake Tribe*, No. 1:18-cv-222 (D.N.D. Apr. 27, 2020), D.E. 97 [hereinafter *Spirit Lake Tribe* Consent Decree]; Order, *id.* (D.N.D. Apr. 24, 2020), D.E. 95; *Spirit Lake Tribe*, 5 F.4th at 852.

6935. *Spirit Lake Tribe* Consent Decree, *supra* note 6934.

6936. Order, *Spirit Lake Tribe*, No. 1:18-cv-222 (D.N.D. May 6, 2020), D.E. 98; *Spirit Lake Tribe*, 5 F.4th at 852–53.

6937. *Spirit Lake Tribe*, 5 F.4th 849; *see* Satisfaction of Judgment, *Spirit Lake Tribe*, No. 1:18-cv-222 (D.N.D. Sept. 21, 2021), D.E. 108 (acknowledging payment of $453,867.95, which included $884.19 in interest).

> determined that the library cards did not meet the requirements of a state statute for voter photo identification.
>
> *Topics:* Voter identification; matters for state courts; case assignment.

A voter and the City of Memphis filed a federal complaint in the Middle District of Tennessee on July 24, 2012, against Tennessee's secretary of state and its coordinator of elections, seeking an order requiring election officials to accept Memphis library cards for photo identification at polling places.[6938] The voter alleged that she had been denied a ballot at an early-voting location on the day before she filed her complaint.[6939] With their complaint, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction.[6940]

The court assigned the case to Judge Aleta A. Trauger, who was away from the court that day.[6941] The court used a rotation system to assign judges to preside over applications for temporary restraining orders;[6942] Judge Kevin H. Sharp heard the application in this case and denied the plaintiffs immediate relief on July 25.[6943]

Judge Trauger set a briefing schedule on July 26 for a preliminary-injunction hearing should the plaintiffs pursue one.[6944] Her order directed the parties to address seven specific points.[6945] Following the plaintiffs' filing an amended complaint,[6946] Judge Trauger ordered the parties to address two additional specific points.[6947]

6938. Complaint, Turner-Golden v. Hargett, No. 3:12-cv-765 (M.D. Tenn. July 24, 2012), D.E. 1.

6939. *Id.* at 6.

6940. Motion, *id.* (July 24, 2012), D.E. 2.

6941. Docket Sheet, *id.* (July 24, 2012) [hereinafter *Turner-Golden* Docket Sheet]; Interview with Judge Aleta A. Trauger, Mar. 20, 2014; *see* Richard Locker, *Federal Judge Seeks ID Rules*, Memphis Commercial Appeal, July 31, 2012, at 2.

Tim Reagan interviewed Judge Trauger for this report by telephone.

6942. Interview with Judge Aleta A. Trauger, Mar. 20, 2014.

6943. Order, *Turner-Golden*, No. 3:12-cv-765 (M.D. Tenn. July 25, 2012), D.E. 6; *see* Richard Locker, *Judge Rejects Library Card*, Memphis Commercial Appeal, July 26, 2012, at 1.

Judge Sharp retired on April 15, 2017. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

6944. Order, *Turner-Golden*, No. 3:12-cv-765 (M.D. Tenn. July 26, 2012), D.E. 10.

6945. *Id.*

6946. Amended Complaint, *id.* (July 30, 2012), D.E. 33 (adding a second voter as a plaintiff).

6947. Order, *id.* (July 30, 2012), D.E. 35.

After a July 31 hearing,[6948] Judge Trauger denied from the bench a preliminary injunction.[6949] According to the opinion issued three days later, the day after the election, the plaintiffs were not entitled to relief because the library cards were issued by a local government entity and not "issued by a branch, department, agency or entity of this state, any other state, or the United States," in the words of the statute at the time.[6950]

On August 7, the plaintiffs moved for leave to file a second amended complaint[6951] and certify questions to Tennessee's supreme court.[6952] At an August 21 telephone conference,[6953] it became clear that the plaintiffs' best and most efficient course of action would be to seek relief in state court.[6954] The plaintiffs voluntarily dismissed their federal case on August 23.[6955]

Ohio's Voter-Identification Law

Northeast Ohio Coalition for the Homeless v. Brunner (Gregory L. Frost and Algenon L. Marbley, S.D. Ohio 2:06-cv-896)

Public-interest organizations challenged Ohio's 2006 voter-identification laws. At the hearing on a temporary restraining order, the parties informed the judge that the case was related to a case already pending before a different judge, to whom the sec-

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6948. Transcript, *id.* (July 31, 2012, filed Aug. 13, 2012), D.E. 48 [hereinafter *Turner-Golden* Transcript]; *see* Second Preliminary-Injunction Motion, *id.* (July 26, 2012), D.E. 11.

6949. Opinion at 1, *id.* (July 26, 2012), D.E. 10 [hereinafter *Turner-Golden* Opinion], 2012 WL 3202307; *Turner-Golden* Transcript, *supra* note 6948, at 74–78; *see* Richard Locker, *Judge Rejects Library Photo Cards*, Memphis Commercial Appeal, Aug. 1, 2012, at 1; *Nashville Judge Criticizes Voter ID Law, Says No to Library Cards*, Nashville Tennessean, Aug. 1, 2012.

> First, let me say that I certainly do hope that the Legislature revisits this Act because to the Court, it is non-sensical that someone who can hold an expired hunter's license from another state qualifies as holding a photo ID under this law, and yet someone who has gotten the photo ID being offered by the Memphis Public Library does not have a photo ID that meets this law.

Turner-Golden Transcript, *supra* note 6948, at 74.

6950. *Turner-Golden* Opinion, *supra* note 6949, at 9–14; *see* Tenn. Code Ann. § 2-7-112 (2015) (now worded, "issued by the state of Tennessee, or the United States").

6951. Motion, *Turner-Golden*, No. 3:12-cv-765 (M.D. Tenn. Aug. 7, 2012), D.E. 41; Brief, *id.* (Aug. 7, 2012), D.E. 42.

6952. Motion, *id.* (Aug. 7, 2012), D.E. 43; Brief, *id.* (Aug. 7, 2012), D.E. 44.

6953. *Turner-Golden* Docket Sheet, *supra* note 6941.

6954. Interview with Judge Aleta A. Trauger, Mar. 20, 2014.

6955. Notice, *Turner-Golden*, No. 3:12-cv-765 (M.D. Tenn. Aug. 23, 2012), D.E. 54; *see* Richard Locker, *Memphis Withdraws Photo-ID Suit*, Memphis Commercial Appeal, Aug. 29, 2012, at 6 ("a spokeswoman for the mayor says it will be refilled in state court").

> ond case was then reassigned. The second judge found the identification laws probably unconstitutional, but the court of appeals stayed his temporary restraining order. The court of appeals also reversed the judge's denial of the state's intervention as a party in addition to the state's secretary of state. In 2017, the district court determined that resolution of issues by statute and litigation obviated further need for a 2010 consent decree.
>
> *Topics:* Voter identification; case assignment; intervention; attorney fees.

On October 24, 2006, public-interest organizations brought a federal constitutional challenge to Ohio's new voter-identification laws.[6956] With the complaint, the plaintiffs filed a motion for a temporary restraining order.[6957] The court assigned the case to Judge Gregory L. Frost, who held a teleconference with the parties that same day.[6958]

Following customary practice when a plaintiff filed a motion for a temporary restraining order with a complaint, the clerk's office walked the complaint and motion to the assigned judge's chambers.[6959] The plaintiff was asked to remain present in the courthouse for a possibly immediate conference.[6960]

6956. Complaint, NEOCH v. Brunner, No. 2:06-cv-896 (S.D. Ohio Oct. 24, 2006), D.E. 2; NEOCH v. Husted, 696 F.3d 580, 584 (6th Cir. 2012); NEOCH v. Husted, 837 F.3d 612, 620 (6th Cir. 2016); NEOCH v. Sec'y of State, 695 F.3d 563, 566; NEOCH v. Blackwell, 467 F.3d 999, 1004 (6th Cir. 2006); NEOCH v. Brunner, 652 F. Supp. 2d 871, 876 (S.D. Ohio 2009); *see* Edward B. Foley, *The Future of* Bush v. Gore?, 68 Ohio St. L.J. 925, 934–35, 937 (2007); Kevin Mayhood, *Groups Sue to Block Voter ID Rules*, Columbus Dispatch, Oct. 25, 2006, at 3D; Mark Rollenhagen, *Suit Calls Ohio's Voter ID Law a Mess, Asks Court to Void It*, Cleveland Plain Dealer, Oct. 25, 2006, at B1; Julie Carr Smyth, *Groups Sue Over Voter ID Measure*, Cincinnati Post, Oct. 25, 2006, at A3. *See generally* Daniel P. Tokaji, *Leave It to the Lower Courts: On Judicial Intervention in Election Administration*, 68 Ohio St. L.J. 1065, 1084–86 (2007).

6957. Temporary-Restraining-Order Motion, *NEOCH*, No. 2:06-cv-896 (S.D. Ohio Oct. 24, 2006), D.E. 3.

6958. Docket Sheet, *Id.* (Oct. 24, 2006); Interview with Judge Gregory L. Frost, June 1, 2012.

Tim Reagan interviewed Judge Frost for this report by telephone.

Judge Frost retired on May 2, 2016. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

6959. Interview with Judge Gregory L. Frost, June 1, 2012.

Judges tried to be available in the courthouse on election days in case they were called upon to preside over emergency election cases. *Id.*

6960. *Id.*

At the first conference, Judge Frost set a hearing on the temporary-restraining-order motion for the next day.[6961] When the parties gathered for the hearing, they informed Judge Frost that the case was related to one before Judge Algenon L. Marbley.[6962]

On the case's third day, it was reassigned to Judge Marbley.[6963] The earlier case arose from an August 31, 2006, complaint that in the 2004 general election Ohio's voting machines were distributed in an unequal and discriminatory manner to the disadvantage of urban and African American voters.[6964] As part of the relief sought in that case, the plaintiffs asked Judge Marbley to order Ohio's secretary of state to order each county to preserve 2004 ballots, but, on September 11, Judge Marbley issued an order directly to the counties that they do so.[6965] In 2012, Judge Marbley determined that the action was barred by the Eleventh Amendment.[6966]

On the day that he was assigned the second case, Judge Marbley convened a hearing at 3:00 p.m.[6967] Scheduling for the second case was greatly facilitated by the overlap of attorneys working the two cases.[6968] The attorneys' considerable familiarity with the applicable areas of law was a great asset in moving the cases forward.[6969]

At 5:10 p.m., the court recessed for forty-five minutes, and then Judge Marbley issued a temporary restraining order against the new voter-identification laws, finding a likelihood that the plaintiffs could prove some unconstitutionality, and ordered an evidentiary hearing on the morning of Wednesday, November 1.[6970]

6961. Notice of Hearing, *NEOCH*, No. 2:06-cv-896 (S.D. Ohio Oct. 24, 2006), D.E. 7.

6962. Interview with Judge Gregory L. Frost, June 1, 2012.

6963. Transfer Order, *NEOCH*, No. 2:06-cv-896 (S.D. Ohio Oct. 26, 2006), D.E. 16; *see* Transcript at 4–5, *id.* (Oct. 27, 2006, filed Oct. 30, 2006), D.E. 27 [hereinafter Oct. 27, 2006, *NEOCH* Transcript] (noting that transfer does not necessarily imply consolidation); *see also* Mark Rollenhagen, *Federal Hearing on Challenge to Voter ID Rule Is Today*, Cleveland Plain Dealer, Oct. 26, 2006, at B3.

6964. Complaint, King Lincoln Bronzeville Neighborhood Ass'n v. Blackwell, No. 2:06-cv-745 (S.D. Ohio Aug. 31, 2006), D.E. 1; King Lincoln Bronzeville Neighborhood Ass'n v. Blackwell, 448 F. Supp. 2d 876, 877 (S.D. Ohio 2006).

6965. *King Lincoln Bronzeville Neighborhood Ass'n*, 448 F. Supp. 2d at 879–80.

6966. Opinion, *King Lincoln Bronzeville Neighborhood Ass'n*, No. 2:06-cv-745 (S.D. Ohio Aug. 31, 2006), D.E. 122, 2012 WL 395030.

6967. Transcript, *NEOCH*, No. 2:06-cv-896 (S.D. Ohio Oct. 26, 2006, filed Oct. 27, 2006), D.E. 30 [hereinafter Oct. 26, 2006, *NEOCH* Transcript].

6968. Interview with Judge Algenon L. Marbley, July 11, 2012.

6969. *Id.*

6970. Temporary Restraining Order, *NEOCH*, No. 2:06-cv-896 (S.D. Ohio Oct. 26, 2006), D.E. 17; Oct. 26, 2006, *NEOCH* Transcript, *supra* note 6967, at 86–103; NEOCH v.

The State of Ohio sought to intervene on October 27 so that it could appeal the temporary restraining order.[6971] Judge Marbley denied the motion, reasoning that the state's interests were adequately represented by the defendant secretary of state.[6972]

On October 31, the court of appeals, with one judge dissenting, stayed the temporary restraining order: "There is . . . a strong public interest in permitting legitimate statutory processes to operate to preclude voting by those who are not entitled to vote."[6973] The appellate court also determined that the state had a right to intervene.[6974]

On the following day, six days before the election, Judge Marbley entered a consent order specifying how voters would have to prove their identities in Ohio for the 2006 election.[6975] For the 2008 election, Judge

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Blackwell, 467 F.3d 999, 1002, 1004 (6th Cir. 2006); NEOCH v. Brunner, 652 F. Supp. 2d 871, 876 n.1 (S.D. Ohio 2009); *see* Matt Leingang, *Judge Suspends ID Law on Absentee Ballots*, Cincinnati Post, Oct. 27, 2006, at A4; Kevin Mayhood, Mark Niquette & Alan Johnson, *Judge Suspends Voter-ID Directive*, Columbus Dispatch, Oct. 27, 2006, at 1A (reporting a reprieve from having absentee votes disqualified because a voter provided the wrong number from the driver's license as identification—the number above the photo identifying where the license was obtained instead of the driver's identification number); Tokaji, *supra* note 6956, at 1085.

6971. Intervention Motion, *NEOCH*, No. 2:06-cv-896 (S.D. Ohio Oct. 27, 2006), D.E. 22; *NEOCH*, 467 F.3d at 1004; *see* Oct. 27, 2006, *NEOCH* Transcript, *supra* note 6963, at 10 (observing "a situation in which two state agencies or two state officials disagree on litigation strategy"); *see also* Matt Leingang, *Disagreement Over Challenge to Voter ID Law*, Cincinnati Post, Oct. 28, 2006, at A4.

6972. Oct. 27, 2006, *NEOCH* Transcript, *supra* note 6963, at 45; *NEOCH*, 467 F.3d at 1004–05; *see* Alan Johnson, Mark Niquette & Joe Hallett, *Voter-ID Rules Remain in Limbo*, Columbus Dispatch, Oct. 28, 2006, at 1A (reporting that Ohio's attorney general sought to intervene on behalf of the state because the secretary of state decided not to appeal).

6973. *NEOCH*, 467 F.3d at 1012; *NEOCH*, 652 F. Supp. 2d at 876 n.1; *see* Foley, *supra* note 6956, at 994 & n.167, 996; Mark Rollenhagen, *Voter ID Rules Change a Third Time in Four Days*, Cleveland Plain Dealer, Oct. 30, 2006, at A1.

> This stay threatened to cause more disruption than it resolved. In particular, it threw into doubt what would happen to the absentee ballots that had been cast during the period that Judge Marbley's order was in effect, at which time voters could reasonably have believed that the ID requirements did not apply to them. Only the diligent efforts of Judge Marbley and the attorneys for both sides forestalled a potential post-election crisis.

Tokaji, *supra* note 6956, at 1085–86 (footnote omitted).

6974. *NEOCH*, 467 F.3d at 1008–09.

6975. Consent Order, *NEOCH*, No. 2:06-cv-896 (S.D. Ohio Nov. 1, 2006), D.E. 51; NEOCH v. Sec'y of State, 695 F.3d 563, 566; *NEOCH*, 652 F. Supp. 2d at 876; *see* Foley, *supra* note 6956, at 991 n.157; Mark Rollenhagen, *Absentee Voter ID Rules Are Suspended*, Cleveland Plain Dealer, Nov. 2, 2006, at A1 ("All absentee ballots will be counted regard-

Marbley also issued orders based on the parties' negotiations.[6976] In 2009, Judge Marbley awarded the plaintiffs $431,374.05 in attorney fees and costs.[6977]

Judge Marbley entered a consent decree in 2010.[6978] The consent decree approved a revision to the earlier award of fees and costs, increasing it to $504,414.11.[6979] On November 30, Judge Marbley awarded an additional $18,943.13 in fees and costs.[6980] Judge Marbley ruled on July 9, 2012, that Ohio's new executive administration was not entitled to relief from the decree.[6981] The court of appeals affirmed Judge Marbley's decision on October 11.[6982]

On June 22, 2012, five labor organizations filed a federal complaint challenging some of Ohio's laws respecting provisional ballots, especially seeking a declaration that provisional ballots cast in the wrong precinct should be counted if they were cast in the wrong precinct because of poll-worker error.[6983] The court determined that this case was related to Judge

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less of whether voters supplied identification when they were cast."); Julie Carr Smyth, *Court Settlement Clarifies Voter ID Law*, Cincinnati Post, Nov. 2, 2006, at A2; Robert Vitale, *Voter ID Ruling Sets Off a Flurry*, Columbus Dispatch, Nov. 3, 2006, at 1A.

6976. Order, *NEOCH*, No. 2:06-cv-896 (S.D. Ohio Oct. 27, 2008), D.E. 143; Order, *id.* (Oct. 24, 2008), D.E. 142; *NEOCH*, 695 F.3d at 566; *NEOCH*, 652 F. Supp. 2d at 876; *see* Ohio *ex rel.* Skaggs v. Brunner, 588 F. Supp. 2d 819, 821 (S.D. Ohio 2008).

6977 *NEOCH*, 652 F. Supp. 2d at 875.

6978. Consent Decree, *NEOCH*, No. 2:06-cv-896 (S.D. Ohio Apr. 19, 2010), D.E. 210 [hereinafter *NEOCH* Consent Decree]; NEOCH v. Husted, 831 F.3d 686, 693 (6th Cir. 2016); *NEOCH*, 695 F.3d at 696–98; Service Employees Int'l Union v. Husted, 887 F. Supp. 2d 761, 767 (S.D. Ohio 2012); *see* Transcript, *NEOCH*, No. 2:06-cv-896 (S.D. Ohio Apr. 19, 2010, filed June 24, 2010), D.E. 217; *see also* Ohio *ex rel.* Painter v. Brunner, 128 Ohio St. 3d 17, 20–21, 941 N.E.2d 782, 788–89 (2011).

6979. *NEOCH* Consent Decree, *supra* note 6978, at 6; Order at 4, *NEOCH*, No. 2:06-cv-896 (S.D. Ohio Nov. 30, 2010), D.E. 234 [hereinafter *NEOCH* Fees and Costs Order], 2010 WL 4939946; *NEOCH*, 695 F.3d at 567.

6980. *NEOCH* Fees and Costs Order, *supra* note 6979, *aff'd*, 695 F.3d 563.

6981. Opinion, *NEOCH*, No. 2:06-cv-896 (S.D. Ohio Apr. 19, 2012), D.E. 307, 2012 WL 2711393; NEOCH v. Husted, 696 F.3d 580, 585 (6th Cir. 2012); *Service Employees Int'l Union*, 887 F. Supp. 2d at 767; *NEOCH*, 831 F.3d at 694.

6982. *NEOCH*, 696 F.3d at 600–04.

6983. Complaint, Service Employees Int'l Union v. Husted, No. 2:12-cv-562 (S.D. Ohio June 22, 2012), D.E. 1; *NEOCH*, 831 F.3d at 694; *NEOCH*, 696 F.3d at 585 n.1; *Service Employees Int'l Union*, 887 F. Supp. 2d at 772; *see* Second Amended Complaint, *Service Employees Int'l Union*, No. 2:12-cv-562 (S.D. Ohio July 24, 2012), D.E. 63; First Amended Complaint, *id.* (July 13, 2012), D.E. 32; *see also* Robert Barnes, *In Ohio, a Fight Over Votes Not Counted*, Wash. Post, Aug. 6, 2012, at A1.

Marbley's pending action, and so it was assigned to him as well.[6984]

On August 27, Judge Marbley determined that provisional ballots cast in the wrong precinct because of poll-worker error must be counted.[6985] In its October 11 affirmance, the court of appeals clarified that the voter must cast a provisional ballot at a correct location.[6986] On October 26, Judge Marbley found that the evidence supported an expansion of his injunction to protect provisional ballots cast in both the wrong location and the wrong precinct because of poll-worker error.[6987] Five days later, the court of appeals issued an emergency stay of the expanded injunction both because "last-minute injunctions changing election procedures are strongly disfavored"[6988] and because, "Though voters must rely heavily on poll workers to direct them to the proper precinct in a multiprecinct voting place, they are not as dependent on poll workers to identify the correct polling place."[6989] On September 30, 2013, the court of appeals dismissed this appeal as moot because the 2012 election was well over.[6990]

On the Friday night before the 2012 general election, Ohio's secretary of state issued a directive that election boards reject provisional ballots

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6984. Order, *Service Employees Int'l Union*, No. 2:12-cv-562 (S.D. Ohio June 26, 2012), D.E. 16; *NEOCH*, 831 F.3d at 694–95; *Service Employees Int'l Union*, 887 F. Supp. 2d at 766 n.1.

The court of appeals affirmed Judge Marbley's denial of a motion to intervene filed by voters five weeks after the complaint was filed. Order, Service Employees Int'l Union v. Husted, No. 12-4079 (6th Cir. Feb. 20, 2013), 2013 WL 628527; *see Service Employees Int'l Union*, 887 F. Supp. 2d at 771–72; *see also NEOCH*, 696 F.3d at 589 n.4.

6985. *Service Employees Int'l Union*, 887 F. Supp. 2d at 798; *NEOCH*, 696 F.3d at 585 & n.2; *NEOCH*, 831 F.3d at 695–97; *see* Robert Barnes, *Ohio Must Count Some Improperly Cast Ballots, Judge Rules*, Wash. Post, Aug. 28, 2012, at A5.

6986. *NEOCH*, 696 F.3d at 589–90; *see id.* at 583 (noting that to resolve the appeal quickly the court of appeals received expedited briefing and heard oral arguments by telephone on October 1); Order, *Service Employees Int'l Union*, No. 2:12-cv-562 (S.D. Ohio July 9, 2013), D.E. 112, 2013 WL 3456756; *NEOCH*, 831 F.3d at 695; *see* Robert Barnes, *Ohio Told Poll Workers' Errors Shouldn't Invalidate Votes*, Wash. Post, Oct. 12, 2012, at A6; Daniel P. Tokaji, Election Law in a Nutshell 168–69, 190, 195 (2013).

6987. Opinion, NEOCH v. Brunner, No. 2:06-cv-896 (S.D. Ohio Oct. 26, 2012), D.E. 344, 2012 WL 5334080; Order, *id.* (Oct. 26, 2012), D.E. 345; Transcript at 60–61, *id.* (Oct. 24, 2012, filed Oct. 26, 2012), D.E. 89; *NEOCH*, 831 F.3d at 699; *see Polling Location Ruling Expanded*, Cincinnati Enquirer, Oct. 26, 2012, at C1.

6988. Service Employees Int'l Union v. Husted, 698 F.3d 341, 345 (6th Cir. 2012).

6989. *Id.* at 344; *see NEOCH*, 831 F.3d at 699; *see also Court: Voters Must Find Right Poll*, Cincinnati Enquirer, Nov. 1, 2012, at C1; Darrel Rowland, *No "Wrong Church, Wrong Pew" Voting*, Columbus Dispatch, Nov. 1, 2012, at 3B.

6990. Service Employees Int'l Union v. Husted, 531 F. App'x 755 (6th Cir. 2013); *NEOCH*, 831 F.3d at 699.

with incomplete identification information.[6991] This violated the consent decree with respect to omissions resulting from poll-worker error for provisional voters who provided Social Security numbers as identification.[6992] On November 13, four days before the counting of provisional ballots was to begin, Judge Marbley enjoined the violation of the consent decree and, as a matter of equal protection, ordered that provisional ballots for all voters be counted if incomplete identification information resulted from poll-worker error.[6993] The court of appeals stayed the injunction pending appeal.[6994] On February 6, 2014, the court of appeals remanded the case to Judge Marbley for vacation of his November 13, 2012, opinion, pursuant to an agreement of the parties approved by Judge Marbley.[6995]

On February 17, 2015, Judge Marbley awarded the plaintiffs $2,227,179.90 in fees and costs.[6996] The court of appeals largely affirmed the award on August 1, 2016, but remanded the fee requests for a reduction of hourly rates for the most highly paid attorneys—attorneys at a San Francisco law firm—and abrogation of the circuit's fees-for-fees cap that the court of appeals determined in this case to be inconsistent with a 1990 Supreme Court case, *Commissioner, INS v. Jean*.[6997] On October 12, 2016, Judge Marbley approved an agreed fee-and-costs award of $2,618,140.78 to cover litigation up to a 2015 supplemental complaint.[6998]

A supplemental complaint was filed on August 10, 2015.[6999] Following twelve days of bench trial concluding on March 31, 2016, Judge Marbley declared on June 7 that some provisions of Ohio's 2014-enacted voting

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6991. Opinion at 4, *NEOCH*, No. 2:06-cv-896 (S.D. Ohio Nov. 13, 2012), D.E. 357, 2012 WL 5497757.

6992. *Id.* at 7–10.

6993. *Id.* at 10–16; *see* Joe Guillen, *Judge Denounces Change to Ballot Rules*, Cleveland Plain Dealer, Nov. 14, 2012, at A1.

6994. Opinion, NEOCH v. Husted, No. 12-4354 (6th Cir. Nov. 16, 2012); *see* Alan Johnson, *Appeals Court Backs Husted on Provisionals*, Columbus Dispatch, Nov. 17, 2012, at 2B.

6995. Order, *NEOCH*, No. 12-4354 (6th Cir. Feb. 6, 2014); Order, *NEOCH*, No. 2:06-cv-896 (S.D. Ohio Feb. 7, 2014), D.E. 405 (vacating the November 13, 2012, opinion); Order, *id.* (Jan. 31, 2014), D.E. 401 (agreeing to vacate the opinion); *see* Order, *NEOCH*, No. 12-4354 (6th Cir. Mar. 6, 2014) (dismissing the appeal as settled).

6996. Opinion, *NEOCH*, No. 2:06-cv-896 (S.D. Ohio Feb. 17, 2015), D.E. 444; NEOCH v. Husted, 831 F.3d 686, 702 (6th Cir. 2016).

6997. *NEOCH*, 831 F.3d at 692, 719–25; *see* Commissioner, INS v. Jean, 496 U.S. 154 (1990).

6998. Order, *NEOCH*, No. 2:06-cv-896 (S.D. Ohio Oct. 12, 2016), D.E. 795.

6999. Second Supplemental Complaint, *id.* (Aug. 10, 2015), D.E. 453; NEOCH v. Husted, 837 F.3d 612, 621, 625 (6th Cir. 2016).

laws were in violation of the constitutional and Voting Rights Act rights of homeless and African American voters: rigid requirements for filling out voting forms, a proscription on poll-worker assistance, and a tight time frame for curing errors.[7000] On September 13, 2016, the court of appeals affirmed the ruling on rigid requirements but, by a vote of two to one, reversed the rulings on poll-worker assistance and curing errors.[7001] The dissenting senior judge voted to rehear the appeal, and six active judges, a minority, voted to rehear the appeal en banc.[7002]

Judge Marbley decided on April 28, 2017, that resolution of issues by statute and litigation had obviated further need for the 2010 consent decree.[7003] On March 28, 2018, Judge Marbley issued a stipulated award of $1,100,000 in attorney fees and costs.[7004]

Extra Proof of Citizenship for Naturalized Citizens

Boustani v. Blackwell (Christopher A. Boyko, N.D. Ohio 1:06-cv-2065)

> The August 2006 suit challenged a new law that required naturalized citizens whose citizenship is challenged at the polls to present their naturalization certificates before they can vote. On the day before an injunction hearing, the secretary of state conceded that the law was constitutionally questionable, but he said that there was not enough time for the legislature to cure the law before the upcoming election. The judge issued an injunction forbidding naturalized citizens from being required to provide additional documentation or information before voting. The plaintiffs recovered $80,000 in attorney fees.
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> *Topics:* Citizenship; registration challenges; voter identification; attorney fees.

On August 29, 2006, eighteen naturalized citizens and six organizations filed in the Northern District of Ohio a constitutional challenge to a new

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7000. Opinion, *id.* (June 7, 2016), D.E. 691, 2016 WL 3166251; *NEOCH*, 837 F.3d at 618, 621–22; *see* Robert Higgs, *Judge Rules Ohio Voting Laws Unconstitutional*, Cleveland Plain Dealer, June 8, 2016, at A1; Darrel Rowland, *2nd Judge Halts GOP Changes in Ohio Law*, Columbus Dispatch, June 8, 2016, at 1A.

7001. *NEOCH*, 837 F.3d 612 (6th Cir.), *cert. denied*, 582 U.S. 914 (2017); *id.* at 638–68 (Circuit Judge Damon J. Keith, concurring in part and dissenting in part: "I am deeply saddened and distraught by the court's deliberate decision to reverse the progress of history.").

7002. *Id.* at 612 & n.*; Opinion, NEOCH v. Husted, No. 16-3603 (6th Cir. Oct. 6, 2016), D.E. 79, 80.

7003. Opinion, *NEOCH*, No. 2:06-cv-896 (S.D. Ohio Apr. 28, 2017), D.E. 813, 2017 WL 1531811.

7004. Order, *id.* (Mar. 28, 2018), D.E. 829.

Ohio law that required naturalized citizens whose citizenship is challenged at the polls to present their naturalization certificates before they can vote.[7005]

The court assigned the case to Judge Christopher A. Boyko.[7006] On the day before an October 4 hearing, Ohio's secretary of state filed a brief stating that he had concerns about the new law and he would not oppose an injunction.[7007] The secretary said that there was not time for the legislature to cure a constitutional defect.[7008] The secretary's concession greatly facilitated the court's accommodation of the case's time pressure.[7009]

After the hearing, Judge Boyko issued an injunction forbidding naturalized citizens from being required to provide additional documentation or information before voting.[7010] Three weeks later, Judge Boyko issued a longer opinion clarifying that he applied strict scrutiny to the statute[7011] and determined, "It is shameful to imagine that this statute is an example of how the State of Ohio says 'thank you' to those who helped build this country."[7012]

Judge Boyko referred the question of attorney fees to Magistrate Judge Nancy A. Vecchiarelli.[7013] After five docketed proceedings,[7014] the parties agreed on March 12, 2007, to a fee award of $80,000.[7015]

7005. Complaint, Boustani v. Blackwell, No. 1:06-cv-2065 (N.D. Ohio Aug. 29, 2006), D.E. 1; Boustani v. Blackwell, 460 F. Supp. 2d 822, 824 (N.D. Ohio 2006); *see* Ohio Rev. Code § 3505.20(A); *see also* Michael O'Malley, *Foreign-Born File Election Suit*, Cleveland Plain Dealer, Aug. 30, 2006, at B1; *Suit Seeks to End Naturalized ID Provision*, Cincinnati Post, Aug. 30, 2006, at A2.

7006. Docket Sheet, *Boustani*, No. 1:06-cv-2065 (N.D. Ohio Aug. 29, 2006).

Tim Reagan interviewed Judge Boyko for this report by telephone on July 19, 2012.

7007. Brief, *Boustani*, No. 1:06-cv-2065 (N.D. Ohio Oct. 3, 2006), D.E. 17 [hereinafter *Boustani* Brief]; *see* Mark Niquette, *Voter-ID Case Remains a Mess as Election Nears*, Columbus Dispatch, Nov. 1, 2006, at 1A.

7008. *Boustani* Brief, *supra* note 7007.

7009. Interview with Judge Christopher A. Boyko, July 19, 2012.

7010. *Boustani*, 460 F. Supp. 2d at 824; *see* Edward B. Foley, *The Future of* Bush v. Gore*?*, 68 Ohio St. L.J. 925, 993 (2007) ("an injunction that was not appealed by the state"); *Judge Rejects Voter Rule*, N.Y. Times, Oct. 5, 2006, at A23; Joe Milicia, *Judge Kills Citizenship Proof Rule*, Cincinnati Post, Oct. 5, 2006, at A3; Mike Tobin, *U.S. Court Blocks Part of Voting Law*, Cleveland Plain Dealer, Oct. 5, 2006, at A1.

7011. *Boustani*, 460 F. Supp. 2d at 825–27.

7012. *Id.* at 827.

7013. Order, Boustani v. Blackwell, No. 1:06-cv-2065 (N.D. Ohio Dec. 20, 2006), D.E. 25.

Judge Vecchiarelli retired on July 22, 2016. Judicial Milestones, www.uscourts.gov/judicial-milestones/nancy-vecchiarelli.

7014. Minutes, *Boustani*, No. 1:06-cv-2065 (N.D. Ohio Jan. 4 and Feb. 6, 7, 9, and 14,

Voter Photo Identification

Common Cause/Georgia v. Billups (Harold L. Murphy, N.D. Ga. 4:05-cv-201)

> On September 19, 2005, Georgia voters filed a federal complaint challenging the constitutionality of Georgia's voter photo-identification law. The district judge signed a proposed order to show cause why a preliminary injunction should not be granted and scheduled a hearing for October 12. On October 18, the court granted a preliminary injunction. Georgia enacted a revised photo-identification law in 2006; in 2007, the court determined that the revised law was constitutional. The court of appeals agreed in 2009.
>
> *Topics:* Voter identification; intervention; news media; section 5 preclearance.

Several voters' rights organizations filed a federal action on September 19, 2005, to declare Georgia's new voter photo-identification law unconstitutional.[7016] Defendants were Georgia's secretary of state, who was chair of the state's election board, and election officials in seven of the eleven counties in the Northern District of Georgia's Rome Division.[7017]

In response to the plaintiffs' request for a preliminary injunction,[7018] on the day the complaint was filed, Judge Harold L. Murphy signed a proposed order to show cause why the preliminary injunction should not be granted, and he set a hearing for October 12.[7019] Because the plaintiffs had

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2007), D.E. 28, 33, 35, 36, 38.

7015. Order, *id.* (Mar. 15, 2007), D.E. 41.

7016. Complaint, Common Cause/Ga. v. Billups, No. 4:05-cv-201 (N.D. Ga. Sept. 19, 2005), D.E. 1 [hereinafter *Common Cause/Ga.* Complaint]; Common Cause/Ga. v. Billups, 554 F.3d 1340, 1346 (11th Cir. 2009); Common Cause/Ga. v. Billups, 439 F. Supp. 2d 1294, 1297 (N.D. Ga. 2006); *see* Carlos Campos & James Salzer, *Suit Slams Voter ID Law*, Atlanta J.-Const., Sept. 20, 2005, at A1; *see also* Amended Complaint, *Common Cause/Ga.*, No. 4:05-cv-201 (N.D. Ga. Oct. 12, 2005), D.E. 41.

7017. *Common Cause/Ga.* Complaint, *supra* note 7016; *see* 28 U.S.C. § 90(a)(3) (listing counties in the division); N.D. Ga. L.R. app. A.I.4 (same).

"[I]t was noticeable when the liberal groups bunched their plaintiffs and defendants in a handful of relatively rural counties near one another." Walter C. Jones, *Shopping Around Helped ID Case*, Augusta Chron., Oct. 30, 2005, at B5.

7018. Preliminary-Injunction Motion, *Common Cause/Ga.*, No. 4:05-cv-201 (N.D. Ga. Sept. 19, 2005), D.E. 2; *see* Common Cause/Ga. v. Billups, 504 F. Supp. 2d 1333, 1337 (N.D. Ga. 2007); *Common Cause/Ga.*, 439 F. Supp. 2d at 1297–98.

7019. Order, *Common Cause/Ga.*, No. 4:05-cv-201 (N.D. Ga. Sept. 19, 2005), D.E. 3; *see Common Cause/Ga.*, 504 F. Supp. 2d at 1337; *Common Cause/Ga.*, 439 F. Supp. 2d at 1298; *see also* Brandon Larrabee, *Debate Heads to Federal Court*, Augusta Chron., Oct. 9,

not filed a supporting brief by October 3, Judge Murphy ordered them to do so by October 6.[7020] The order to show cause and the briefing order helped to get the case moving quickly.[7021]

On October 5, the election board moved to intervene.[7022] At a telephone conference that day, Judge Murphy granted the motion.[7023] On October 18, six days after the hearing,[7024] Judge Murphy issued a 123-page order enjoining application of the new photo-identification law.[7025] On October 20, Judge Murphy denied Georgia's motion to stay the injunction pending appeal.[7026] The court of appeals denied a stay one week later.[7027]

The case received considerable attention from the news media, but that did not interfere with the case's proceedings.[7028]

In 2006, Georgia enacted a new voter photo-identification law, which the U.S. Justice Department precleared pursuant to section 5 of the Voting

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2005, at B8.

Tim Reagan interviewed Judge Murphy for this report by telephone on October 12, 2012. Judge Murphy died on December 28, 2022. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

7020. Order, *Common Cause/Ga.*, No. 4:05-cv-201 (N.D. Ga. Oct. 3, 2005), D.E. 19; *see Common Cause/Ga.*, 504 F. Supp. 2d at 1337; *Common Cause/Ga.*, 439 F. Supp. 2d at 1298.

7021. Interview with Judge Harold L. Murphy, Oct. 12, 2012.

7022. Intervention Motion, *Common Cause/Ga.*, No. 4:05-cv-201 (N.D. Ga. Oct. 5, 2005), D.E. 20.

7023. Order, *id.* (Oct. 5, 2005), D.E. 24; Minutes, *id.* (Oct. 5, 2005), D.E. 22.

7024. Transcript, *id.* (Oct. 12, 2005, filed Oct. 26, 2005), D.E. 54.

7025. Common Cause/Ga. v. Billups, 406 F. Supp. 2d 1326 (N.D. Ga. 2005) (fifty-three pages in the *Federal Supplement*); *see* Common Cause/Ga. v. Billups, 554 F.3d 1340, 1346 (11th Cir. 2009); *Common Cause/Ga.*, 504 F. Supp. 2d at 1338; *Common Cause/Ga.*, 439 F. Supp. 2d at 1298; *see also* Brandon Larrabee, *Federal Judge Stalls Georgia Voter ID Law*, Augusta Chron., Oct. 19, 2005, at B4; Bill Rankin, *Judge Halts Voter ID Law*, Atlanta J.-Const., Oct. 19, 2005, at A1; Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. Rev. 689, 699, 713 (2006).

7026. Order, *Common Cause/Ga.*, No. 4:05-cv-201 (N.D. Ga. Oct. 20, 2005), D.E. 51; *see Common Cause/Ga.*, 504 F. Supp. 2d at 1338; *Common Cause/Ga.*, 439 F. Supp. 2d at 1298; *see also* Bill Rankin, *Judge Firm on Voter ID Ruling*, Atlanta J.-Const., Oct. 21, 2005, at D5.

7027. Docket Sheet, Common Cause/Ga. v. Billups, No. 05-15784 (11th Cir. Oct. 21, 2005) (noting denial of a stay on Oct. 27, 2005, and remand of the case on Feb. 9, 2006); *see Common Cause/Ga.*, 504 F. Supp. 2d at 1338; *Common Cause/Ga.*, 439 F. Supp. 2d at 1298; *see also* Bill Rankin, *Hold on Photo ID Law Upheld*, Atlanta J.-Const., Oct. 28, 2005, at A1.

7028. Interview with Judge Harold L. Murphy, Oct. 12, 2012.

Rights Act.[7029] The plaintiffs amended their complaint to challenge the constitutionality of the new law on April 26, 2006.[7030] On July 14, Judge Murphy enjoined application of the new law to the July 18 primary elections and any necessary runoff elections.[7031]

One week earlier, a state court judge had similarly enjoined application of the law during the primary elections,[7032] and Georgia's supreme court denied a stay of that order.[7033] On June 11, 2007, however, Georgia's supreme court concluded that the plaintiff in the state case lacked standing because she possessed sufficient identification to entitle her to vote.[7034]

Two voters without the required identification documents filed a separate complaint on August 16[7035] and sought on August 17 to consolidate their action with the 2005 case.[7036] Pending in the 2005 case was a motion to add these two voters as plaintiffs,[7037] a motion that Judge Murphy grant-

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7029. Notice, *Common Cause/Ga.*, No. 4:05-cv-201 (N.D. Ga. Apr. 21, 2006), D.E. 83; *see* Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination); *see also Common Cause/Ga.*, 554 F.3d at 1346–47; *Common Cause/Ga.*, 504 F. Supp. 2d at 1338; Carlos Campos & Nancy Badertscher, *U.S. Oks Latest ID Voter Law*, Atlanta J.-Const., Apr. 22, 2006, at E1; Shannon McCaffrey, *Georgia Voter ID Law Cleared*, Augusta Chron., Apr. 22, 2006, at A1.

On June 25, 2013, the Supreme Court declined to hold section 5 unconstitutional, but the Court did hold unconstitutional the criteria for which jurisdictions require section 5 preclearance. Shelby County v. Holder, 570 U.S. 529 (2013).

7030. Second Amended Complaint, *Common Cause/Ga.*, No. 4:05-cv-201 (N.D. Ga. Apr. 26, 2006), D.E. 85; *see Common Cause/Ga.*, 504 F. Supp. 2d at 1338; *Common Cause/Ga.*, 439 F. Supp. 2d at 1298.

7031. *Common Cause/Ga.*, 439 F. Supp. 2d at 1360; *see Common Cause/Ga.*, 504 F. Supp. 2d at 1340; *see also* Brenda Goodman, *Federal Judge Rules Voter ID Card Law in Georgia Is Illegal*, N.Y. Times, July 13, 2006, at A18; Errin Haines, *Voter Photo ID Rule Ruled Out*, Augusta Chron., July 13, 2006, at B1; Sonji Jacobs & Carlos Campos, *Photo ID Law Suffers 2 Setbacks*, Atlanta J.-Const., July 13, 2006, at B1.

7032. Temporary Restraining Order, Lake v. Perdue, No. 2006CV119207 (Ga. Sup. Ct. July 7, 2006), filed as Ex. 1, State Motion, *Common Cause/Ga.*, No. 4:05-cv-201 (N.D. Ga. July 7, 2006), D.E. 113; *see Common Cause/Ga.*, 504 F. Supp. 2d at 1340; *see also* Carlos Campos, *Voter ID Law on Hold*, Atlanta J.-Const., July 8, 2006, at A1; Brenda Goodman, *Judge Blocks Requirement in Georgia for Voter ID*, N.Y. Times, July 8, 2006, at A10.

7033. *See Common Cause/Ga.*, 504 F. Supp. 2d at 1340.

7034. Perdue v. Lake, 647 S.E.2d 6, 7–8 (Ga. 2007); *see Common Cause/Ga.*, 554 F.3d at 1347; *Common Cause/Ga.*, 504 F. Supp. 2d at 1341.

7035. Complaint, Young v. Billups, No. 4:07-cv-163 (N.D. Ga. Aug. 16, 2007), D.E. 1.

7036. Emergency Motion, *id.* (Aug. 17, 2007), D.E. 2.

7037. Motion to Amend Complaint, *Common Cause/Ga.*, No. 4:05-cv-201 (N.D. Ga. Aug. 13, 2007), D.E. 159.

ed on August 17.[7038] He denied the motion to consolidate the new action, because the new action was redundant and trial was approaching in the first action.[7039] In 2008, the new action was dismissed voluntarily.[7040]

On September 6, 2007, after a bench trial, Judge Murphy determined that after the 2006 statutory change, the plaintiffs' complaint was ultimately without merit, and he awarded judgment to the defendants.[7041] The court of appeals agreed on January 14, 2009.[7042]

Native American Voter Identification

ACLU of Minnesota v. Kiffmeyer (James M. Rosenbaum, D. Minn. 0:04-cv-4653)

> A federal court determined that recognizing tribal photo-identification cards as proof of both identity and address only if the voter resided on an Indian reservation violated equal protection. While the case was pending, the legislature brought the state's law into compliance.
>
> *Topics:* Voter identification; Help America Vote Act (HAVA); equal protection.

Six days before the 2004 general election, on October 27, the ACLU of Minnesota and Native American voters filed an action in the federal district court claiming that Minnesota's statutes, rules, and directives violated equal protection and the Help America Vote Act[7043] because of overly restrictive voter-identification requirements for Native American voters.[7044] The plaintiffs moved on the following day for a temporary restraining or-

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7038. Order, *id.* (Aug. 17, 2007), D.E. 181; *see* Amendment to Second Amended Complaint, *id.* (Aug. 20, 2007), D.E. 193.

7039. Order, *Young*, No. 4:07-cv-163 (N.D. Ga. Aug. 17, 2007), D.E. 3.

7040. Voluntary Dismissal, *id.* (Apr. 24, 2008), D.E. 5.

7041. Common Cause/Ga. v. Billups, 504 F. Supp. 2d 1333, 1383 (N.D. Ga. 2007); *see* Common Cause/Ga. v. Billups, 554 F.3d 1340, 1348 (11th Cir. 2009); *see also* Shaila Dewan, *Photo IDs for Voters Are Upheld*, N.Y. Times, Sept. 7, 2007, at A22; Vicky Eckenrode, *Voting ID Law Upheld*, Augusta Chron., Sept. 7, 2007, at B1; Bill Rankin & Jim Galloway, *State Law Upheld*, Atlanta J.-Const., Sept. 7, 2007, at A1.

7042. *Common Cause/Ga.*, 554 F.3d at 1352–55, *cert. denied*, NAACP v. Billups, 556 U.S. 1282 (2009); *see* Bill Rankin, *Georgia's Voter ID Law Upheld in Federal Appeals Court Ruling*, Atlanta J.-Const., Jan. 15, 2009, at C3.

7043. Pub. L. No. 107-252, 116 Stat. 1666 (2002), *as amended*, 52 U.S.C. §§ 20901–21145. *See generally* Marie Leary & Robert Timothy Reagan, The Help America Vote Act (Federal Judicial Center 2012); Symposium, *HAVA @ 10*, 12 Election L.J. 111 (2013).

7044. Complaint, ACLU of Minn. v. Kiffmeyer, No. 0:04-cv-4653 (D. Minn. Oct. 27, 2004), D.E. 1; *see* Pat Doyle, *Voter Registration Suit Seeks Broader Use of Indian ID for Voting*, Minneapolis–St. Paul Star Trib., Oct. 29, 2004, at 5B.

der.[7045] On the day after that, District Judge James M. Rosenbaum[7046] held a hearing[7047] and granted the motion.[7048]

Many members of the news media attended the hearing, and Minnesota's attorney general argued on behalf of the secretary of state.[7049] Following the in-court proceeding, the judge and the parties met in chambers, where Judge Rosenbaum drafted an injunction in consultation with counsel for both sides.[7050] The attorney general assured the judge and the plaintiffs that he would not file an appeal.[7051]

Judge Rosenbaum found that Minnesota's recognizing tribal photo-identification cards as proof of both identity and address only if the voter resided on a reservation violated equal protection.[7052] He ordered that a tribal photo-identification card be accepted as proof of both identity and address, and if the identification card did not show a current address then it be accepted as proof of identity and a document such as a recent utility bill could be used as proof of address, which was the same requirement for voters with driver's licenses containing old addresses.[7053]

Four months after the election, Magistrate Judge Franklin L. Noel[7054] held a pretrial conference to address long-term resolution of the complaint.[7055] Judge Rosenbaum presided over a telephone conference about three weeks later.[7056]

7045. Temporary-Restraining-Order Motion, *ACLU of Minn.*, No. 0:04-cv-4653 (D. Minn. Oct. 28, 2004), D.E. 2.

7046. Tim Reagan interviewed Judge Rosenbaum for this report by telephone on April 24, 2012.

Judge Rosenbaum retired on August 25, 2010, to take a position with JAMS. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges; JAMS Neutrals, www.jamsadr.com/rosenbaum/; *see* James Walsh, *U.S. District Judge Will Step Down in August*, Minneapolis–St. Paul Star Trib., Apr. 23, 2010, at 1B.

7047. *See* Notice of Hearing, *ACLU of Minn.*, No. 0:04-cv-4653 (D. Minn. Oct. 29, 2004).

7048. Temporary Restraining Order, *id.* (Oct. 29, 2004), D.E. 13 [hereinafter *ACLU of Minn.* Temporary Restraining Order]; *see* Pat Doyle, *Order Broadens Use of Indian IDs*, Minneapolis–St. Paul Star Trib., Oct. 30, 2004, at 1B; Patrick Sweeney, *Ruling Backs Use of Tribal IDs at Any Polling Place*, St. Paul Pioneer Press, Oct. 30, 2004, at B14.

7049. Interview with James M. Rosenbaum, Apr. 24, 2012.

7050. *Id.*

7051. *Id.*

7052. *ACLU of Minn.* Temporary Restraining Order, *supra* note 7048.

7053. *Id.*

7054. Judge Noel retired on August 31, 2018. Judicial Milestones, www.uscourts.gov/judicial-milestones/franklin-l-noel.

7055. Minute Entry, ACLU of Minn. v. Kiffmeyer, No. 0:04-cv-4653 (D. Minn. Mar. 8,

On September 12, 2005, Judge Rosenbaum entered a consent judgment.[7057] It recognized that intervening legislation had mooted one of the plaintiffs' claims: a tribal photo-identification card listing a voter's current address could be used as both proof of identity and proof of address regardless of whether the voter lived on a reservation.[7058] The consent judgment required Minnesota to recognize a tribal photo-identification card with an old address or without an address as proof of a voter's identity.[7059]

On the day of the hearing, two other Minnesota voters moved to intervene as plaintiffs.[7060] Their attorney presented an argument at the hearing, but he was not included in the in-chambers conference immediately following.[7061] Judge Rosenbaum's order acknowledged the motion,[7062] but did not include a ruling on it.[7063] On March 31, 2005, the motion to intervene was withdrawn.[7064]

An Accusation of Widespread Fraudulent Registrations

Golisano v. Pataki (John Gleeson, E.D.N.Y. 1:02-cv-4784)

> The district judge denied enhanced identification requirements at a minor party's primary election for governor on allegations of widespread recent fraudulent registrations.
>
> *Topics:* Registration challenges; voter identification; primary election; matters for state courts.

Twelve days before the September 10, 2002, Independence Party gubernatorial primary election in New York, a candidate for governor, a candidate for lieutenant governor, and three voters filed a federal complaint in the Eastern District of New York complaining that the incumbent governor

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2005), D.E. 17.

7056. *See* Notice of Phone Conference, *id.* (Mar. 22, 2005), D.E. 19.

7057. Consent Judgment, *id.* (Sept. 12, 2005), D.E. 22 [hereinafter *ACLU of Minn.* Consent Judgment]; *see* Lee Egerstrom, *Judge Gives OK for Tribal IDs in Vote Registration*, St. Paul Pioneer Press, Sept. 13, 2005, at 1A; Matt McKinney, *Tribal IDs Cleared for Use at Poll Sites*, Minneapolis–St. Paul Star Trib., Sept. 14, 2005, at 9B.

7058. *ACLU of Minn.* Consent Judgment, *supra* note 7057, at 3; *see* Minn. Stat. § 201.061, subd. 3(d).

7059. *ACLU of Minn.* Consent Judgment, *supra* note 7057, at 3–5.

7060. Motion to Intervene, *ACLU of Minn.*, No. 0:04-cv-4653 (D. Minn. Oct. 29, 2004), D.E. 11.

7061. Interview with James M. Rosenbaum, Apr. 24, 2012.

7062. *ACLU of Minn.* Temporary Restraining Order, *supra* note 7048, at 1.

7063. *Id.* at 6.

7064. Order, *ACLU of Minn.*, No. 0:04-cv-4653 (D. Minn. Apr. 1, 2005), D.E. 21; Motion to Withdraw, *id.* (Mar. 31, 2005), D.E. 20.

was leading a scheme to create large numbers of fraudulent Independence Party registrations in an effort to win the party's nomination.[7065]

On the day after the complaint was filed, Judge John Gleeson signed an order that defendants show cause on September 5 why newly registered Independence Party voters should not show proof of identification.[7066] At the hearing, Judge Gleeson denied the plaintiffs immediate relief.[7067] Following the lead plaintiff's victory in the primary election, Judge Gleeson granted the plaintiffs a voluntary dismissal.[7068]

Voter Identification in Lawrence, Massachusetts

Morris v. City of Lawrence (Rya W. Zobel, D. Mass. 1:01-cv-11889)

> On the day before a municipal election, a voter and two voting-rights organizations filed a federal complaint challenging a city's planned voter-identification requirement. Defense counsel acknowledged that voters would show up without identification, because they would not be aware of the new requirement, and they would only be able to vote if they signed their ballots. The court enjoined the requirement.
>
> *Topics:* Voter identification; case assignment.

On the day before the November 2001 municipal election in Lawrence, Massachusetts, a voter and two voting-rights organizations filed a federal complaint in the District of Massachusetts challenging Lawrence's planned voter-identification requirement, alleging that (1) the requirement violated the Constitution, the Voting Rights Act, and a 1999 consent decree;[7069] (2) persons without identification would be able to vote but they would have to sign their ballots; and (3) the new requirement had been insufficiently publicized.[7070]

7065. Complaint, Golisano v. Pataki, No. 1:02-cv-4784 (E.D.N.Y. Aug. 29, 2002), D.E. 1.

7066. Order, *id.* (Sept. 4, 2002), D.E. 3.

Judge Gleeson resigned on March 9, 2016. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

7067. Order, *Golisano*, No. 1:02-cv-4784 (E.D.N.Y. Sept. 5, 2002, filed Sept. 10, 2002), D.E. 26; *see* Tom Precious, *Candidates Clash Over Calls About Sabres*, Buffalo News, Sept. 6, 2002, at C1 (reporting that a state-court action also was unsuccessful).

7068. Order, *Golisano*, No. 1:02-cv-4784 (E.D.N.Y. Sept. 30, 2002), D.E. 74.

7069. *See* Docket Sheet, United States v. City of Lawrence, No. 1:98-cv-12256 (D. Mass. Nov. 5, 1998).

7070. Complaint, Morris v. City of Lawrence, No. 1:01-cv-11889 (D. Mass. Nov. 5, 2001), D.E. 1; *see* Farah Stockman, *Lawrence Voting Regulation Targeted Democrats*, Boston Globe, Nov. 5, 2001, at B1.

The court assigned the case to Judge William G. Young, who signed the consent decree, but Judge Rya W. Zobel heard the matter because of Judge Young's unavailability.[7071] Judge Zobel was on duty that month to handle miscellaneous matters, such as grand-jury issues, naturalizations, wire taps, and proceedings in other judges' cases if the other judges were unavailable.[7072] Judges in the district rotated duty months in order of seniority.[7073]

On approximately five minutes' notice, Judge Zobel conducted the hearing while a jury in a criminal case before her was deliberating.[7074] Defense counsel acknowledged that voters would show up on the following day without identification and only be able to vote if they signed their ballots.[7075] Later that day, Judge Zobel issued a preliminary injunction against the voter-identification requirement.[7076]

7071. Transcript, *Morris*, No. 1:01-cv-11889 (D. Mass. Nov. 5, 2001, filed Nov. 28, 2001), D.E. 11 [hereinafter *Morris* Transcript]; Minutes, *id.* (Nov. 5, 2001), D.E. 7.

Tim Reagan interviewed Judge Zobel for this report by telephone on September 9, 2013.

7072. Interview with Judge Rya W. Zobel, Sept. 9, 2013.

7073. *Id.*

7074. *Morris* Transcript, *supra* note 7071, at 12, 21, 24.

7075. *Id.* at 14, 16.

7076. Preliminary Injunction, *Morris*, No. 1:01-cv-11889 (D. Mass. Nov. 5, 2001), D.E. 6; *see* Shelley Murphy, *Judge Strikes Lawrence ID Rule*, Boston Globe, Nov. 6, 2001, at B2.

13. Poll Hours

Perhaps the most iconic emergency lawsuit about an election is a suit to keep the polls open longer. Such suits filed on election day require at least preliminary resolution within hours or even minutes.[7077]

> [It has been said] that "long lines at the polls are the sign of a 'healthy democracy.'" In reality, large numbers of voters are the sign of a "healthy democracy." Forcing those voters to wait on long lines is a sign that the democracy does not have sufficient capacity to accommodate its participants efficiently.[7078]

Perhaps bad weather[7079] or a traffic pile-up[7080] is preventing voters from getting to the polls on time. Perhaps election officials missed the mark in setting up the polls on election day.[7081]

A judge might grant the relief requested. The judge might extend voting hours, but not for as long as requested.[7082] The judge might extend voting hours for only a selection of locations.[7083] Or the judge might provide alternative relief, such as alternative methods of voting if the problem is

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7077. *See, e.g.*, "Keeping Polls Open Because They Were Moved with Inadequate Notice," *infra* page 943 (the judge stepped away from a trial to hear the case).

7078. Justin Levitt, *Long Lines at the Courthouse: Pre-Election Litigation of Election Day Burdens*, 9 Election L.J. 19, 21 (2010) (footnote omitted).

7079. *See, e.g.*, "Keeping Polls Open Longer Because of Weather," *infra* page 947.

7080. *See, e.g.*, "No Order Without a Plaintiff," *infra* page 946.

7081. *See, e.g.*, "Keeping Polls Open Because They Were Moved with Inadequate Notice," *infra* page 943 (inadequate notice of poll-location changes); "Keeping Polls Open Late Because They Opened Late," *infra* page 949 (polls opened late because voting equipment was new); "Long Lines at the Polls," *infra* page 951 (too few voting machines).

7082. *E.g.*, Order, Idaho State Democratic Party v. Rich, No. 1:16-cv-491 (D. Idaho Nov. 8, 2016), D.E. 6, *as reported in* "Keeping Polls Open Because They Were Moved with Inadequate Notice," *infra* page 943.

7083. *E.g.*, Temporary Restraining Order, Obama for Am. v. Cuyahoga Cty. Bd. of Elections, No. 1:08-cv-562 (N.D. Ohio Mar. 4, 2008), D.E. 5 (only locations within the judge's district, and only some of the locations within the district that were requested), *as reported in* "Keeping Polls Open Longer Because of Weather," *infra* page 947; Temporary Restraining Order, Ohio Democratic Party v. Cuyahoga Cty. Bd. of Elections, No. 1:06-cv-2692 (N.D. Ohio Nov. 7, 2006), D.E. 8, *as reported in* "Keeping Polls Open Late Because They Opened Late," *infra* page 949.

too few voting machines.[7084] Perhaps the judge concludes that the long lines are an inconvenience but not a deprivation of the right to vote.[7085]

For the presidential election in 2000, election officials purged from voter-registration records voters who had not voted recently. Large numbers of them showed up to vote in Portland, Maine, and they were directed to city hall to resolve registration issues. Long lines there prompted a lawsuit to keep the polls open longer so that voters had time to resolve their eligibility to vote. No district judge was in town that day, so the case was heard by a resident circuit judge. The judge did not extend voting hours, but he did order election officials to resolve registration issues at polling places rather than require the voters to go to city hall.[7086]

For an election in 2016, a traffic accident caused a major disruption to interstate travel across a bridge on election day. At the request of an anonymous caller to the courthouse, a judge who was out of town extended voting hours. The court of appeals later held that the judge was without jurisdiction to order relief without so much as an identifiable plaintiff.[7087]

An analysis by Professor Justin Levitt disclosed that "every state allows citizens to vote if they are present at the poll closing time."[7088]

The judge may order ballots cast by voters arriving during the voting-time extension segregated as provisional ballots.[7089] In general, allowance for a provisional ballot if a voter's registration or eligibility to vote is in question allows the voter to submit a completed ballot first and resolve the eligibility question later. Among other benefits of the provisional ballot, it relieves courts of some pressure to extend voting hours for pervasive registration confusion.[7090]

7084. *E.g.*, Transcript, Ohio Democratic Party v. Blackwell, No. 2:04-cv-1055 (S.D. Ohio Nov. 2, 2004, filed Nov. 3, 2004), D.E. 11, *as reported in* "Long Lines at the Polls," *infra* page 951.

7085. *See, e.g.*, "No Federal Relief from Long Lines," *infra* page 955.

7086. Order, Me. Democratic Party v. City of Portland, No. 2:00-cv-360 (D. Me. Nov. 7, 2000), D.E. 4, *as reported in* "Keeping Polls Open Late Because of Excessive Registration Purging," *infra* page 953.

7087. *In re* 2016 Primary Election, 836 F.3d 584 (6th Cir. 2016), *as reported in* "No Order Without a Plaintiff," *infra* page 946.

7088. Levitt, *supra* note 7078, at 25.

7089. *See, e.g.*, Temporary Restraining Order, Obama for Am. v. Cuyahoga Cty. Bd. of Elections, No. 1:08-cv-562 (N.D. Ohio Mar. 4, 2008), D.E. 5, *as reported in* "Keeping Polls Open Longer Because of Weather," *infra* page 947; Docket Sheet, Ohio Democratic Party v. Cuyahoga Cty. Bd. of Elections, No. 06-4452 (6th Cir. Nov. 7, 2006), *as reported in* "Keeping Polls Open Late Because They Opened Late," *infra* page 949.

7090. *See* Levitt, *supra* note 7078, at 26.

A substantial problem with litigation conducted with tight time pressure is the possibility that even if an order is issued in time to provide a remedy, the order might not be received by election officials in time.[7091]

Suit to Keep Polls Open Later Unsuccessful Because It Was Filed Less Than an Hour Before the Polls Closed

Bernie 2020 v. Logan (Consuelo B. Marshall, C.D. Cal. 2:20-cv-2096)

> A suit filed after 7:00 p.m. to keep polls open after 8:00 because of long lines was unsuccessful because it was not assigned to a judge until two days later.
>
> *Topics:* Polling hours; primary election; case assignment; laches.

A presidential campaign filed a federal complaint in the Central District of California against the registrar for Los Angeles County at 7:09 p.m. on March 3, 2020, seeking a court order keeping the polls open past 8:00 for a presidential primary election, alleging "wait times up to four hours to cast a ballot."[7092] With its complaint, the campaign filed an application for a temporary restraining order at 7:12.[7093]

On March 5, the court assigned the case to Judge Consuelo B. Marshall.[7094] As it was too late to provide the plaintiff with the requested relief, Judge Marshall dismissed the case as moot.[7095]

Keeping Polls Open Because They Were Moved with Inadequate Notice

Idaho State Democratic Party v. Rich (B. Lynn Winmill, D. Idaho 1:16-cv-491)

> Five polling places in one county were moved to achieve compliance with the Americans with Disabilities Act. On election day, a political party filed a federal complaint seeking two hours of additional voting at the moved polls, alleging that voters had received inadequate notice of the moves. Stepping away from a tri-

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7091. *See, e.g.*, "No Order Without a Plaintiff," *infra* page 946; "Keeping Polls Open Longer Because of Weather," *infra* page 947; *see also* "Suit to Keep Polls Open Later Unsuccessful Because It Was Filed Less Than an Hour Before the Polls Closed," *infra* page 943.

7092. Complaint at 1, Bernie 2020 v. Logan, No. 2:20-cv-2096 (C.D. Cal. Mar. 3, 2020), D.E. 1; Minutes, *id.* (Mar. 5, 2020), D.E. 9 [hereinafter *Bernie 2020* Minutes].

7093. Temporary-Restraining-Order Application, *id.* (May 3, 2020), D.E. 2; *Bernie 2020* Minutes, *supra* note 7092.

7094. Notice, *Bernie 2020*, No. 2:20-cv-2096 (C.D. Cal. May 5, 2020), D.E. 6; *Bernie 2020* Minutes, *supra* note 7092.

7095. *Bernie 2020* Minutes, *supra* note 7092.

> al, the district judge held a telephonic hearing at 4:07 p.m. and ruled approximately one hour later that the five polling places should be kept open an additional hour, which the judge determined would be enough time for voters who showed up at the end of voting hours at the wrong locations. Among the judge's findings was a conclusion that the plaintiff party had not cherry-picked polling locations.
>
> *Topics:* Polling hours; poll locations; provisional ballots; ballot segregation; Help America Vote Act (HAVA).

On the day of the 2008 general election, Idaho's Democratic Party filed a federal complaint in the District of Idaho against Idaho's secretary of state and Ada County's clerk seeking a two-hour extension of voting hours at five polling places in the county, alleging that the polling places were moved without sufficient notice, creating voter confusion.[7096] With its complaint, the party filed a motion for a temporary restraining order and emergency injunctive relief.[7097]

Stepping away from a trial, Judge B. Lynn Winmill held a telephonic hearing at 4:07 p.m.[7098]

According to the plaintiff's attorney,

> So the gist of the situation is this: [O]ver the summer, Ada County received notice that some of the polling locations were not [compliant with the Americans with Disabilities Act]. Rather than acting immediately on the situation, the County took no action until right before the election, which is happening today, to send out notices that the five polling locations had been moved.[7099]

The attorney for the county clerk responded, "We actually went above and beyond . . . ."[7100]

At the hearing, Judge Winmill discussed with the parties whether ballots cast during the extension of polling hours would be segregated as provisional ballots or immediately treated as valid ballots and commingled

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7096. Complaint, Idaho State Democratic Party v. Rich, No. 1:16-cv-491 (D. Idaho Nov. 8, 2016), D.E. 1 [hereinafter *Idaho State Democratic Party* Complaint].

7097. Motion, *id.* (Nov. 8, 2016), D.E. 2.

7098. Transcript at 1, 4, 9, *id.* (Nov. 8, 2016, filed Dec. 19, 2016), D.E. 7 [hereinafter *Idaho State Democratic Party* Transcript]; Minutes, *id.* (Nov. 8, 2016), D.E. 5 [hereinafter *Idaho State Democratic Party* Minutes]; *see Idaho State Democratic Party* Transcript, *supra*, at 6, 8 (Judge Winmill's noting the unfortunate difficulty of a judge's ability to interject questions during a telephonic hearing).

7099. *Idaho State Democratic Party* Transcript, *supra* note 7098, at 5.

7100. *Id.* at 6.

with the ballots cast earlier.[7101] The plaintiff was originally content to have voters casting ballots during the extension cast provisional ballots.[7102] The county clerk responded that "Idaho does not have provisional ballots because we're a same-day registration state."[7103] So the plaintiff replied, "Now, if that is something that's unavailable here, we are happy to amend our complaint to allow for the voters that are casting ballots between 8:00 and 10:00 p.m. to have their votes fully counted as they should be."[7104]

Following a recess from 4:54 p.m. to 5:05 p.m., Judge Winmill ordered the five polling locations kept open an additional hour, from 8:00 p.m. to 9:00 p.m., and ordered notices posted at the original locations by 7:00 p.m.[7105]

> I think an additional one hour would be sufficient to capture those individuals who intended on voting after work, get to the . . . polls too late to find out that the polling place has changed and then change the location and travel to the new location.
>
> . . .
>
> As I indicated, if the request had been to segregate the ballots for those who cast votes after 8:00 and then have an individual hearing on that to determine whether or not their right to vote was, in fact, [compromised], I would have kept the polling place open until 10:00.[7106]

Among Judge Winmill's findings was that the plaintiff had not cherry-picked polling locations; "they have selected all of the voting locations where [the voting location was changed late in the game]."[7107]

Judge Winmill issued a stipulated dismissal of the action on March 31, 2017.[7108]

7101. *Id.* at 10–11.

7102. *Idaho State Democratic Party* Complaint, *supra* note 7096, at 6–8; *Idaho State Democratic Party* Transcript, *supra* note 7098, at 10.

7103. *Idaho State Democratic Party* Transcript, *supra* note 7098, at 10.

7104. *Id.* at 11.

7105. Order, Idaho State Democratic Party v. Rich, No. 1:16-cv-491 (D. Idaho Nov. 8, 2016), D.E. 6; *Idaho State Democratic Party* Transcript, *supra* note 7098, at 11–13; *Idaho State Democratic Party* Minutes, *supra* note 7098; *see* Sven Berg, *Judge Rules on Idaho Democrats' Lawsuit to Extend Voting Hours at 5 Precincts*, Idaho Statesman, Nov. 8, 2016.

7106. *Idaho State Democratic Party* Transcript, *supra* note 7098, at 12.

7107. *Id.* at 11.

7108. Order, *Idaho State Democratic Party*, No. 1:16-cv-491 (D. Idaho Mar. 31, 2017), D.E. 10; *see* Stipulation, *id.* (Mar. 30, 2017), D.E. 9.

No Order Without a Plaintiff

In re 2016 Primary Election (Susan J. Dlott, S.D. Ohio 1:16-mc-5)

> A federal district judge ordered a one-hour extension of voting hours in four counties following an anonymous telephone request to the court. A serious traffic accident had resulted in the closure of a transstate bridge. The court of appeals determined that the court was without jurisdiction to issue an order without a plaintiff.
>
> *Topics:* Polling hours; presiding remotely; intervention; case assignment; primary election.

Early during the evening rush hour on March 15, 2016, the day of Ohio's primary election, a traffic accident involving twelve vehicles, one of which plunged into the Ohio River, resulted in closure for several hours of the eastbound lanes of the Combs-Hehl Bridge from Kentucky to Ohio.[7109] The clerk's office in Cincinnati's federal courthouse received an anonymous telephone request to keep polls open beyond the scheduled closing time of 7:30 p.m. to accommodate delayed motorists.[7110] The request was referred to Judge Susan J. Dlott, who was away from the courthouse and who orally instructed the clerk's office to issue an order keeping the polls open until 8:30 p.m. in four southwest Ohio counties: Butler, Clermont, Hamilton (which includes Cincinnati), and Warren.[7111] News of the order did not reach many election officials until after 7:30.[7112]

Boards of elections for Butler and Hamilton Counties moved to intervene on April 4 and 5, respectively, in order to appeal Judge Dlott's order and explain to the courts why such orders should not be issued without giving county boards of elections an opportunity to explain their difficulties in complying with such orders.[7113] On April 8, Judge Dlott transferred

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7109. *In re* 2016 Primary Election, 836 F.3d 584, 586 (6th Cir. 2016); *see* Patrick Brennan & Bob Strickley, *Authorities Locate Car That Fell Into the River*, Cincinnati Enquirer, Mar. 16, 2016, at A16; *Witnesses Describe Car Falling from Bridge to 911 Dispatchers*, Cincinnati Enquirer, Mar. 16, 2016, www.cincinnati.com/videos/news/2016/03/16/81892858/ (audio recordings of 911 calls).

7110. *In re 2016 Primary Election*, 836 F.3d at 585–86.

7111. *Id.* at 586; Order, *In re* 2016 Primary Election, No. 1:16-mc-5 (S.D. Ohio Mar. 15, 2016), D.E. 1; *see* Dan Horn, *I-275 Incident Mars Otherwise Smooth Vote*, Cincinnati Enquirer, Mar. 16, 2016, at A3.

7112. *In re 2016 Primary Election*, 836 F.3d at 587; *see* Dan Horn, *Judge: Stranded Drivers "Wanted to Vote,"* Cincinnati Enquirer, Mar. 7, 2016, at A6.

7113. Intervention Motion, *In re 2016 Primary Election*, No. 1:16-mc-5 (S.D. Ohio Apr. 5, 2016), D.E. 4 (Butler County); Intervention Motion, *id.* (Apr. 4, 2016), D.E. 4 (Hamilton County).

the case to the clerk of court for reassignment.[7114] That same day, Judge Timothy S. Black granted the motions to intervene.[7115] Ohio's secretary of state and the two boards filed notices of appeal on April 11 and 12.[7116]

The court of appeals appointed pro bono counsel to defend the district court's order.[7117] On September 6, the court of appeals determined, by a vote of two to one, that the district court did not have power to issue an order based on an anonymous telephone call.[7118]

> The district court judge, we realize, was in a difficult spot. She was out of the office. It was late. She had little time to act. All of this presumably led her to err on the side of protecting people's right to vote. But none of this explains why the clerk's office or the court couldn't answer the phone call with the most natural of questions: "Who is it?" And none of this allowed the court to sidestep the Article III limitations on our power.[7119]

The third judge would have dismissed the appeal as moot.[7120]

Keeping Polls Open Longer Because of Weather

Obama for America v. Cuyahoga County Board of Elections (Solomon Oliver, Jr., N.D. Ohio 1:08-cv-562)

> On the evening of a presidential primary election, bad weather was interfering with both ballots and voters getting to the polls. One of the candidates filed a late motion to keep the polls open. Because of technical difficulties, the clerk's office was unable to reach the assigned judge, so the day's duty judge held a telephonic proceeding on the temporary-restraining-order motion. He decided not to provide relief with respect to polling places in the state's other district, but he did order some polls in his district to remain open late. He ordered ballots cast by voters arriving after

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7114. Order, *id.* (Apr. 8, 2016), D.E. 5.

7115. Order, *id.* (Apr. 8, 2016), D.E. 6, 2016 WL 1392498.

7116. Notice of Appeal, *id.* (Apr. 12, 2016), D.E. 9 (Butler County); Notice of Appeal, *id.* (Apr. 11, 2016), D.E. 8 (secretary of state); Notice of Appeal, *id.* (Apr. 11, 2016), D.E. 7 (Hamilton County); *In re 2016 Primary Election*, 836 F.3d at 586.

7117. Order, *In re* 2016 Primary Election, No. 16-3350 (6th Cir. May 3, 2016), D.E. 7; Letter, *id.* (May 6, 2016), D.E. 8; *In re 2016 Primary Election*, 836 F.3d at 586.

7118. *In re 2016 Primary Election*, 836 F.3d 584; *see* Dismissal Order, *In re 2016 Primary Election*, No. 1:16-mc-5 (S.D. Ohio Sept. 28, 2016), D.E. 12; *see also* Jessie Balmert, *Judge Should Not Have Kept Polls Open, Appeals Panel Finds*, Cincinnati Enquirer, Sept. 8, 2016, at A4.

7119. *In re 2016 Primary Election*, 836 F.3d at 589 (opinion by Circuit Judge Jeffrey S. Sutton, joined by Circuit Judge Eugene E. Siler, Jr.).

7120. *Id.* at 589–91 (concurring and dissenting opinion by Circuit Judge Ramsey Guy Cole, Jr.).

> the regular closing time to be segregated. The news media reported that polls had already closed by the time they got the judge's order and did not reopen.
>
> *Topics:* Polling hours; case assignment; ballot segregation.

Ohio's 2008 presidential primary election was held on March 4, and the weather in Ohio that day was not good.[7121] In addition, many locations in the state were experiencing shortages of ballots.[7122] Barack Obama filed a federal action in the Northern District of Ohio to keep the polls open until 9:00 p.m.—an extra hour and a half—in three counties: Franklin, which includes Columbus; Cuyahoga, which includes Cleveland; and Clermont, a county slightly east of Cincinnati.[7123]

The court assigned the case to Judge Patricia A. Gaughan.[7124] By the time the plaintiffs filed their action, however, Judge Gaughan had gone home.[7125] The clerk's office tried to reach her, but it either had or dialed an incorrect telephone number.[7126]

Judge Solomon Oliver, Jr., was on duty that day for miscellaneous matters, and he was still in the courthouse that evening when the case was filed.[7127] He held a teleconference proceeding with the parties.[7128] The Obama campaign withdrew its claim with respect to Clermont County, and Judge Oliver denied the claim with respect to Franklin County.[7129] Both Clermont County and Franklin County are in the other district.[7130] Judge Oliver granted the requested relief with respect to some polling places in Cuyahoga County, based on representations made at the telecon-

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7121. Temporary Restraining Order, Obama for Am. v. Cuyahoga Cty. Bd. of Elections, No. 1:08-cv-562 (N.D. Ohio Mar. 4, 2008), D.E. 5 [hereinafter *Obama for Am.* Temporary Restraining Order] (filed at 8:07 p.m.); *see* Complaint at 2–3, *id.* (Mar. 4, 2008), D.E. 1 [hereinafter *Obama for Am.* Complaint]; *see also* Joe Guillen, *Obama Campaign Outcry Extends Precinct Hours*, Cleveland Plain Dealer, Mar. 5, 2008, at A1; Mark Niquette, *Weather, Suit Slow Cuyahoga County Results*, Columbus Dispatch, Mar. 5, 2008, at 1A.

7122. *Obama for Am.* Temporary Restraining Order, *supra* note 7121; *see Obama for Am.* Complaint, *supra* note 7121, at 1; *see also* Niquette, *supra* note 7121.

7123. *Obama for Am.* Complaint, *supra* note 7121.

7124. Docket Sheet, *Obama for Am.*, No. 1:08-cv-562 (N.D. Ohio Mar. 4, 2008) [hereinafter *Obama for Am.* Docket Sheet].

7125. Interview with Judge Solomon Oliver, Jr., July 27, 2012.

Tim Reagan interviewed Judge Oliver for this report by telephone.

7126. Interview with Judge Solomon Oliver, Jr., July 27, 2012.

7127. *Id.*

7128. *Obama for Am.* Docket Sheet, *supra* note 7124.

7129. *Obama for Am.* Temporary Restraining Order, *supra* note 7121.

7130. Interview with Judge Solomon Oliver, Jr., July 27, 2012.

ference.[7131] All votes received by persons arriving after the usual closing time of 7:30 p.m. would be segregated as provisional ballots.[7132] It was reported that some polls covered by the order had already closed when they received the order, and some of them did not reopen.[7133]

Judge Gaughan formally dismissed the action on March 24 on the plaintiff's representation that no live claim remained.[7134]

As a result of the court's experiences with this case, it sharpened its procedures for being available on election days.[7135] The clerk's office took greater care to make sure it would have accurate contact information for the judges.[7136] The clerk's office started staying open late to accept filings, with a court reporter on duty.[7137]

Keeping Polls Open Late Because They Opened Late

Ohio Democratic Party v. Cuyahoga County Board of Elections (Dan Aaron Polster, N.D. Ohio 1:06-cv-2692)

> Because a county was using new voting equipment, several polls opened late, so one of the political parties filed a federal action to delay poll closings as well. The judge assigned to the case could not be reached, so the motion for a temporary restraining order was heard by the day's duty judge. The duty judge determined that the problems were localized, so he ordered late closing for sixteen precincts.
>
> *Topics:* Polling hours; voting technology; case assignment; intervention; news media.

On the day of the 2006 gubernatorial election, Ohio's Democratic Party filed a federal action in the Northern District of Ohio to keep the polls in Cuyahoga County, the county that includes Cleveland, open until 9:00 p.m., an extra hour and a half, because many polling places opened late, sometimes approximately one hour after 6:30 a.m.[7138] The party filed with

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7131. *Obama for Am.* Temporary Restraining Order, *supra* note 7121 (listing twenty-one polling places); Interview with Judge Solomon Oliver, Jr., July 27, 2012; *see* Guillen, *supra* note 7121 (reporting that the order applied to twenty precincts); Niquette, *supra* note 7121 (reporting that the order applied to "14 of the 576 Cuyahoga County polling locations").

7132. *Obama for Am.* Temporary Restraining Order, *supra* note 7121.

7133. Guillen, *supra* note 7121; Niquette, *supra* note 7121.

7134. Minute Order, Obama for Am. v. Cuyahoga Cty. Bd. of Elections, No. 1:08-cv-562 (N.D. Ohio Mar. 4, 2008), D.E. 15.

7135. Interview with Judge Solomon Oliver, Jr., July 27, 2012.

7136. *Id.*

7137. *Id.*

7138. Complaint, Ohio Democratic Party v. Cuyahoga Cty. Bd. of Elections, No. 1:06-

its complaint a motion for a temporary restraining order and a preliminary injunction.[7139] The county opposed the motion.[7140] Ohio's secretary of state moved to intervene[7141] in opposition to the motion.[7142]

The court randomly assigned the case to Judge Lesley Wells,[7143] but she could not be reached.[7144] Judge Dan Aaron Polster was the duty judge that day, so he heard the motion in chambers.[7145] Members of the news media asked to attend the hearing, but Judge Polster denied the request because it was after hours.[7146] By the time he issued his order that day, he realized his error and apologized to the media downstairs when he delivered a copy of his order to them.[7147]

The voting equipment was new, and that resulted in difficulties getting the polls operational on time that morning.[7148] Presentations by the parties indicated that the problems were localized to the east side of town, where voters often had to wait in line more than an hour.[7149]

Judge Polster granted the plaintiffs immediate relief.[7150] "[T]he Court informed the parties that having the votes cast according to voters' constitutional rights is a more compelling need than an immediate determination of the election winners."[7151] At 7:25 p.m., Judge Polster ordered sixteen polling places—all on the east side of Cleveland and in east-side sub-

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cv-2692 (N.D. Ohio Nov. 7, 2006), D.E. 1; *see* Barbara Carmen & Dean Narciso, *Voting Hours Extended After Legal Flap*, Columbus Dispatch, Nov. 8, 2006, at 1A.

7139. Motion, *Ohio Democratic Party*, No. 1:06-cv-2692 (N.D. Ohio Nov. 7, 2006), D.E. 2.

7140. County Opposition, *id.* (Nov. 7, 2006), D.E. 3.

7141. Intervention Motion, *id.* (Nov. 7, 2006), D.E. 5.

7142. Secretary of State Opposition, *id.* (Nov. 7, 2006), D.E. 6.

Judge Wells retired on October 2, 2015. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

7143. Docket Sheet, *Ohio Democratic Party*, No. 1:06-cv-2692 (N.D. Ohio Nov. 7, 2006).

7144. Interview with Judge Dan Aaron Polster, July 23, 2012.

Tim Reagan interviewed Judge Polster for this report by telephone.

7145. *Id.*

7146. *Id.*

7147. *Id.*

7148. *Id.*

7149. *Id.*

7150. Temporary Restraining Order, Ohio Democratic Party v. Cuyahoga Cty. Bd. of Elections, No. 1:06-cv-2692 (N.D. Ohio Nov. 7, 2006), D.E. 8 [hereinafter *Ohio Democratic Party* Temporary Restraining Order]; *see* Carmen & Narciso, *supra* note 7138; Edward B. Foley, *The Future of* Bush v. Gore*?*, 68 Ohio St. L.J. 925, 993 (2007).

7151. *Ohio Democratic Party* Temporary Restraining Order, *supra* note 7150, at 1–2.

urbs—to stay open until 9:00 p.m.[7152] Judge Polster was pleased to hear the announcement of the late closings on the radio that evening.[7153]

The secretary appealed the order that same day and moved to stay it.[7154] Judge Polster had not granted the secretary's motion to intervene, because the judge was not sure that the secretary had standing, but the judge permitted the secretary's attorney to attend the hearing; deciding when the polls should close was a higher priority than deciding the secretary's intervention.[7155]

The court of appeals ordered segregated as provisional all ballots cast by voters who arrived after the usual closing time.[7156]

The secretary ordered all counties to not report results until 9:00 p.m.[7157] The late voting contributed to a later-than-usual reporting of election results by the news media.[7158]

On January 16, 2007, Judge Wells approved a voluntary dismissal.[7159]

Long Lines at the Polls

Ohio Democratic Party v. Blackwell (Algenon L. Marbley, S.D. Ohio 2:04-cv-1055)

> At 5:54 p.m. on election day 2004, Ohio's Democratic Party filed a federal action to keep polls open longer in two counties, alleging that an insufficient number of voting machines was resulting in long lines, which were discouraging voters. The court ordered the polling places to offer voters alternative methods of voting.
>
> *Topics:* Polling hours; voting technology; provisional ballots; absentee ballots.

7152. *Id.* at 2–3 (filed at 7:25 p.m.); *see* Amy Goldstein & Alan Cooperman, *Courts Weigh In After Voting Difficulties Emerge at the Polls*, Wash. Post, Nov. 8, 2006, at A35; Joan Mazzolini, *Election Day Generally Goes Smoothly*, Cleveland Plain Dealer, Nov. 8, 2006, at S2; William Neuman, *Ohio Democrats Win Races for Senate and Governor*, N.Y. Times, Nov. 8, 2006, at P10.

7153. Interview with Judge Dan Aaron Polster, July 23, 2012.

7154. Docket Sheet, Ohio Democratic Party v. Cuyahoga Cty. Bd. of Elections, No. 06-4452 (6th Cir. Nov. 7, 2006) [hereinafter 6th Cir. *Ohio Democratic Party* Docket Sheet].

7155. Interview with Judge Dan Aaron Polster, July 23, 2012.

7156. 6th Cir. *Ohio Democratic Party* Docket Sheet, *supra* note 7154; *see* Foley, *supra* note 7150, at 994.

7157. *See* Carmen & Narciso, *supra* note 7138.

7158. *See* Molly Willow, *TV Election Coverage Grows Up, Grows Dull*, Columbus Dispatch, Nov. 8, 2006, at 1B.

7159. Order, Ohio Democratic Party v. Cuyahoga Cty. Bd. of Elections, No. 1:06-cv-2692 (N.D. Ohio Jan. 16, 2007), D.E. 13.

For the 2004 general election, there were long lines at the polls in the Ohio counties of Franklin, which includes Columbus, and Knox, which is nearby; at 5:54 p.m., the Ohio Democratic Party filed a federal action in the Southern District of Ohio's Columbus courthouse claiming that an insufficient number of voting machines was provided and seeking a temporary restraining order providing alternative voting methods, such as paper ballots, for the rest of the evening to speed up the process.[7160] Ohio's secretary of state and the two county boards of elections were named defendants.[7161]

The district's federal judges had developed a tradition of staying late on election day to handle emergency cases, should they arise.[7162] Judge Algenon L. Marbley held an evidentiary hearing at 6:45 p.m.[7163] In the interest of time, Judge Marbley provisionally granted oral motions to intervene as defendants by the Ohio Republican Party[7164] and the State of Ohio.[7165] The defendants argued that no alternative voting mechanism was feasible.[7166] Both absentee voters and provisional voters used punch cards, and that process, they claimed, would not be faster than the voting machines.[7167] Moreover, anyone in line by the closing time of 7:30 p.m. would be permitted to vote.[7168] Judge Algenon concluded the hearing at 7:35 p.m. with a temporary restraining order requiring "the board to provide, whether they be absentee ballots, whether they be provisional ballots, or any other mechanism necessary to provide these people with an adequate

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7160. Complaint, Ohio Democratic Party v. Blackwell, No. 2:04-cv-1055 (S.D. Ohio Nov. 2, 2004), D.E. 1 [hereinafter *Ohio Democratic Party* Complaint]; Temporary-Restraining-Order Motion, *id.* (Nov. 2, 2004), D.E. 2. *See generally* Ari Berman, Give Us the Ballot 220–21 (2015).

7161. *Ohio Democratic Party* Complaint, *supra* note 7160.

7162. Interview with Judge Algenon L. Marbley, July 11, 2012.

Tim Reagan interviewed Judge Marbley for this report by telephone.

7163. Minutes, *Ohio Democratic Party*, No. 2:04-cv-1055 (S.D. Ohio Nov. 2, 2004), D.E. 3; Transcript, *id.* (Nov. 2, 2004, filed Nov. 3, 2004), D.E. 11 [hereinafter *Ohio Democratic Party* Transcript].

7164. *Ohio Democratic Party* Transcript, *supra* note 7163, at 4; Intervention Motion, *Ohio Democratic Party*, No. 2:04-cv-1055 (S.D. Ohio Nov. 3, 2004), D.E. 8.

On August 26, 2005, Judge Marbley formally granted intervention to the Ohio Republican Party. Opinion, *Ohio Democratic Party*, No. 2:04-cv-1055 (S.D. Ohio Aug. 26, 2005), D.E. 28 (also denying a motion to intervene by the Alliance for Democracy, which sought to expand the case to a challenge of the legitimacy of President Bush's reelection).

7165. *Ohio Democratic Party* Transcript, *supra* note 7163, at 4–5.

7166. *Id.* at 9–15.

7167. *Id.* at 9, 12, 15.

7168. Ohio Rev. Code § 35.32(A); *see Ohio Democratic Party* Transcript, *supra* note 7163, at 10, 26.

opportunity to vote."[7169] Judge Marbley saw protection of the elective franchise as one of the most important rights he could protect as a judge.[7170]

Apparently the boards did what they said they could not do; they supplemented voting machines with paper ballots.[7171] At 11:00 p.m., the court of appeals, with one judge dissenting, denied a stay of Judge Marbley's order.[7172] On August 26, 2005, Judge Marbley granted the plaintiff a voluntary dismissal.[7173]

Keeping Polls Open Late Because of Excessive Registration Purging

Maine Democratic Party v. City of Portland (Kermit V. Lipez, D. Me. 2:00-cv-360)

> A large number of voters went to the polls in Portland, Maine, for the 2000 general election to discover that their voter registrations had been canceled. Poll workers referred them to city hall, where lines grew very long. On the afternoon of the election, the Democratic Party sought a temporary restraining order to keep the polls open an extra two hours. All district judges were out of town, so a local circuit judge heard the motion. The judge declined to keep the polls open late but ordered the polls to let voters correct registration errors at the polls and ordered that all voters in line by the time the polls closed be able to vote.
>
> *Topics:* Registration challenges; National Voter Registration Act; polling hours.

On the afternoon of the 2000 general election, Maine's Democratic Party and a voter filed a federal complaint against the City of Portland in the

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7169. *Ohio Democratic Party* Transcript, *supra* note 7163, at 31–32; *see* Temporary Restraining Order, *Ohio Democratic Party*, No. 2:04-cv-1055 (S.D. Ohio Nov. 2, 2004), D.E. 4; *see also* T.C. Brown, *Judge Says Long Lines Can Prevent Voting*, Cleveland Plain Dealer, Nov. 4, 2004, at B5; Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 Geo. Wash. L. Rev. 1206, 1238–39 (2005).

7170. Interview with Judge Algenon L. Marbley, July 11, 2012.

7171. *See* Lisa A. Abraham, *Ohioans Suffer Through Long Lines, Leave Lawsuits to Others*, Akron Beacon J., Nov. 3, 2004, at A1.

7172. Order, Ohio Democratic Party v. Blackwell, Nos. 04-4314 and 04-4315 (6th Cir. Nov. 2, 2004), *filed as* Order of USCA, *Ohio Democratic Party*, No. 2:04-cv-1055 (S.D. Ohio Nov. 2, 2004), D.E. 7; *see* Brown, *supra* note 7169; *see also* Abraham, *supra* note 7171 ("In Franklin County, some people in line by 7:30 p.m. were still voting at 11:30 p.m. In Knox County, some were still voting at 9:45.").

7173. Order, *Ohio Democratic Party*, No. 2:04-cv-1055 (S.D. Ohio Aug. 26, 2005), D.E. 29.

District of Maine's Portland courthouse seeking an extension of polling hours and other immediate relief from Portland's allegedly improper purging of voter registrations.[7174] Apparently, Portland had purged from its registration rolls voters who should not have been purged, and the purged voters had to wait in a long line at city hall to correct the errors before they could vote.[7175]

All three district judges were out of town, but Circuit Judge Kermit V. Lipez, whose chambers were in Portland, was available.[7176] The district court later ensured that one of its judges would always be available on election day.[7177]

Judge Lipez got the call to preside over the case at 4:40 p.m.[7178] At approximately 6:00, he held an evidentiary hearing.[7179] At approximately 7:15, at the end of the hearing, Judge Lipez ruled against keeping the polls open late because it would have been too disruptive.[7180] Judge Lipez ruled that the city was in violation of the National Voter Registration Act.[7181] He ordered the city to allow voters to correct registration errors at their polling places, rather than only at city hall, and he ordered that anyone in line by 8:00 be permitted to vote.[7182]

7174. Complaint, Me. Democratic Party v. City of Portland, No. 2:00-cv-360 (D. Me. Nov. 7, 2000), D.E. 1.

7175. *See* Eric Blom, *Error Removes Hundreds from Portland Voter Lists*, Portland Press Herald, Nov. 8, 2000, at 5A.

7176. Interview with Judge Kermit V. Lipez, June 19, 2012.

Tim Reagan interviewed Judge Lipez for this report by telephone.

7177. *Id.*

7178. *Id.*

7179. Docket Sheet, *Me. Democratic Party*, No. 2:00-cv-360 (D. Me. Nov. 7, 2000); Audio Recording of Evidentiary Hearing, *id.* (Nov. 7, 2000) [hereinafter *Me. Democratic Party* Audio Recording].

7180. *Me. Democratic Party* Audio Recording, *supra* note 7179; *see* Blom, *supra* note 7175.

7181. Order, *Me. Democratic Party*, No. 2:00-cv-360 (D. Me. Nov. 7, 2000), D.E. 4 [hereinafter *Me. Democratic Party* Order] (noting, in particular, violation of 42 U.S.C. § 1973gg-6(e)(1) and (2)(A), *now* 52 U.S.C. § 20507(e)(1) and (2)(A)); *see* Pub. L. No. 103-31, 107 Stat. 77 (1993), *as amended*, 52 U.S.C. §§ 20501–20511. *See generally* Robert Timothy Reagan, Motor Voter: The National Voter Registration Act (Federal Judicial Center 2014).

7182. *Me. Democratic Party* Order, *supra* note 7181.

No Federal Relief from Long Lines

Howard v. Currie (Bernard A. Friedman, E.D. Mich. 2:00-cv-74912)

> Having observed long lines in the morning on general-election day 2000, a party and its presidential campaign sued for relief from expected long lines in the evening. The court denied relief.
>
> *Topic:* Polling hours.

The Gore and Lieberman campaign, the Democratic Party's state committee, and a Detroit voter filed a federal complaint in the Eastern District of Michigan on general-election day 2000 seeking relief from expected long evening lines at the polls in Detroit, alleging long lines in the morning.[7183] The Republican Party filed a motion to intervene as a defendant.[7184]

The court assigned the case to Judge Victoria A. Roberts,[7185] but Judge Bernard A. Friedman heard the case from 7:14 to 8:30 p.m. on the day that the case was filed.[7186] Judge Friedman granted the motion to intervene and denied the plaintiffs relief.[7187] According to the *Detroit Free Press*, Judge Friedman "ruled that Detroit's long lines were bothersome but not a denial of people's rights to vote."[7188] Radio stations erroneously reported that voting hours had been extended.[7189]

7183. Complaint, Howard v. Currie, No. 2:00-cv-74912 (E.D. Mich. Nov. 7, 2000), D.E. 1 [hereinafter *Howard* Complaint].

7184. Intervention Motion, *id.* (Nov. 7, 2000), D.E. 2.

7185. Docket Sheet, *id.* (Nov. 7, 2000) [hereinafter *Howard* Docket Sheet]; *Howard* Complaint, *supra* note 7183.

7186. *Howard* Docket Sheet, *supra* note 7185; *see Detroit Denied More Hours*, Detroit Free Press, Nov. 8, 2000, at A13.

7187. *Howard* Docket Sheet, *supra* note 7185 (D.E. 8).

7188. *Detroit Denied More Hours*, *supra* note 7186.

7189. *See id.*

14. Voting Procedures

Every part of how an election is conducted can become a matter for litigation, depending on how it departs from optimal practices and what impact it has on outcomes.[7190]

Ballot Contents

The contents of the ballot have many complexities. In addition to which candidates[7191] and ballot questions[7192] are offered, there can be disputes over the order of choices,[7193] how write-in options are handled,[7194] and what language options are available.[7195]

Often a voter is voting for both a candidate and a party. Some ballots allow for straight-ticket voting, so the voter can vote for all candidates who are members of a selected party without making individual choices for each office.[7196]

7190. *See, e.g.*, "An Attorney's Unsuccessful Challenges to Georgia's 2020 General-Election Procedures," *infra* page 964; "Unsuccessful Complaint That Municipal Officers Were Too Incompetent to Oversee an Election," *infra* page 1000; "A Citizenship Check-box on Ballot Applications," *infra* page 1023; "Challenging Both Nominating and Voting Procedures," *infra* page 1069.

7191. *See* "6. Getting on the Ballot," *supra* page 257.

7192. *See* "8. Ballot Measures," *supra* page 525.

7193. *See, e.g.*, "Order of Names on the Ballot," *infra* page 1025 (unsuccessful challenge to alphabetical order).

7194. *See, e.g.*, "Write-In Candidates Closing a Primary Election," *infra* page 1026 (no relief from a rule that a primary election is open if only one party intends to field a candidate in the general election and a registered general-election write-in candidate counts as a reason to keep the primary election closed); "Write-In Lists," *infra* page 1032 (lists of write-in candidates provided only on request and without disclosure of party affiliation).

7195. *See, e.g.*, "Spanish-Language Ballots for Puerto Rican Voters Outside Puerto Rico," *infra* page 1001 (Spanish-language election materials to accommodate voters educated in Spanish in Puerto Rico); "Bilingual Ballots in Puerto Rico," *infra* page 1048 (successful challenge to Spanish-only ballots in Puerto Rico); "Spanish-Language Ballots in Philadelphia," *infra* page 1058 (unsuccessful motion for election monitors to enforce the provision of Spanish-language ballots in Philadelphia because the complaint was brought too close to the election); "Spanish-Language Ballots in Springfield, Massachusetts," *infra* page 1060 (suit for Spanish-language ballots in Springfield, Massachusetts, resolved by a consent decree).

7196. *See, e.g.*, "Unsuccessful Challenge to Straight-Ticket Voting," *infra* page 1037;

Litigation arose in New York in 2010 because of a change from lever voting machines to optical-scan paper ballots.[7197] Candidates nominated by more than one party were listed separately on the ballot for each party nominating them. Lever voters could only vote for the candidate once, but optical voters could vote for any of the candidate's nominations, and the question was how the parties would receive credit for what the plaintiffs called fusion voting.[7198] The federal judge denied immediate relief because the plaintiffs had waited too long to seek it.[7199] After the election, the case was resolved by a consent judgment that included a requirement that voters receive notice that multiple votes for the same candidate will only count for the selected party that appears first on the ballot.[7200]

Litigation arose in Nevada in 2012 because of the inclusion of "none of these" as a ballot choice, although "none of these" was not permitted to win.[7201] The court of appeals determined that the requested remedy of eliminating the choice would not cure the alleged harm of not counting it.[7202]

There has been litigation over how an individual candidate's name is represented. One candidate was unsuccessful in seeking a court order to include a nickname on the ballot.[7203] Another candidate was unsuccessful in adding idiosyncratic orthographic embellishments: Each "i" in "Phillip" represented as a dot with an eyebrow over it, and a smile under the double "l."[7204]

Ranked-choice voting, also sometimes described as instant-runoff voting, has been used as a remedy when the interval of time between an election and a runoff election is not adequate for overseas voters to receive and

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"Changing How Straight-Party Votes Are Marked Without Preclearance," *infra* page 1073.

7197. *See* "Fusion Voting," *infra* page 1039.

7198. *See* Michael Waldman, The Fight to Vote 82 (2016) (referring to fusion tickets as tickets backed by more than one party).

7199. Order Denying Preliminary Injunction at 4–5, Conservative Party of N.Y. State v. N.Y. State Bd. of Elections, No. 1:10-cv-6923 (S.D.N.Y. Oct. 15, 2010), D.E. 41, 2010 WL 4455867; Conservative Party v. Walsh, 818 F. Supp. 2d 670, 672 (S.D.N.Y. 2011).

7200. Consent Judgment, *Conservative Party*, No. 1:10-cv-6923 (S.D.N.Y. Sept. 8, 2011), D.E. 86.

7201. *See* "'None of These Candidates,'" *infra* page 1028.

7202. Townley v. Miller, 722 F.3d 1128, 1131–32 (9th Cir.), *cert. denied*, 571 U.S. 1127 (2014)

7203. Order, House v. Ala. Republican Party, No. 2:04-cv-703 (N.D. Ala. Apr. 23, 2004), D.E. 23, *as reported in* "Including a Nickname on the Ballot," *infra* page 1067.

7204. NaPier v. Baldacci, 453 F. Supp. 2d 185 (D. Me. 2006), *as reported in* "Idiosyncratic Preferences for Name on Ballot," *infra* page 1059.

cast a runoff ballot after the results of the first election are certified.[7205] Instead of selecting only one choice for an office, a voter can rank-order more than one choice, and lower-ranked choices are counted if higher-ranked choices have no chance of winning.[7206] In 2018, there was litigation in Maine over the state's use of ranked-choice voting for all voters.[7207] An incumbent who earned a plurality of first choices in a field of four candidates was unsuccessful in getting the runoff results in favor of a challenger overturned.[7208]

Poll Locations

Litigation sometimes arises over the number and location of polling places.[7209]

A suit challenging the use of a school as a voting location for a school-bond election was unsuccessful.[7210] Also unsuccessful was a suit challenging the move of a polling place away from the civic center—because of planned construction near there—to a location outside of town; voters were to be provided transportation to the new location.[7211]

A challenge to the closure of Indian-reservation polling places in a jurisdiction moving toward voting by mail was partially successful: the judge agreed to enjoin the closing of two locations within the reservation but not a third near the reservation.[7212]

7205. *See, e.g.*, "Timely Overseas Ballots in Alabama," *supra* page 852.

7206. Case studies involving ranked-choice voting or instant runoff ballots have "instant runoff" among their case-study topics.

7207. *See* "Ranked-Choice Voting," *infra* page 1008.

7208. Baber v. Dunlap, 376 F. Supp. 3d 125 (D. Me. 2018); Baber v. Dunlap, 349 F. Supp. 3d 68, 72 (D. Me. 2018).

7209. Case studies involving the location of polling places have "poll locations" among their case-study topics. *See, e.g.*, "No Relief from Reductions in Polling Locations in Kentucky During a Pandemic," *infra* page 980; "No Additional Polling Place in Washington, D.C.'s Ward 8 During the Covid-19 Pandemic," *infra* page 983; "Retroactive Preclearance for Emergency Consolidation of Polling Places," *infra* page 1076.

"The greater the number and diversity of polling locations, the greater the opportunity to vote in elections, particularly for people of lesser means." Allan J. Lichtman, The Embattled Vote in America 32 (2018).

7210. Minutes, Duke v. Lawson, No. 2:11-cv-246 (E.D. Tex. May 9, 2011), D.E. 7, *as reported in* "School-Bond Opposition Dilution," *infra* page 1030.

7211. Rangel-Lopez v. Cox, 344 F. Supp. 3d 1285 (D. Kan. 2018), *as reported in* "Moving a Town's Only Polling Place Outside of Town to Accommodate Civic-Center Construction," *infra* page 997.

7212. Opinion, Spirit Lake Tribe v. Benson County, No. 2:10-cv-95 (D.N.D. Oct. 21, 2010), D.E. 38, 2010 WL 4226614, *as reported in* "Suit to Reopen Polling Places on an Indian Reservation," *infra* page 1038.

A challenge to drive-through voting as an accommodation of the Covid-19 pandemic was unsuccessful because of the plaintiffs' lack of standing, but the judge opined that the election code only provided for poll locations within buildings.[7213]

Technology

Litigation can arise over equipment and technology. Even equipment contracts can generate litigation.[7214] Litigation may arise from the impact a change in voting technology has on persons with disabilities.[7215] An unsuccessful 2020 case in Nevada challenged signature-matching software.[7216]

Voting machines can make vote counting faster, but paper ballots may provide a more reliable and durable record of voting choices.[7217] Paper ballots can be retained indefinitely; voting-machine records may be erased for the next election.[7218]

Mechanical voting machines gave way to touchscreen voting machines.[7219] In a lawsuit brought on the Friday before election day, a complaint that the machines would default to the other party's candidate was remedied by notice to voters that they examine their choices carefully.[7220] An action in the Virgin Islands to enforce a voter's preference for a paper ballot over an electronic ballot was unsuccessful.[7221]

7213. Opinion at 7, Hotze v. Hollins, No. 4:20-cv-3709 (S.D. Tex. Nov. 2, 2020), D.E. 63, 2020 WL 6437668, *as reported in* "No Standing to Challenge Drive-Through Voting," *infra* page 974.

7214. *See, e.g.*, "No-Bid Contract for Election Software," *infra* page 1021.

7215. *See, e.g.*, "Voting Equipment for the Blind in Volusia County," *infra* page 1064; "A Challenge to Paper Ballots for Blind Voters," *infra* page 1065.

7216. *See* "Challenges to the 2020 Vote Count in Nevada," *infra* page 971.

7217. *See, e.g.*, "No Relief from Digital Electronic Voting Machines," *infra* page 998; "Paper Primary Ballots for Minor Parties and Machine Primary Ballots for Major Parties," *infra* page 1077.

"The adoption of secret ballots led to the innovation of voting machines to make voting more private and secure than before." Lichtman, *supra* note 7209, at 133.

7218. *See, e.g.*, "Unsuccessful Attempt at Federal Mandamus Relief Against State Election Officials," *infra* page 984; "Preserving Voting-Machine Data," *infra* page 1043.

7219. *See, e.g.*, "Replacing Mechanical Voting Machines with Electronic Voting Machines," *infra* page 1062.

7220. Temporary Restraining Order, Fetzer v. Barlett, No. 4:10-cv-158 (E.D.N.C. Oct. 30, 2010), D.E. 7 (also requiring preservation of evidence concerning how the machines functioned), *as reported in* "Enjoining Temperamental Voting Machines," *infra* page 1034.

7221. Opinion, Bryan v. Abramson, No. 1:10-cv-79 (D.V.I. Aug. 31, 2010), D.E. 17, *as reported in* "No Right to Cast a Paper Ballot," *infra* page 1042.

Ballot manipulation has always been a concern. Electronic voting records prompt concerns about the potential for hacking.[7222] Punch-card ballots provided electronic counting and a paper record, but imperfect punches complicated both counting and recounting.[7223] Optical-scan ballots are paper ballots that the voter can visually verify and that can be counted quickly by machine.

Litigants may object to how voting machines work. A suit in Ohio alleged that the machines would not give voters sufficient notice of errors, but the court provided no immediate relief because of the case's late filing.[7224] Machines can fail. A 2008 lawsuit in Pennsylvania challenged a rule that emergency paper ballots would be provided only if all machines in a precinct failed; the judge required paper ballots if half or more of the machines failed.[7225]

Assistance

A district judge in the Western District of Arkansas held that the Voting Rights Act providing for voting assistance by a person of the voter's choice preempted a provision in Arkansas's code permitting persons who are not poll workers to assist no more than six voters.[7226] Appeals are pending.[7227]

Poll Workers

Polling locations require human resources.[7228]

Poll-worker selection can trigger litigation.[7229] Complaints can allege unequal distribution of poll workers.[7230] Or they can allege biased selection.[7231]

7222. *See, e.g.*, "Challenges to a Secretary of State's Election Management," *infra* page 988.

7223. *See, e.g.*, "Continuing the Use of Punch-Card Ballots for a Special Election," *infra* page 1070.

7224. Minutes, ACLU v. Brunner, No. 1:08-cv-145 (N.D. Ohio Feb. 6, 2008), D.E. 30, *as reported in* "Voting Without Notice of Errors," *infra* page 1052.

7225. NAACP State Conference of Pa. v. Cortés, 591 F. Supp. 2d 757 (E.D. Pa. 2008), *as reported in* "Preparing for Voting-Machine Failure," *infra* page 1047.

7226. Ark. United v. Thurston, 626 F. Supp. 3d 1064 (W.D. Ark. 2022), *as reported in* "Voters Who Need Personal Assistance to Vote," *infra* page 972.

7227. Docket Sheet, Ark. United v. Thurston, No. 23-1154 (8th Cir. Jan. 26, 2023); Docket Sheet, Ark. United v. Thurston, No. 22-2918 (8th Cir. Sept. 12, 2022).

7228. *See, e.g.*, "Election Observers," *infra* page 1035.

7229. *See, e.g.*, "Preclearance Not Required for How Election Officials Are Selected," *infra* page 1080.

7230. *See, e.g.*, "Adequate Polling-Place Resources," *infra* page 1045.

7231. *See, e.g.*, "Preference for Faction Loyalists as Party Poll Workers," *infra* page 1079.

The stricter the criteria for who can be a poll worker, the fewer poll workers there may be for the election. A judge in Pennsylvania found it rational to require poll workers to serve in their counties of residence.[7232] Fewer poll workers can result in more inconvenience for voters, perhaps because of longer lines, and that can affect turnout. Long lines themselves can trigger emergency litigation.[7233] Often certain candidates or political parties believe that they will benefit from higher or lower turnout.

Party Matters

Political parties use democratic processes to select nominees for general elections, but political parties are not units of government,[7234] and that implies an additional layer of complexity in litigation over party matters.[7235]

Parties typically select their nominees for general elections by primary election, but sometimes they select their nominees by caucus. In 2018, a judge in the Northern District of New York declined to enjoin one party's using a caucus when others were using primary elections, but he ordered specific accommodations for persons with disabilities.[7236]

In a traditional primary election, members of a political party vote to select the party's nominee for the general election. In a closed primary election, only members of a political party may vote in that party's primary election. In many jurisdictions, when voters register to vote, they register as members of a party or of no party. In some jurisdictions, party membership is not disclosed as part of the voter-registration process, but parties may nevertheless strive to restrict participation in their primary elections to party members.

In presidential primary elections, voters are actually voting for delegates to a nominating convention, and in some nominating procedures voters select delegates to a convention that selects delegates for another

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7232. Republican Party of Pa. v. Cortés, 218 F. Supp. 3d 396 (E.D. Pa. 2016), *as reported in* "Limiting Poll Watchers to Counties of Residence," *infra* page 1013.

7233. *See, e.g.*, "Preventing Long Lines," *infra* page 1022.

7234. *E.g.*, Ripon Soc'y v. Nat'l Republican Party, 525 F.2d 567 (D.C. Cir. 1975) (holding that political parties can govern themselves in ways that would not be permitted for the population at large), *as reported in* "At-Large Caucus Precincts," *infra* page 1054; *see also, e.g.*, "Challenge to Weighted Voting in Party-Endorsement Procedures," *infra* page 1031 (the voting power of local party committee members was weighted by the number of registered party members in the committee members' districts).

7235. *See, e.g.*, "Invalid Primary Election," *infra* page 1020.

7236. Opinion, Napierski v. Guilderland Democratic Comm., No. 1:18-cv-846 (N.D.N.Y. July 24, 2018), D.E. 30, *as reported in* "Unsuccessful Challenge to Holding a Caucus," *infra* page 1007.

convention.[7237] A federal judge deferred to pending litigation in state court in 2016 over whether persons who would be eighteen by the time of the general election could vote in a presidential primary election—in a jurisdiction that permitted them to vote in other primary elections if they would be eighteen by the time of the general election—on a theory that in a presidential election, voters are not actually voting for a presidential candidate in a future election but for delegates to a convention in a present election.[7238]

Parties do not have to close their primary elections to independent voters.[7239] A narrowly unsuccessful candidate in a local primary election in North Carolina was unable to persuade a federal judge to nullify the election because independents voted in it.[7240]

Virginia does not record party membership in voter registration. A political party decided to require voters in its presidential primary election to promise that they were members of the party.[7241] A federal judge denied relief, reasoning, "A private, unenforceable pledge does not pose a severe burden."[7242] After absentee balloting had begun, the party decided not to use the pledge.[7243]

A 2002 suit in Georgia for the right of independent voters to vote for one party's candidate for one office and another party's candidate for another office in a primary election was unsuccessful.[7244]

In 2016, a federal complaint filed in California alleged that independent voters were not sufficiently informed that they could vote in some parties' presidential primary elections.[7245] Immediate relief was denied for lack of a clear federal question and a feasible judicial remedy.[7246]

7237. *See, e.g.*, "Preclearance of Nominating Procedures," *infra* page 1050.

7238. Opinion, Smith v. Husted, No. 2:16-cv-212 (S.D. Ohio Mar. 11, 2016), D.E. 14, *as reported in* "Voting in a Primary Election at Seventeen If Eighteen by the General Election," *infra* page 1017.

7239. Tashjian v. Republican Party of Conn., 479 U.S. 208 (1986).

7240. Hole v. N.C. Bd. of Elections, 112 F. Supp. 2d 475, 476 (M.D.N.C. Aug. 17, 2000), *as reported in* "Permitting Independent Voters to Vote in Party Primary Elections," *infra* page 1082.

7241. *See* "Loyalty Oath," *infra* page 1018.

7242. Parson v. Alcorn, 157 F. Supp. 3d 479, 494 (E.D. Va. 2016).

7243. *See* Laura Vozzella & Antonio Olivo, *GOP Scraps Loyalty Pledge Trump Called "Suicidal,"* Wash. Post, Jan. 31, 2016, at C12.

7244. Opinion, Snellgrove v. Georgia, No. 5:02-cv-288 (M.D. Ga. Aug. 20, 2002), D.E. 8, *as reported in* "Voters' Right to a Completely Open Primary Election," *infra* page 1074.

7245. *See* "Informing Independent Voters of the Right to Vote in a Presidential Primary Election," *infra* page 1014.

7246. Opinion, Voting Rights Def. Project v. Depuis, No. 3:16-cv-2739 (N.D. Cal. June

No relief was granted in a case challenging a $35 participation fee for a political party's 2007 presidential-election straw poll in Iowa, because the poll was held by a private political party with no binding effect.[7247]

Conflicts of Interest

Claims of conflicts of interest have arisen when election officials, especially elected election officials, were active in their political parties or candidates for other offices.

A 2018 action challenged the governor of Florida's exercising authority over election matters following a close election in which he was a candidate for the U.S. Senate.[7248] The judge determined that the governor "toed the line between imprudent campaign-trail rhetoric and problematic state action. But he has not crossed the line."[7249]

A suit in Georgia challenged post-election oversight by Georgia's secretary of state because he was a candidate for governor.[7250] The secretary, who was to win election as governor, responded to the litigation by recusing himself from election oversight.[7251]

Private Funding

Federal cases filed in 2020 challenged private grants to local election authorities, apparently concerned that the grants would benefit one political party more than the other, but the courts determined that the plaintiffs did not have standing to pursue such general grievances.[7252]

An Attorney's Unsuccessful Challenges to Georgia's 2020 General-Election Procedures

Wood v. Raffensperger (Steven D. Grimberg, 1:20-cv-4651) and Pearson v. Kemp (1:20-cv-4809) and Wood v. Raffensperger (1:20-cv-5155) (Timothy C. Batten, Sr.) (N.D. Ga.)

> Ten days after the 2020 general election, a voter alleged that a settlement agreement reached in another case the previous March would result in too few invalidations of absentee ballots.

2, 2016), D.E. 46, 2016 WL 3092079.

7247. Opinion, Schulz v. Iowa, No. 4:07-cv-350 (S.D. Iowa Aug. 10, 2007), D.E. 10, *as reported in* "Application of Election Law to a Straw Poll," *infra* page 1056.

7248. *See* "Challenging a Governor's Oversight of Elections When He Is a Candidate for Another Office," *infra* page 986.

7249. League of Women Voters of Fla. v. Scott, 366 F. Supp. 3d 1311, 1315 (N.D. Fla. 2018).

7250. *See* "Challenges to a Secretary of State's Election Management," *infra* page 988.

7251. Minutes, Brown v. Kemp, No. 1:18-cv-5121 (N.D. Ga. Nov. 8, 2018), D.E. 15.

7252. *See* "Unsuccessfully Challenging Private Grants to Local Election Authorities," *infra* page 975.

> The district judge determined that the plaintiff did not have standing to challenge the other parties' settlement agreement, the action had been brought too late for equitable relief, and the claims had no merit. The court of appeals agreed that the plaintiff lacked standing. Three weeks and a day after the general election, the voter in the earlier case acted as counsel for plaintiffs in a case challenging how absentee ballots and voting machines were used in the election. Relief was denied because the claims belonged in state court, the plaintiffs did not have standing to bring them, and they brought them too late for equitable relief. In a third action, the plaintiff in the first case and attorney in the second case brought a pro se challenge to Georgia's election procedures for a pending runoff election, but both the district judge and the court of appeals determined that the plaintiff did not have standing to bring his claims.
>
> *Topics:* Enjoining certification; absentee ballots; voting technology; signature matching; laches; interlocutory appeal; intervention; matters for state courts; Electoral College; Covid-19; pro se party.

An attorney pursued three unsuccessful 2020 challenges to Georgia's election procedures: two actions as a plaintiff and one action representing would-be members of the Electoral College.[7253]

First Action as a Plaintiff

The attorney's Friday, November 13, 2020, complaint filed in the Northern District of Georgia as a voter against Georgia's secretary of state and members of Georgia's election board alleged, "The validity of the results of the November 3, 2020 general election in Georgia are at stake as a result of Defendants' unauthorized actions in the handling of absentee ballots within this state, actions that were contrary to the Georgia Election Code."[7254] In particular, the complaint challenged the terms of a March 6 settlement agreement resolving the verification of absentee-ballot signatures during a time of heavy absentee voting because of the global infectious Covid-19

7253. *See generally* Alan Judd, *Amid Personal Turmoil, Libel Lawyer Wood Goes on the Attack for Trump*, Atlanta J.-Const., Dec. 19, 2020, at 1A.

7254. Complaint at 2, Wood v. Raffensperger, No. 1:20-cv-4651 (N.D. Ga. Nov. 13, 2020), D.E. 1 [hereinafter *Wood* Complaint]; *see* Wood v. Raffensperger, 981 F.3d 1307, 1310–12 (11th Cir. 2020); Wood v. Raffensperger, 501 F. Supp. 3d 1310, 1316–17 (N.D. Ga. 2020); *see also* Mark Niesse, *Georgia Sued in Attempt to Stop Election Results*, Atlanta J.-Const., Nov. 14, 2020, at 8A.

pandemic, "making it less likely that [defective absentee ballots] would be identified or, if identified, processed for rejection."[7255]

On Monday, the voter filed an amended complaint, attaching affidavits supporting a motion for a temporary restraining order.[7256] On Tuesday, the voter filed an "Emergency Motion for Injunctive Relief and Memorandum of Law in Support Thereof," which the court docketed as a motion for a temporary restraining order.[7257]

The plaintiff political party in the settled case moved on November 18 to intervene in the new case.[7258] Three voters and two voting-rights advocacy organizations also filed a motion that day to intervene as defendants in the new case.[7259]

Judge Steven D. Grimberg set the case for a remote audio and video hearing on the afternoon of Thursday, November 19.[7260] At the hearing, Judge Grimberg granted intervention to the plaintiff party in the settled case and permitted its attorney to cross-examine the witness presented by the new plaintiff.[7261] Judge Grimberg also allowed the other prospective intervenors to make an argument without granting their intervention motion.[7262]

Following a recess from 5:31 to 5:47 p.m., Judge Grimberg denied the voter a temporary restraining order.[7263] He issued a published opinion on

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7255. *Wood* Complaint, *supra* note 7254, at 13–14; *see* Notices of Settlement, Democratic Party of Ga., Inc. v. Raffensperger, No. 1:19-cv-5028 (N.D. Ga. Mar. 6, 2020), D.E. 55, 56; Order, *id.* (Mar. 9, 2020), D.E. 57 (order by Judge William M. Ray II closing the case); Amended Complaint, *id.* (Dec. 27, 2019), D.E. 30; Complaint, *id.* (Nov. 6, 2019).

7256. Amended Complaint, *Wood*, No. 1:20-cv-4651 (N.D. Ga. Nov. 16, 2020), D.E. 5; *Wood*, 501 F. Supp. 3d at 1317.

7257. Motion, *Wood*, No. 1:20-cv-4651 (N.D. Ga. Nov. 17, 2020), D.E. 6; Docket Sheet, *id.* (Nov. 13, 2020); *Wood*, 501 F. Supp. 3d at 1317; *see* Supplement, *Wood*, No. 1:20-cv-4651 (N.D. Ga. Nov. 18, 2020), D.E. 7, 20 (exhibit Q, inadvertently omitted from the motion filed on the previous day).

7258. Intervention Motion, *Wood*, No. 1:20-cv-4651 (N.D. Ga. Nov. 18, 2020), D.E. 8; *Wood*, 501 F. Supp. 3d at 1317.

7259. Intervention Motion, *Wood*, No. 1:20-cv-4651 (N.D. Ga. Nov. 18, 2020), D.E. 22; *Wood*, 501 F. Supp. 3d at 1317.

7260. Notice, *Wood*, No. 1:20-cv-4651 (N.D. Ga. Nov. 18, 2020), D.E. 21; Minutes, *id.* (Nov. 19, 2020), D.E. 52; Wood v. Raffensperger, 981 F.3d 1307, 1312–13 (11th Cir. 2020); *Wood*, 501 F. Supp. 3d at 1317.

7261. Transcript at 41–44, *Wood*, No. 1:20-cv-4651 (N.D. Ga. Nov. 19, 2020, filed Nov. 24, 2020), D.E. 65.

7262. *Id.* at 76–80.

7263. *Id.* at 92; *Wood*, 501 F. Supp. 3d at 1317; *Wood*, 981 F.3d at 1313; *see* Alan Judd, *Judge Rejects Bid to Block Results*, Atlanta J.-Const., Nov. 20, 2020, at 1A.

the following day.[7264] "As a threshold matter, the Court finds [that the plaintiff] lacks standing to assert [his] claims."[7265] Even if he had standing, his claims would be barred by the doctrine of laches.[7266] The settlement agreement had been in place for eight months, in effect for at least three elections.[7267] The claims did not merit immediate injunctive relief.[7268]

The court of appeals agreed to expedite review of Judge Grimberg's decision and ordered briefing completed by Thursday, December 3.[7269] Agreeing that the voter lacked standing to contest the settlement agreement, the court of appeals affirmed the denial of injunctive relief on December 5.[7270] In addition, the matter had become moot because of Georgia's certification of its election results.[7271]

Judge Grimberg ordered the case closed on February 24, 2021.[7272]

Action as an Attorney

Three weeks and a day after the November 3, 2020, general election—on the day before Thanksgiving Day—seven would-be members of the Electoral College filed a federal complaint against Georgia election officials in the Northern District alleging "massive election fraud."[7273] Also identified as a plaintiff in the complaint, but not included in the caption, was a county Republican Party chair.[7274] The plaintiff in Judge Grimberg's case was one of the plaintiffs' attorneys in this case.[7275] The allegations included challenges to the use of voting equipment provided by companies "founded by foreign oligarchs and dictators"[7276] and "handling absentee ballots in a manner that is not consistent with the laws promulgated by the Georgia

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7264. *Wood*, 501 F. Supp. 3d 1310; *Wood*, 981 F.3d at 1313.

7265. *Wood*, 501 F. Supp. 3d at 1320.

7266. *Id.* at 1323.

7267. *Id.* at 1324.

7268. *Id.* at 1325–31.

7269. Order, Wood v. Raffensperger, No. 20-14418 (11th Cir. Nov. 25, 2020).

7270. Wood v. Raffensperger, 981 F.3d 1307 (11th Cir. 2020), *cert. denied*, 592 U.S. ___, 141 S. Ct. 1379 (2021); *see* David Wickert, *Court Rejects Bid to Overturn Presidential Election*, Atlanta J.-Const., Dec. 6, 2020, at 12A; David Wickert, *Supreme Court Rejects Ga. Election Challenge*, Atlanta J.-Const., Feb. 23, 2021, at 3A.

7271. *Wood*, 981 F.3d at 1310, 1316–18.

7272. Order, Wood v. Raffensperger, No. 1:20-cv-4651 (N.D. Ga. Feb. 24, 2021), D.E. 78.

7273. Complaint, Pearson v. Kemp, No. 1:20-cv-4809 (N.D. Ga. Nov. 25, 2020), D.E. 1.

7274. *Id.* at 14.

7275. *Id.* at 103.

7276. *Id.* at 4.

Legislature for elections in this state."[7277] Two days later, the plaintiffs filed an "Emergency Motion for Declaratory, Emergency, and Permanent Injunctive Relief," which the court docketed as a motion for a temporary restraining order.[7278] The plaintiffs also filed a motion to file two affidavits under seal to protect the affiants from harassment and physical harm.[7279] The court assigned the case to Judge Timothy C. Batten, Sr.[7280]

Judge Batten heard the case by videoconference on Sunday evening, November 29.[7281] A few local runoff elections were scheduled for December 1, and statewide runoff elections were scheduled for January 5, 2021.[7282] At 10:10 p.m. on the day of the hearing, Judge Batten issued an order preserving the possibility of plaintiffs' experts examining voting machines: ordering the defendants not to erase them and to provide briefing on security and proprietary risks resulting from the plaintiffs' examinations.[7283] On the following day, Judge Batten certified his order for immediate appeal.[7284] At the hearing, he agreed that the forthcoming order could only apply to named defendants, who might have no control over whether the machines were erased.[7285]

Judge Batten set the case for an in-person hearing on Friday, December 4.[7286] The state's Democratic Party moved to intervene in defense of a certified victory for its presidential candidate in Georgia,[7287] and Judge Batten granted intervention on the next day.[7288] Meanwhile, the court of appeals ordered an appellee brief by midnight on December 4 and an option-

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7277. *Id.* at 22.

7278. Motion, *id.* (Nov. 27, 2020), D.E. 6; Docket Sheet, *id.* (Nov. 25, 2020) [hereinafter *Pearson* Docket Sheet].

7279. Motion, *id.* (Nov. 27, 2020), D.E. 5.

7280. *Pearson* Docket Sheet, *supra* note 7278.

7281. Transcript, *Pearson*, No. 1:20-cv-4809 (N.D. Ga. Nov. 29, 2020, filed Nov. 30, 2020), D.E. 23 [hereinafter Nov. 29, 2020, *Pearson* Transcript]; Minutes, *id.* (Nov. 29, 2020), D.E. 18.

7282. Nov. 29, 2020, *Pearson* Transcript, *supra* note 7281, at 6–8.

7283. Order, *Pearson*, No. 1:20-cv-4809 (N.D. Ga. Nov. 29, 2020), D.E. 14, 2020 WL 7040582.

7284. Order, *id.* (Nov. 30, 2020), D.E. 22; *see* Notice of Appeal, *id.* (Dec. 1, 2020), D.E. 32.

7285. Nov. 29, 2020, *Pearson* Transcript, *supra* note 7281, at 33.

7286. Order, *Pearson*, No. 1:20-cv-4809 (N.D. Ga. Nov. 30, 2020), D.E. 17; Nov. 29, 2020, *Pearson* Transcript, *supra* note 7281, at 17.

7287. Intervention Motions, *Pearson*, No. 1:20-cv-4809 (N.D. Ga. Nov. 30 and Dec. 2, 2020), D.E. 20, 41.

7288. Order, *id.* (Dec. 3, 2020), D.E. 42.

al reply brief by midnight on Sunday, December 6.[7289] In light of the pending appeal, Judge Batten stayed further hearing.[7290]

On December 3, the defendants moved for relief from the temporary restraining order to remove uncertainty about whether county election officials could prepare voting machines for the upcoming runoff elections for Georgia's two U.S. senators and its public service commissioner.[7291] On the following day, a county board of registrations and elections moved to intervene in support of the defendants' motion.[7292]

On December 4, the court of appeals dismissed the appeal for lack of jurisdiction, noting that the temporary restraining order "gave the plaintiffs what they said they wanted."[7293] Judge Batten set the case for hearing on Monday morning, December 7.[7294]

Judge Batten required everyone to wear a face mask, even when addressing the court, and he reminded the parties that the proceedings would be audio-streamed publicly.[7295] He opened with a description of the case:

> In this case, the Plaintiffs are a group of disappointed Republican presidential electors. They assert that the 2020 presidential election in Georgia was stolen, and that the results, Joe Biden winning, occurred only because of massive fraud. Plaintiffs contend that this massive fraud was manifest primarily, but not exclusively, through the use of ballot stuffing. And they allege that this ballot stuffing has been rendered virtually invisible by computer software created and run by foreign oligarchs and dictators from Venezuela to China to Iran.[7296]

At the close of the hearing, Judge Batten dismissed the action because (1) the claims belonged in state court, (2) "[t]he Plaintiffs have essentially alleged in their pleading that their interests are one and the same as any

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7289. Order, Pearson v. Governor, No. 20-14480 (11th Cir. Dec. 2, 2020).

7290. Order, *Pearson*, No. 1:20-cv-4809 (N.D. Ga. Dec. 2, 2020), D.E. 40; *see* Order, *id.* (Dec. 1, 2020), D.E. 37 ("Any delay in conducting the hearing on the claims in Plaintiffs' complaint would be attributable to Plaintiffs—not this Court—since Plaintiffs are the ones who filed the notice of appeal."); *see also id.* at 3 n.2 ("The Court's November 20 order [22] certifying the November 29 order for immediate appellate review pursuant to 28 U.S.C.A. § 1292(b) does not render the November 29 order directly appealable. This is because the court of appeals has not as of this time granted Plaintiffs permission to appeal.").

7291. Motion, *id.* (Dec. 3, 2020), D.E. 52; Minutes, *id.* (Dec. 7, 2020), D.E. 74.

7292. Intervention Motion, *id.* (Dec. 4, 2020), D.E. 55.

7293. Pearson v. Kemp, 831 F. App'x 467, 470 (11th Cir. 2020).

7294. Order, *Pearson*, No. 1:20-cv-4809 (N.D. Ga. Dec. 4, 2020), D.E. 56.

7295. Transcript at 2, 6, *id.* (Dec. 7, 2020, filed Dec. 8, 2020), D.E. 79.

7296. *Id.* at 2.

Georgia voter," and (3) a complaint about the voting machines should have been filed months previously.[7297]

On January 20, 2021, the court of appeals granted a January 19 voluntary dismissal of the plaintiffs' appeal.[7298]

Second Action as a Plaintiff

Representing himself, the attorney filed a third case in the Northern District on Friday, December 18, 2020, against state election officials.[7299] The complaint challenged absentee-ballot and voting-machine procedures and sought "an emergency injunction halting Georgia's [January 5, 2021,] senatorial runoff election because the Defendants are conducting it in a 'Manner' that differs from and conflicts with the election scheme established by the State Legislature."[7300] The plaintiff's emergency motion for injunctive relief filed at the same time included 276 pages of text and exhibits.[7301] Also filed was an "Emergency Motion for Preservation of Evidence and Inspection of Electronic Election/Voting Equipment and for Production of Original Ballots and Other Documents."[7302]

On Monday, Judge Batten ordered briefing concluded by Sunday, December 27, and set the case for hearing, if necessary, on December 30.[7303] On Tuesday, Judge Batten granted a Monday motion by Georgia's Democratic Party to intervene.[7304]

Judge Batten concluded on December 28 that he need not reach the merits of the complaint because the plaintiff attorney did not have standing to pursue the claims.[7305]

The plaintiff filed a notice of appeal that day.[7306] One month later, the court of appeals asked him to address whether the January 5, 2021, elec-

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7297. *Id.* at 41–44; *see* Greg Bluestein, James Salzer & Mark Niesse, *In Georgia, Rare GOP Pushback on Trump*, Atlanta J.-Const., Dec. 8, 2020, at 1A.

7298. Order, Pearson v. Governor, No. 20-14579 (11th Cir. Jan. 20, 2020); Motion, *id.* (Jan. 19, 2020).

7299. Complaint, Wood v. Raffensperger, No. 1:20-cv-5155 (N.D. Ga. Dec. 18, 2020), D.E. 1.

7300. *Id.* at 1.

7301. Motion, *id.* (Dec. 18, 2020), D.E. 2.

7302. Motion, *id.* (Dec. 18, 2020), D.E. 3.

7303. Orders, *id.* (Dec. 20, 2020), D.E. 11, 12.

7304. Order, *id.* (Dec. 22, 2020), D.E. 14; Intervention Motion, *id.* (Dec. 21, 2020), D.E. 13.

7305. Opinion, *id.* (Dec. 28, 2020), D.E. 35, 2020 WL 7706833; *see* David Wickert, *Federal Judge Dismisses Suit Seeking to Stop Jan. 5 Runoff*, Atlanta J.-Const., Dec. 29, 2020, at 7A; Paul Woolverton, *Judge Blocks Attempt to Stop Georgia Runoffs*, Augusta Chron., Dec. 30, 2020, at A4.

tion mooted the appeal.[7307] The court of appeals agreed on August 6, 2021, that the plaintiff lacked standing to make his claims.[7308] "Because we hold [the plaintiff] lacked Article III standing to sue, we need not reach the question of whether the appeal is moot."[7309]

Challenges to the 2020 Vote Count in Nevada

Stokke v. Cegavske (Andrew P. Gordon, D. Nev. 2:20-cv-2046)

> While the 2020 general-election vote was being counted in Nevada, a federal complaint alleged that a county's use of signature-matching software for absentee ballots was improper and that media access to vote counting was inadequate. The district judge denied the plaintiffs relief.
>
> *Topics:* Signature matching; voting technology; absentee ballots; early voting; news media; intervention; equal protection; matters for state courts; Covid-19; recusal; case assignment.

Two days after the November 3, 2020, general election, two candidate committees, a voter, and a member of the media filed a federal complaint against the secretary of state for Nevada and the registrar of voters for Clark County, the county that includes Las Vegas.[7310] The complaint alleged that Clark County was using improper signature-matching software to verify absentee ballots, and the county denied the member of the media an adequate opportunity to view the counting of ballots.[7311] The complaint alleged that the voter returned an absentee ballot by mail without a signature and was wrongfully prevented from voting in person on election day.[7312] With their complaint, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction[7313] and a motion for expedited hearing and briefing.[7314]

The court initially assigned the case to Judge Gloria M. Navarro, but she recused herself, and the court reassigned the case to Judge Andrew P.

7306. Notice of Appeal, *Wood*, No. 1:20-cv-5155 (N.D. Ga. Dec. 28, 2020), D.E. 37.

7307. Jurisdictional Question, Wood v. Raffensperger, No. 20-14813 (11th Cir. Jan. 29, 2021).

7308. Opinion, *id.* (Aug. 6, 2021), 2021 WL 3440690, *cert. denied*, 595 U.S. ___, 142 S. Ct. 1211 (2022).

7309. *Id.* at 3 n.1.

7310. Complaint, Stokke v. Cegavske, No. 2:20-cv-2046 (D. Nev. Nov. 5, 2020), D.E. 1 [hereinafter *Stokke* Complaint]; *see* Rory Appleton, *GOP Campaigns, Voter File Lawsuit Alleging Improper Votes in Nevada*, Las Vegas Rev.-J., Nov. 6, 2020, at A1.

7311. *Stokke* Complaint, *supra* note 7310.

7312. *Id.* at 3.

7313. Motion, *Stokke*, No. 2:20-cv-2046 (D. Nev. Nov. 5, 2020), D.E. 3.

7314. Motion, *id.* (Nov. 5, 2020), D.E. 4.

Gordon,[7315] who set the case—which was filed during a time of social distancing made necessary by a global Covid-19 infectious pandemic—for a hearing by videoconference on November 6.[7316] A docket entry provided the public with contact information for the hearing and an admonishment not to broadcast or record it.[7317] Judge Gordon reminded participants of the admonishment at the hearing: "Let me put everyone on notice that recording—and this includes the folks on the phone as well—recording, taping, streaming, or otherwise broadcasting district court hearings is expressly prohibited by this court's General Order 2017-02 and the policies of the Judicial Conference."[7318]

At the hearing, Judge Gordon granted a motion to intervene by a political party, which argued in its motion that the federal suit followed a similar and unsuccessful suit in state court.[7319] Judge Gordon expressed a reluctance to "usurp [the] proper role of state legislatures and rewrite state election laws."[7320] He denied the plaintiffs immediate relief.[7321]

The plaintiffs voluntarily dismissed their case on November 24.[7322]

Voters Who Need Personal Assistance to Vote

Arkansas United v. Thurston (Timothy L. Brooks, W.D. Ark. 5:20-cv-5193)

> An action filed on the night before election day sought an injunction against limitations on who could assist voters who needed personal assistance to cast their ballots. Because of the late filing, the district judge denied the plaintiffs immediate relief. But ruling on summary-judgment motions later, he granted the plaintiffs some relief. Appeals are pending.
>
> *Topics:* Voting technology; laches.

7315. Docket Sheet, *id.* (Nov. 5, 2020) [hereinafter *Stokke* Docket Sheet] (D.E. 2, 5).

7316. Order, *id.* (Nov. 6, 2020), D.E. 11; *see Stokke* Docket Sheet, *supra* note 7315 (minutes, D.E. 27).

7317. *Stokke* Docket Sheet, *supra* note 7315 (D.E. 20).

7318. Transcript at 5, *Stokke*, No. 2:20-cv-2046 (D. Nev. Nov. 6, 2020, filed Nov. 17, 2020), D.E. 30 [hereinafter *Stokke* Transcript].

7319. *Id.* at 7; *Stokke* Docket Sheet, *supra* note 7315 (minutes, D.E. 27); Intervention Motion, *Stokke*, No. 2:20-cv-2046 (D. Nev. Nov. 6, 2020), D.E. 10.

7320. *Stokke* Transcript, *supra* note 7318, at 76.

7321. *Stokke* Docket Sheet, *supra* note 7315 (minutes, D.E. 27); *Stokke* Transcript, *supra* note 7318, at 76–82; *see* Alexander Burns & Jonathan Martin, *New Leading in Pa., Ga. as Count Goes On*, Boston Globe, Nov. 7, 2020, at A1 ("the plaintiffs lacked evidence that the automatic scanner was affecting voters"); *see also* Emily Bazelon, *The Trump Campaign Has Filed 16 Lawsuits Contesting the Election*, N.Y. Times, Nov. 16, 2020, at A16.

7322. Voluntary Dismissal, *Stokke*, No. 2:20-cv-2046 (D. Nev. Nov. 24, 2020), D.E. 31.

A federal complaint filed in the Western District of Arkansas—at 10:43 p.m. on the night before the November 3, 2020, general election—against state and county election officials by an organization that promotes the interests of immigrants and its founder sought "[a]n injunction requiring Defendants to develop and implement a remedial plan to ensure that voters are permitted to use assistance from persons of their choice when they cast their ballots."[7323] Thirty-eight minutes later, the plaintiffs filed a motion for a temporary restraining order or a preliminary injunction.[7324]

Judge Timothy L. Brooks decided that the injunction motion was adequately briefed and that he could deny it on November 3—election day—without a hearing.[7325] He found a likelihood of success on the merits:[7326] section 208 of the Voting Rights Act provides, "Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union."[7327] But "the equities do not favor intervention where the election is already in progress and the requested relief would change the rules of the game mid-play."[7328]

On February 5, 2021, he declined to dismiss an amended complaint.[7329] Resolving summary-judgment motions, he determined on August 19, 2022, that one provision of Arkansas's code violated the Voting Rights Act and another did not.[7330] A provision permitting persons who are not poll workers to assist no more than six voters was preempted,[7331] but a provision requiring poll workers to maintain names and addresses of voter assisters was not.[7332]

7323. Complaint at 16, Ark. United v. Thurston, No. 5:20-cv-5193 (W.D. Ark. Nov. 2, 2020), D.E. 1; Opinion at 3, *id.* (Nov. 3, 2020), D.E. 35 [hereinafter Nov. 3, 2020, *Ark. United* Opinion], 2020 WL 6472651; Ark. United v. Thurston, 517 F. Supp. 3d 777, 782 (W.D. Ark. 2021).

7324. Motion, *Ark. United*, No. 5:20-cv-5193 (W.D. Ark. Nov. 2, 2020), D.E. 3; Nov. 3, 2020, *Ark. United* Opinion, *supra* note 7323, at 3.

7325. Nov. 3, 2020, *Ark. United* Opinion, *supra* note 7323, at 2; *Ark. United*, 517 F. Supp. 3d at 782.

7326. Nov. 3, 2020, *Ark. United* Opinion, *supra* note 7323, at 6–9.

7327. 52 U.S.C. § 10508.

7328. Nov. 3, 2020, *Ark. United* Opinion, *supra* note 7323, at 10.

7329. *Ark. United*, 517 F. Supp. 3d 777; *see* Amended Complaint, *Ark. United*, No. 5:20-cv-5193 (W.D. Ark. Dec. 8, 2020), D.E. 79.

7330. Opinion, *Ark. United*, No. 5:20-cv-5193 (Aug. 19), D.E. 168, 2022 WL 3584626, *as amended*, Ark. United v. Thurston, 626 F. Supp. 3d 1064 (W.D. Ark. 2022).

7331. *See* Ark. Code § 7-5-310(b)(4)(B).

7332. *See id.* § 7-5-310(b)(5).

Judge Brooks awarded the plaintiffs $103,030.43 in attorney fees and costs on January 13, 2023.[7333]

Appeals were held in abeyance pending resolution of another case, which was decided on November 20, 2023.[7334] In that other case, the court of appeals determined that section 2 of the Voting Rights Act does not provide for private rights of action.[7335]

No Standing to Challenge Drive-Through Voting

Hotze v. Hollins (Andrew S. Hanen, S.D. Tex. 4:20-cv-3709)

> A district judge held that challengers to drive-through voting in a Texas county during the 2020 election did not have standing to challenge the policy in federal court.
>
> *Topics:* Poll locations; early voting; intervention; Covid-19.

According to an October 28, 2020, federal complaint filed in the Southern District of Texas against Harris County's clerk by a member of the Texas legislature, two candidates, and an additional voter, "[b]y indiscriminately encouraging and allowing any and all Harris County registered voters to cast their ballots via curbside drive-thru voting, Defendant is violating both federal and state law, and Plaintiffs will suffer irreparable injury if such ultra vires action is not stopped."[7336] Two days later, the plaintiffs filed a motion for a preliminary injunction.[7337] On that day, Judge Andrew S. Hanen set the case for hearing on November 2,[7338] including an intervention motion.[7339]

7333. Opinion, *Ark. United*, No. 5:20-cv-5193 (W.D. Ark. Jan. 13, 2023), D.E. 199, 2023 WL 187507.

7334. Orders, Ark. United v. Thurston, Nos. 22-2918 and 23-1154 (8th Cir. Mar. 6, 2023).

7335. Ark. State Conf. NAACP v. Ark. Bd. of Apportionment, ___ F.4th ___, 2023 WL 8011300 (8th Cir. 2023) (opinion filed at 8th Cir. No. 22-1395), *aff'g* 586 F. Supp. 3d 893 (E.D. Ark. 2022); *see* Mariana Alfaro, *Ruling on Key Section of Voting Rights Act Could Limit Enforcement Efforts*, N.Y. Times, Nov. 21, 2023, at A5; Nick Corasaniti, *Court Limits Who Can Sue Under Voting Rights Act*, N.Y. Times, Nov. 21, 2023, at A18; Mariah Timms, *Appeals Court Curbs Key Tool to Enforce Voting Rights Act*, Wall St. J., Nov. 21, 2023, at A3.

7336. Complaint at 1, Hotze v. Hollins, No. 4:20-cv-3709 (S.D. Tex. Oct. 28, 2020), D.E. 1.

7337. Preliminary-Injunction Motion, *id.* (Oct. 30, 2020), D.E. 3.

7338. Order, *id.* (Oct. 30, 2020), D.E. 6; *see* Transcripts, *id.* (Nov. 2, 2020, filed Nov. 2, 2020), D.E. 61, 62; *see also* Jasper Scherer, *State Judges Allow Drive-Thru Votes; Federal Court Yet to Hear Bid by Republicans to Disqualify 127,000 Harris County Ballots*, Houston Chron., Nov. 2, 2020, at A3.

7339. Intervention Motion, *Hotze*, No. 4:20-cv-3709 (S.D. Tex. Oct. 30, 2020), D.E. 5

By November 2, several intervention motions had been filed, and Judge Hanen granted some of them:

> Before the Court are multiple motions to intervene filed on behalf of individual early drive through voters and political entities. The Court grants the motions to intervene on behalf of voters who have already voted in a drive through polling location and defers ruling on those made by political entities.[7340]

Also on November 2, Judge Hanen dismissed the action for lack of standing.[7341]

> . . . [I]f the Court had found standing existed, it would have denied an injunction as to the drive-thru early voting.
>
> . . . [But for] Election Day, as opposed to early voting there is no legislative authorization for movable structures as polling places. The Election Code makes clear that, on Election Day, each polling place shall be located inside a building.[7342]

The court of appeals also denied the plaintiffs an injunction on November 2.[7343] On October 25, 2021, the court of appeals agreed that the plaintiffs lacked standing, and the case had become moot anyway.[7344]

[hereinafter First *Hotze* Intervention Motion].

7340. Opinion, *id.* (Nov. 2, 2020), D.E. 59; *see* Intervention Motions, *id.* (Nov. 1 and 2, 2020), D.E. 16, 26, 28, 40, 44, 51 (granted); First *Hotze* Intervention Motion, *supra* note 7339 (granted); Intervention Motions, *Hotze*, No. 4:20-cv-3709 (S.D. Tex. Nov. 2, 2020), D.E. 36, 45 (not granted).

7341. Opinion, *Hotze*, No. 4:20-cv-3709 (S.D. Tex. Nov. 2, 2020), D.E. 63 [hereinafter *Hotze* Dismissal Opinion], 2020 WL 6437668; *see* Zach Despart & Samantha Ketterer, *Drive-Thru Votes Allowed*, Houston Chron., Nov. 3, 2020, at A1; Brent Kendall & Sara Randazzo, *Judges Deny GOP Vote-Rule Challenges*, Wall St. J., Nov. 3, 2020, at A3; Neena Satija, Brittney Martin & Aaron Schaffer, *Judge Allows Drive-Through Votes in Texas County*, Wash. Post, Nov. 3, 2020, at A2.

7342. *Hotze* Dismissal Opinion, *supra* note 7341, at 7 (quotation marks omitted).

7343. Order, Hotze v. Hollins, No. 20-20574 (5th Cir. Nov. 2, 2020), D.E. 13, 2020 WL 6440440.

7344. Hotze v. Hudspeth, 16 F.4th 1121 (5th Cir. 2021); *see* Order, *Hotze*, No. 4:20-cv-3709 (S.D. Tex. Dec. 23, 2021), D.E. 77 (again dismissing the case).

Unsuccessfully Challenging Private Grants to Local Election Authorities

Wisconsin Voters Alliance v. City of Racine (William C. Griesbach, E.D. Wis. 1:20-cv-1487), Pennsylvania Voters Alliance v. Centre County (Matthew W. Brann, M.D. Pa. 4:20-cv-1761), Texas Voters Alliance v. Dallas County (Amos L. Mazzant, E.D. Tex. 4:20-cv-775), and Minnesota Voters Alliance v. City of Minneapolis (Michael J. Davis, D. Minn. 0:20-cv-2049)

> Courts in the Eastern District of Wisconsin, the Middle District of Pennsylvania, the Eastern District of Texas, and the District of Minnesota held that the plaintiffs did not have standing to challenge private grants to election authorities, because the complaints alleged only policy grievances.
>
> *Topics:* Voting technology; equal protection; Covid-19; interlocutory appeal; Help America Vote Act (HAVA); National Voter Registration Act; laches.

In Wisconsin, Pennsylvania, Texas, and Minnesota, judges found no standing to challenge private grants to local election authorities for the operation of 2020 elections.

Eastern District of Wisconsin

An organization and seven voters filed a federal complaint in the Eastern District of Wisconsin against five Wisconsin cities on September 24, 2020, alleging that the cities' receiving more than six million dollars in private federal election grants from the Center for Tech and Civic Life (CTCL) violated federal law.[7345] With their complaint, the plaintiffs filed a motion for a temporary restraining order.[7346]

Four days later, Judge William C. Griesbach set the case for a telephonic hearing on September 29, posting contact information in the docket sheet.[7347] At the hearing, Judge Griesbach set the case for oral argument by videoconference on October 13.[7348]

7345. Complaint, Wis. Voters Alliance v. City of Racine, No. 1:20-cv-1487 (E.D. Wis. Sept. 24, 2020), D.E. 1; *see* Mitchell Schmidt, *Group Sues to Block Private Election Grants to Five Cities*, Wis. State J., Sept. 27, 2020, at A3; Bruce Vielmetti, *Group Says Wisconsin Cities Can't Legally Accept Election Grants*, Milwaukee J. Sentinel, Sept. 26, 2020, at A2.

7346. Temporary-Restraining-Order Motion, *Wis. Voters Alliance*, No. 1:20-cv-1487 (E.D. Wis. Sept. 24, 2020), D.E. 2.

7347. Docket Sheet, *id.* (Sept. 24, 2020).

7348. Minutes, *id.* (Sept. 29, 2020), D.E. 4; *see* Minutes, *id.* (Oct. 13, 2020), D.E. 28; *see also* Bruce Vielmetti, *Cities Seek to Dismiss Suit Over Private Election Grants*, Milwaukee J. Sentinel, Oct. 14, 2020, at A8.

On October 9, the cities moved to dismiss the case for lack of standing.[7349]

Judge Griesbach denied the plaintiffs immediate relief on the day following oral argument:[7350]

> It is important to note that Plaintiffs do not challenge any of the specific expenditures the defendant Cities have made in an effort to ensure safe and efficient elections can take place in the midst of the pandemic that has struck the nation over the last eight months. In other words, Plaintiffs do not claim that the defendant Cities are using funds to encourage only voters in favor of one party. It is the mere acceptance of funds from a private and, in their view, left-leaning organization that Plaintiffs contend is unlawful. . . .
>
> . . . The more densely populated areas face more difficult problems in conducting safe elections in the current environment, the defendant Cities contend, and this fact best explains their need for the . . . grants.
>
> Plaintiffs have presented at most a policy argument for prohibiting municipalities from accepting funds from private parties to help pay the increased costs of conducting safe and efficient elections.[7351]

The plaintiffs filed a notice of appeal[7352] and a motion for a preliminary injunction pending appeal[7353] on the next day. Judge Griesbach denied the injunction on October 21.[7354] The appeal was dismissed by agreement of the parties on November 6.[7355]

On January 19, 2021, Judge Griesbach dismissed an amended complaint for lack of standing: "Though this is a federal lawsuit seeking relief in a federal court, Plaintiffs have offered only a political argument for prohibiting municipalities from accepting money from private entities to assist in the funding of elections for public offices."[7356]

7349. Motion, *Wis. Voters Alliance*, No. 1:20-cv-1487 (E.D. Wis. Oct. 9, 2020), D.E. 23; Brief, *id.* (Oct. 9, 2020), D.E. 24.

7350. Opinion, *id.* (Oct. 14, 2020), D.E. 27 [hereinafter Oct. 14, 2020, *Wis. Voters Alliance* Opinion], 2020 WL 6129510; *see* Mitchell Schmidt, *Judge Declines to Block Private Grants to Cities*, Wis. State J., Oct. 15, 2020, at A5; Bruce Vielmetti, *Judge Oks Cities' Use of Election Grant Money*, Milwaukee J. Sentinel, Oct. 15, 2020, at A3.

7351. Oct. 14, 2020, *Wis. Voters Alliance* Opinion, *supra* note 7350, at 2.

7352. Notice of Appeal, *Wis. Voters Alliance*, No. 1:20-cv-1487 (E.D. Wis. Oct. 15, 2020), D.E. 30.

7353. Preliminary-Injunction Motion, *id.* (Oct. 15, 2020), D.E. 31.

7354. Opinion, *id.* (Oct. 21, 2020), D.E. 37, 2020 WL 6591209.

7355. Order, Wis. Voters Alliance v. City of Racine, No. 20-3002 (7th Cir. Nov. 6, 2020), D.E. 11, 2020 WL 9254456.

7356. Opinion at 6, *Wis. Voters Alliance*, No. 1:20-cv-1487 (E.D. Wis. Jan. 15, 2021, filed Jan. 19, 2021), D.E. 49, 2021 WL 179166; *see* Amended Complaint, *id.* (Oct. 30,

Middle District of Pennsylvania

An organization and fourteen voters filed a federal complaint against Philadelphia and two Pennsylvania counties on Friday, September 25, 2020, alleging that CTCL "has essentially created a constitutionally impermissible public–private partnership with Pennsylvania's urban counties and cities to run its federal elections on November 3, 2020. . . . In total, CTCL is providing over $14,000,000 of private federal election grants to . . . three local governments."[7357] The plaintiffs filed a motion for a temporary restraining order on Monday.[7358]

On Tuesday, Judge Matthew W. Brann set the case for a telephonic status conference on Thursday.[7359]

> The Court's preference is that counsel do not participate in telephonic conference calls by cellular phone or other mobile device; however, in light of current circumstances necessitated by the COVID-19 virus pandemic afflicting our nation, which compel counsel to work outside of their offices, I will permit such telephonic conference calls to be made by cellular phone if that is the only means of telephonic communication for counsel.[7360]

During the next week, Judge Brann set the case for a courtroom hearing on October 16.[7361] An October 12 amended complaint added the secretary of the commonwealth as a defendant.[7362] Three days later, the plaintiffs filed a motion for a temporary restraining order against her.[7363]

Judge Brann concluded on October 21 that the plaintiffs did not have standing to pursue their complaint, which alleged only speculative and generalized grievances.[7364] An appeal was summarily dismissed on No-

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2020), D.E. 39; *see also* Nuha Dolby, *Where Wisconsin Lawsuits on Behalf of Trump Stand*, Milwaukee J. Sentinel, Dec. 9, 2020, at A4.

7357. Complaint at 1, Pa. Voters Alliance v. Centre County, No. 4:20-cv-1761 (M.D. Pa. Sept. 25, 2020), D.E. 1; Pa. Voters Alliance v. Centre County, 496 F. Supp. 3d 861, 864–65 (M.D. Pa. 2020).

7358. Temporary-Restraining-Order Motion, *Pa. Voters Alliance*, No. 4:20-cv-1761 (M.D. Pa. Sept. 28, 2020), D.E. 4.

7359. Order, *id.* (Sept. 29, 2020, filed Oct. 1, 2020), D.E. 12.

7360. *Id.* at 2.

7361. Order, *id.* (Oct. 7, 2020), D.E. 32; *see* Transcript, *id.* (Oct. 16, 2020, filed Oct. 22, 2020); *see also* John Beauge, *Judge Hears Arguments on Grant Funds*, Pittsburgh Post-Gazette, Oct. 18, 2020, at C3.

7362. Amended Complaint, *Pa. Voters Alliance*, No. 4:20-cv-1761 (M.D. Pa. Oct. 12, 2020), D.E. 38.

7363. Temporary-Restraining-Order Motion, *id.* (Oct. 15, 2020), D.E. 51.

7364. Pa. Voters Alliance v. Centre County, 496 F. Supp. 3d 861 (M.D. Pa. 2020); *see* Chris Brennan, *Another Election Lawsuit in Pa. Bites the Dust*, Phila. Inquirer, Oct. 23,

vember 20 "for lack of standing, as there is no injury-in-fact,"[7365] and the Supreme Court denied certiorari on January 11, 2021.[7366]

Eastern District of Texas

An organization and four voters filed a federal complaint against four Texas counties on October 9, 2020, alleging, "The plaintiffs are injured by CTCL's private federal election grants because they are targeted to counties and cities with progressive voter patterns."[7367] With their complaint the plaintiffs filed a motion for a temporary restraining order.[7368]

Judge Amos L. Mazzant set the case for a hearing on October 16[7369] and denied the plaintiffs immediate relief on October 20.[7370]

> CTCL—a nonpartisan, nonprofit organization—offers COVID-19 relief election administration grants to counties and cities as supplemental funding to ensure the safety of voters. All counties and cities in the United States are eligible to apply for funds under the grants, regardless of the political affiliation of their officials or the voting tendencies of their electorates . . .
>
> Almost half of the 254 counties in Texas applied for CTCL grants. The overwhelming majority of those counties voted for the Republican presidential candidate in 2016.[7371]

Judge Mazzant determined that the plaintiffs did not have standing to pursue the suit.[7372] On December 9, he granted the plaintiffs a voluntary dismissal.[7373]

2020, at B2.

7365. Order, Pa. Voters Alliance v. County of Centre, No. 20-3175 (3d Cir. Nov. 23, 2020), D.E. 28.

7366. Pa. Voters Alliance v. Centre County, 592 U.S. ___, 141 S. Ct. 1126 (2021).

7367. Complaint at 1, Tex. Voters Alliance v. Dallas County, No. 4:20-cv-775 (E.D. Tex. Oct. 9, 2020), D.E. 1; Tex. Voters Alliance v. Dallas County, 495 F. Supp. 3d 441, 449 (E.D. Tex. 2020).

7368. Temporary-Restraining-Order Motion, *Tex. Voters Alliance*, No. 4:20-cv-775 (E.D. Tex. Oct. 9, 2020), D.E. 2; *Tex. Voters Alliance*, 495 F. Supp. 3d at 449.

7369. Order, *Tex. Voters Alliance*, No. 4:20-cv-775 (E.D. Tex. Oct. 13, 2020), D.E. 10; *see* Transcript, *id.* (Oct. 16, 2020, filed Oct. 19, 2020), D.E. 26; Minutes, *id.* (Oct. 16, 2020), D.E. 22; *Tex. Voters Alliance*, 495 F. Supp. 3d at 449.

7370. *Tex. Voters Alliance*, 495 F. Supp. 3d 441.

7371. *Id.* at 449.

7372. *Id.* at 451–57.

7373. Motion, *Tex. Voters Alliance*, No. 4:20-cv-775 (E.D. Tex. Dec. 9, 2020), D.E. 31; *see* Notice, *id.* (Nov. 17, 2020), D.E. 30.

District of Minnesota

"The City of Minneapolis is one of 22 Minnesota municipalities that applied for and was awarded a COVID-19 Response Grant from the Center for Tech and Civic Life to assist with the substantial costs entailed with administering an election during a global pandemic."[7374]

A September 24, 2020, federal complaint filed in the District of Minnesota alleged that it was unconstitutional for a municipality to accept private funds for its administration of the November 3 general election.[7375] Five days later, the plaintiffs filed a motion for a temporary restraining order.[7376]

Judge Michael J. Davis set the case for an October 15 videoconference hearing, posting in the docket sheet a telephone number for receiving dial-in instructions.[7377]

On October 16, Judge Davis ruled that the plaintiffs did not have standing to bring the suit.[7378]

> Plaintiffs allege no injury to their right to vote caused by the City's actions. For example, nowhere do they allege that they will be unable to cast a ballot, or that they will be forced to choose between voting under unsafe pandemic conditions and not voting at all. The City's actions in applying for and accepting the grant and using the grant money to improve all manners of voting in Minneapolis in the 2020 election affect all Minneapolis voters equally. All individual Plaintiffs are Minneapolis voters. Plaintiffs fail to explain how they will be uniquely affected by Minneapolis's actions.[7379]

The plaintiffs filed a voluntary dismissal on January 4, 2021.[7380]

7374. Opinion at 1–2, Minn. Voters Alliance v. City of Minneapolis, No. 0:20-cv-2049 (D. Minn. Oct. 16, 2020), D.E. 25 [hereinafter *Minn. Voters Alliance* Opinion], 2020 WL 6119937 (footnote omitted).

7375. Complaint, *id.* (Sept. 24, 2020), D.E. 1; *see* Amended Complaint, *id.* (Nov. 13, 2020), D.E. 29.

7376. Temporary-Restraining-Order Motion, *id.* (Sept. 29, 2020), D.E. 7.

7377. Docket Sheet, *id.* (Sept. 24, 2020) (D.E. 16); *see* Notice, *id.* (Oct. 6, 2020), D.E. 15.

7378. *Minn. Voters Alliance* Opinion, *supra* note 7374; *see* Liz Navratil, *Judge Rules Mpls. Can Accept Election Grant*, Minneapolis Star Trib., Oct. 18, 2020, at 3B.

7379. *Minn. Voters Alliance* Opinion, *supra* note 7374, at 2.

7380. Voluntary Dismissal, *Minn. Voters Alliance*, No. 0:20-cv-2049 (D. Minn. Jan. 4, 2021), D.E. 38.

No Relief from Reductions in Polling Locations in Kentucky During a Pandemic

Nemes v. Bensinger (Charles R. Simpson III, W.D. Ky. 3:20-cv-407)

Because of the global Covid-19 infectious pandemic, some populous counties in Kentucky planned to operate only one polling place each for a primary election in which voting by mail would be encouraged. A federal judge denied a requested injunction to require more polling places.

Topics: Poll locations; Covid-19; intervention; case assignment; recusal; primary election; class action.

Fifteen days before a June 23, 2020, primary election in Kentucky, a state legislator and six other voters filed a federal class-action complaint in the Western District of Kentucky challenging the number of planned voting locations—which would be reduced because of heavy voting by mail and concerns about exposing poll workers to infection during the global Covid-19 infectious pandemic—as burdensome and dangerous for voters.[7381]

The court initially assigned the case to Judge Claria Horn Boom,[7382] but then it reassigned the case to Judge Justin R. Walker.[7383] Then, on the case's third day, the plaintiffs filed a motion for a temporary restraining order or a preliminary injunction.[7384] Judge Boom's recusal was issued on the same day as the motion.[7385] On the next day, Judge Walker recused himself,[7386] and the case was reassigned to Judge Rebecca Grady Jennings.[7387] She recused herself, and the case was reassigned to Judge Charles R. Simpson

7381. Complaint, Nemes v. Bensinger, No. 3:20-cv-407 (W.D. Ky. June 8, 2020), D.E. 1; Nemes v. Bensinger, 467 F. Supp. 3d 509, 519, 524 (W.D. Ky. 2020); Nemes v. Bensinger, 336 F.R.D. 132, 135 (W.D. Ky. 2020).

7382. Notice, *Nemes*, No. 3:20-cv-407 (W.D. Ky. June 8, 2020), D.E. 2.

7383. Notice, *id.* (June 9, 2020), D.E. 15.

7384. Motion, *id.* (June 10, 2020), D.E. 4.

7385. Recusal, *id.* (June 10, 2020, filed June 11, 2020), D.E. 9.

7386. Judge Walker was elevated to a seat on the Court of Appeals for the District of Columbia Circuit on September 2, 2020. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges (noting that his elevation was confirmed by the Senate on June 18, 2020).

7387. Docket Sheet, *Nemes*, No. 3:20-cv-407 (W.D. Ky. June 8, 2020) (D.E. 10).

III on June 11.[7388] Judge Simpson set the case for a videoconference at 11:00 on the following morning.[7389]

At the conference, Judge Simpson disclosed that he had voted absentee by mail because of the Covid-19 pandemic and his age; he gave the attorneys enough time to bring the facts to the attention of their clients and set 4:00 that afternoon as the deadline for a recusal request.[7390] No party asked for his recusal.[7391]

Two motions to intervene were filed on June 12:[7392] one before the conference by the candidate who would win a major party's primary election for the U.S. Senate[7393] and one after the conference by a member of an urban council who promised to assist with possible remedies.[7394] The second motion was unopposed, and Judge Simpson granted it.[7395] Judge Simpson denied the first motion because of time constraints and the plaintiffs' adequately representing the proposed intervenor's interests.[7396]

At the conference, Judge Simpson set the case for an evidentiary hearing on June 17.[7397] He and the parties agreed that he would address claims with respect to counties in both of Kentucky's districts.[7398] An order filed on June 16 gave the public instructions for how to request audio access to the hearing,[7399] but the parties and the judge agreed that he could decide the injunction issue without a hearing, so the hearing was canceled.[7400]

7388. Recusal, *id.* (June 11, 2020), D.E. 13.

Tim Reagan interviewed Judge Simpson for this report by telephone on September 24, 2020.

7389. Order, *Nemes*, No. 3:20-cv-407 (W.D. Ky. June 11, 2020), D.E. 17.

7390. Postconference Order, *Nemes*, No. 3:20-cv-407 (W.D. Ky. June 13, 2020), D.E. 22 [hereinafter *Nemes* Postconference Order]; Interview with Hon. Charles R. Simpson III, Sept. 24, 2020.

7391. *Nemes* Postconference Order, *supra* note 7390.

7392. *See id.*; *see also* Ben Tobin, *McGrath Campaign Joins Suit on Voting*, Louisville Courier-J., June 13, 2020, at A6.

7393. Intervention Motion, *Nemes*, No. 3:20-cv-407 (W.D. Ky. June 12, 2020), D.E. 18; Nemes v. Bensinger, 336 F.R.D. 132, 135 (W.D. Ky. 2020).

7394. Intervention Motion, *Nemes*, No. 3:20-cv-407 (W.D. Ky. June 12, 2020), D.E. 19.

7395. Order, *id.* (June 16, 2020), D.E. 34; *see* Intervenor Complaint, *id.* (June 16, 2020), D.E. 35.

7396. *Nemes*, 336 F.R.D. 132.

7397. *Nemes* Postconference Order, *supra* note 7390.

7398. *Id.* at 3.

7399. Order, *Nemes*, No. 3:20-cv-407 (W.D. Ky. June 16, 2020), D.E. 39.

7400. Order, *id.* (June 17, 2020), D.E. 48.

Judge Simpson denied the plaintiffs immediate relief on June 18.[7401] "While it may seem intuitive that, when it comes to polling places, more is better, that is not a call for this Court to make, *unless* we first find a constitutional or statutory violation."[7402]

> Comprehensive plans were put in place which included making absentee ballots available for all voters, providing early in-person voting options for 15 days leading up to Election Day, and establishing a polling place for Election Day in-person voting. This Triple Crown of voting options wins against the pandemic's risk of disenfranchising the Kentucky voter.[7403]

A month later, the plaintiffs voluntarily dismissed their complaint without prejudice "based on public representations by the Kentucky Secretary of State that he will not permit single polling locations in Kentucky's largest counties in the November general election."[7404]

As luck would have it, Judge Simpson had been assigned at random an earlier case seeking modifications to election procedures for the November 3 general election in light of the pandemic.[7405] The plaintiffs in that action also dismissed their complaint when they became satisfied with the commonwealth's general-election plan.[7406]

No Additional Polling Place in Washington, D.C.'s Ward 8 During the Covid-19 Pandemic

Robinson v. Board of Elections (Dabney L. Friedrich, D.D.C. 1:20-cv-1364)

> Because of poor mail service in the ward and health risks resulting from the Covid-19 global infectious pandemic, two plaintiffs sought an order requiring the establishment of an additional polling location in their ward. The district judge denied immediate relief.
>
> *Topics:* Poll locations; Covid-19.

7401. Nemes v. Bensinger, 467 F. Supp. 3d 509 (W.D. Ky. 2020); *see* Ben Tobin, *Jefferson, Fayette Counties Will Not Have to Add More Polling Locations*, Louisville Courier-J., June 20, 2020, at A6.

7402. *Nemes*, 467 F. Supp. 3d at 524.

7403. *Id.* at 526.

7404. Notice, *Nemes*, No. 3:20-cv-407 (W.D. Ky. July 17, 2020), D.E. 52.

7405. Notice, Collins v. Adams, No. 3:20-cv-375 (W.D. Ky. May 27, 2020), D.E. 2; Complaint, *id.* (May 27, 2020), D.E. 1; *see* Amended Complaint, *id.* (Aug. 19, 2020), D.E. 56.

7406. Stipulated Dismissal, *id.* (Sept. 1, 2020), D.E. 59; Interview with Hon. Charles R. Simpson III, Sept. 24, 2020.

Two voters filed a federal complaint in the district court for the District of Columbia on Thursday, May 21, 2020, seeking an order that election officials prepare by May 26—the day after Memorial Day—another polling location in their ward.[7407] The complaint noted the closing of fourteen out of seventeen polling places in the ward because of the Covid-19 global infectious pandemic and residents' not receiving mail-in ballots because of poor mail service in the ward.[7408] With their complaint, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction.[7409]

On Friday, the parties stipulated a briefing schedule: the board would file a summary-judgment motion by 8:00 Saturday night, the plaintiffs would reply by 8:00 Sunday night, and the hearing would be held on Tuesday following the three-day weekend.[7410] Judge Dabney L. Friedrich set the hearing for 4:00 p.m.[7411]

On the holiday, Judge Friedrich noted that the parties had not prepared summary-judgment materials properly and ordered additional briefing.[7412] The parties agreed to additional briefing by June 1.[7413] Judge Friedrich instead ordered briefing completed by 8:00 p.m. on May 27 and held a telephonic hearing at noon on May 28.[7414] Members of the public were permitted to listen.[7415]

Judge Friedrich began the hearing ready to rule.[7416] She denied the plaintiffs immediate relief "[f]or the reasons stated on the record."[7417] Because of the pandemic, the district allowed voting anywhere in the district

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7407. Complaint, Robinson v. Bd. of Elections, No. 1:20-cv-1364 (D.D.C. May 21, 2020), D.E. 1.

7408. *Id.* at 1.

7409. Motion, *id.* (May 21, 2020), D.E. 2.

7410. Joint Consent Scheduling Motion, *id.* (May 22, 2020), D.E. 7.

7411. Docket Sheet, *id.* (May 21, 2020) [hereinafter *Robinson* Docket Sheet].

Tim Reagan interviewed Judge Friedrich for this report by telephone on October 8, 2020.

7412. *Robinson* Docket Sheet, *supra* note 7411 (D.E. 11).

7413. Joint Status Report, *Robinson*, No. 1:20-cv-1364 (D.D.C. May 26, 2020), D.E. 14; *see* Transcript at 4–5, *id.* (May 28, 2020, filed Dec. 17, 2020), D.E. 27 [hereinafter *Robinson* Transcript].

7414. *Robinson* Transcript, *supra* note 7413; *see id.* at 2 (noting the court's requirement that civil proceedings be held remotely or postponed because of the Covid-19 pandemic).

7415. Interview with Judge Dabney L. Friedrich, Oct. 8, 2020; *see Robinson* Transcript, *supra* note 7413, at 2 ("And just as a reminder, in accordance with the rules of this court, recordings of this hearing, audio or otherwise, are not permitted.").

7416. *Robinson* Transcript, *supra* note 7413, at 4.

7417. Order, *Robinson*, No. 1:20-cv-1364 (D.D.C. May 21, 2020), D.E. 20.

and encouraged absentee voting, and the plaintiffs supported their claims with limited demographic data.[7418]

Judge Friedrich approved a voluntary dismissal of the case on June 30.[7419]

Unsuccessful Attempt at Federal Mandamus Relief Against State Election Officials

Fox v. Detzner (Mark E. Walker, N.D. Fla. 4:18-cv-529)

> A district judge denied as beyond the court's jurisdiction a federal mandamus action seeking an order requiring state election officials to follow the law. The judge also denied a request for a temporary restraining order because the plaintiffs did not comply with the notice requirements of Federal Rule of Civil Procedure 65.
>
> *Topics:* Voting technology; matters for state courts; case assignment.

A November 13, 2018, "Complaint in Mandamus and Request for Expedited Consideration" filed in the U.S. District Court for the Northern District of Florida sought to compel Florida election officials to preserve election ballot materials for the November 6 general election as required by law.[7420] Among other concerns, the plaintiffs—eight voters—alleged that "[b]ecause of the scheduled statewide recounts commencing as soon as Sunday, November 11, 2008, the unpreserved digital ballot images are in danger of being obliterated and overwritten by the tabulation of recounted ballots."[7421]

The prayer for relief included a temporary restraining order request.[7422]

Senior Judges Robert L. Hinkle[7423] and William Stafford[7424] disqualified themselves from the case in turn over the next two days. On Friday, November 16, Judge Mark E. Walker denied the plaintiffs immediate relief.[7425] First, "a federal court lacks the general power to issue writs of mandamus to direct state officers in the performance of their duties when mandamus

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7418. *Robinson* Transcript, *supra* note 7413.

7419. *Robinson* Docket Sheet, *supra* note 7411.

7420. Complaint, Fox v. Detzner, No. 4:18-cv-529 (N.D. Fla. Nov. 13, 2018), D.E. 1 [hereinafter *Fox* Complaint]; *see* Jeffrey Schweers, *Seven Lawsuits and Counting: Tallahassee Is Ground Zero*, Tallahassee Democrat, Nov. 14, 2018, at A6.

7421. *Fox* Complaint, *supra* note 7420, at 3.

7422. *Id.* at 15.

7423. Disqualification, *Fox*, No. 4:18-cv-529 (N.D. Fla. Nov. 14, 2018), D.E. 3.

7424. Disqualification, *id.* (Nov. 15, 2018), D.E. 4.

7425. Order, *id.* (Nov. 16, 2018), D.E. 6.

is the only relief sought."[7426] Second, the plaintiffs had not followed the notice requirements that Federal Rule of Civil Procedure 65 requires for a temporary restraining order.[7427]

On Monday, Judge Walker instructed the plaintiffs to inform him how they intended to proceed with the case by noon on the following day.[7428] The plaintiffs responded that they probably would file an amended complaint within the next several days,[7429] and they did so on December 26.[7430] Judge Walker granted the defendants a dismissal on April 2, 2019, finding that the plaintiffs' cited legal obligations on election officials did not afford the plaintiffs a private right of action.[7431]

Challenging a Governor's Oversight of Elections When He Is a Candidate for Another Office

League of Women Voters of Florida v. Scott (Mark E. Walker, N.D. Fla. 4:18-cv-525)

> A federal complaint filed a few days after a general election challenged the governor's authority over vote-counting matters because he was a candidate for the U.S. Senate in a close election. The federal judge decided that the governor had come close to but not crossed a line of propriety.
>
> *Topic:* Recounts.

Two organizations and a voter filed a federal complaint in the Northern District of Florida against Florida's governor on November 12, 2018, six days after a general election, alleging that the governor, who was an apparently prevailing candidate for the United States Senate, "has already misused his authority to influence and frustrate the high stakes vote-counting process, and the powers of his office give him opportunity to misuse his authority."[7432] With their complaint, the plaintiffs filed a motion for a tem-

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7426. *Id.* at 1–2 (citing Moye v. Clerk, 474 F.2d 1275, 1276 (5th Cir. 1973)).

7427. *Id.* at 2.

7428. Order, *id.* (Nov. 19, 2018), D.E. 26.

7429. Notice, *id.* (Nov. 20, 2018), D.E. 27.

7430. Amended Complaint, *id.* (Dec. 26, 2018), D.E. 28.

7431. Opinion, Fox v. Lee, *id.* (Apr. 2, 2019), D.E. 82 (granting dismissal without a hearing).

7432. Complaint at 2, League of Women Voters of Fla. v. Scott, No. 4:18-cv-525 (N.D. Fla. Nov. 12, 2018), D.E. 1; *see* Daniel Chang, Elizabeth Koh & Nicholas Nehmas, *Legal Sparring Continues; Recounts Get Uneven Start*, Miami Herald, Nov. 13, 2018, at 1A; Jeffrey Schweers, *Seven Lawsuits and Counting: Tallahassee Is Ground Zero*, Tallahassee Democrat, Nov. 14, 2018, at A6; David Smiley, Kyra Gurney, Steve Bousquet & Emily L. Mahoney, *It's "Prayer Mode" as Legal Decisions and Deadlines Loom*, Miami Herald, Nov.

porary restraining order and a preliminary injunction.[7433] Judge Mark E. Walker set the case for a telephonic status conference on November 14.[7434]

At the status conference, Judge Walker set the case for an evidentiary hearing on November 15.[7435] On the day of the hearing, the governor moved to quash a subpoena commanding him to appear personally, arguing that "absent extraordinary circumstances, high-ranking officials may not be subjected to depositions or called to testify regarding their official actions."[7436] Judge Walker quashed the subpoena.[7437] "This Court will revisit the issue if at today's hearing, Plaintiffs make the unlikely showing that Governor Scott has information that cannot be gleaned from any other source. What this Court will not do, however, is permit the Governor to be called for the sole purpose of grandstanding."[7438]

After the hearing, Judge Walker denied the plaintiffs immediate relief.[7439] He noted that two days after the election, the governor alleged at a press conference that there was rampant election fraud in two counties, "despite the presence of election monitors from the Florida Department of State who had not reported any criminal activity."[7440] But Judge Walker concluded that the governor had not impermissibly crossed a line:

> This is a case about the precariousness of public trust. . . .
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> . . .
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> The crux of this case is whether [Governor] Scott's post-Election Day words and actions require extraordinary court-ordered recusal under the

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15, 2018, at 1A; Kenneth P. Vogel & Patricia Mazzei, *Legal Pugilist for Democrats at Center of Recount Fight in Florida*, N.Y. Times, Nov. 15, 2018, at A12.

7433. Motion, *League of Women Voters of Fla.*, No. 4:18-cv-525 (N.D. Fla. Nov. 12, 2018), D.E. 4.

7434. Order, *id.* (Nov. 12, 2018), D.E. 8.

A docket entry gave parties and the public dial-in information. Docket Sheet, *id.* Nov. 12, 2018) (D.E. 9).

7435. Minutes, *id.* (Nov. 14, 2018), D.E. 16; *see* Transcript, *id.* (Nov. 15, 2018, filed Nov. 15, 2018), D.E. 26; Minutes, *id.* (Nov. 15, 2018), D.E. 28; *see also* Schweers, *supra* note 7432.

7436. Motion, *League of Women Voters of Fla.*, No. 4:18-cv-525 (N.D. Fla. Nov. 15, 2018), D.E. 22.

7437. Order, *id.* (Nov. 15, 2018), D.E. 23.

7438. *Id.*

7439. League of Women Voters of Fla. v. Scott, 366 F. Supp. 3d 1311 (N.D. Fla. 2018); *see* Audra D.S. Burch & Glenn Thrush, *Florida Recounts Senate Votes Again, and Democrat's Chances Dwindle*, N.Y. Times, Nov. 17, 2018, at A20; Manuel Roig-Franzia & Amy Gardner, *Nelson's Chances in Senate Race Dim as Key Fla. Counties Complete Recount*, Wash. Post, Nov. 17, 2018, at A4.

7440. *League of Women Voters of Fla.*, 366 F. Supp. 3d at 1313.

> U.S. Constitution because of alleged due process deprivations. . . . While campaign-trail rhetoric is increasingly bombastic, imprudent, and not necessarily rooted in objective facts, there is a critical line between campaign rhetoric and that rhetoric transforming into state action that requires judicially imposed recusal.
>
> . . .
>
> Here, Scott has toed the line between imprudent campaign-trail rhetoric and problematic state action. But he has not crossed the line.
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> . . .
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> . . . Scott has not yet moved to indicate an objective risk of bias. He has not suspended any election official. He has not ordered any investigation. He has not interfered with the recount so far.[7441]

The plaintiffs voluntarily dismissed the case on November 27.[7442]

Challenges to a Secretary of State's Election Management

Common Cause of Georgia v. Kemp (Amy Totenberg, 1:18-cv-5102) and Brown v. Kemp (William M. Ray II, 1:18-cv-5121) (N.D. Ga.)

> Two federal lawsuits filed on the day before and the day of a general election challenged a secretary of state's election oversight. The first case alleged susceptibility to tampering of voters' records. The second case challenged the propriety of a secretary of state presiding over an election in which he is running for governor. A related case from the previous year challenged the security of touchscreen voting machines. A federal judge ordered the use of provisional ballots as an interim remedy for voter-record discrepancies, pursuant to the Help America Vote Act. Apparently the winner of the gubernatorial election, the secretary notified the judge in the other case of his resignation as secretary of state.
>
> *Topics:* Voting technology; provisional ballots; case assignment; Help America Vote Act (HAVA); laches; removal; enjoining certification; attorney fees.

Two federal lawsuits, filed in the Northern District of Georgia on the day before and on the day of the 2018 general election, challenged election oversight by Georgia's secretary of state. They were related to litigation initiated in 2017 over ballot technology.

Susceptibility to Security Breaches

According to the *Washington Post*,

7441. *Id.* at 1313, 1315, 1317.

7442. Dismissal Notice, *League of Women Voters of Fla.*, No. 4:18-cv-525 (N.D. Fla. Nov. 27, 2018), D.E. 30.

> [A cybersecurity sleuth] was taken aback when [a Google] query turned up a file with a list of voters and then alarmed when a subsequent simple data pull retrieved the birth dates, drivers' license numbers and partial Social Security numbers of more than 6 million voters, as well as county election supervisors' passwords for use on Election Day. He also discovered the server had a software flaw that an attacker could exploit to take control of the machine.[7443]

Common Cause of Georgia filed a federal complaint in the Northern District against Georgia's secretary of state on November 5, 2018, one day before the general election, alleging that the state's voter-registration website was improperly susceptible to security breaches and urging the use of provisional ballots in cases of registration questions.[7444] On the following day, Judge Eleanor L. Ross reassigned the case from herself to Judge Amy Totenberg as related to a 2017 case over which Judge Totenberg was presiding.[7445]

Direct Recording Electronic Voting Machines

On August 8, 2017, state and county election officials removed to the Northern District's federal court a July 3 complaint filed in state court challenging the use of direct recording electronic (DRE) voting machines in a June 20 special congressional runoff election.[7446] "DREs do not create a paper trail or any other means by which to independently verify or audit the recording of each elector's vote."[7447] On August 12, the plaintiffs filed a motion for limited early and expedited discovery, disclosing an intention to seek a preliminary injunction barring DREs—also known as touch-screen voting machines—in the November 7 municipal elections.[7448] On August 14, Judge Totenberg observed that the record did not show service

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7443. Ellen Nakashima, *Georgia Faces Legal Challenge Over Its Voting Technology*, Wash. Post, Sept. 17, 2018, at A13.

7444. Complaint, Common Cause of Ga. v. Kemp, No. 1:18-cv-5102 (N.D. Ga. Nov. 5, 2018), D.E. 1; Common Cause Ga. v. Secretary, 17 F.4th 102, 105 (11th Cir. 2021).

7445. Order, *Common Cause of Ga.*, No. 1:18-cv-5102 (N.D. Ga. Nov. 6, 2018), D.E. 4; Transcript at 18, *id.* (Nov. 8, 2018, Nov. 10, 2018), D.E. 54 [hereinafter *Common Cause of Ga.* Transcript].

7446. Notice of Removal, Curling v. Kemp, No. 1:17-cv-2989 (N.D. Ga. Aug. 8, 2017), D.E. 1; *see* Mark Niesse, *Lawsuit Tries to Force Georgia to Use Paper Ballots*, Atlanta J.-Const., June 4, 2018, at 1A.

7447. Curling v. Kemp, 334 F. Supp. 3d 1303, 1308 (N.D. Ga. 2018).

7448. Motion, *Curling*, No. 1:17-cv-2989 (N.D. Ga. Aug. 12, 2017), D.E. 4.

In 2002, Georgia was the first state to adopt DRE technology for elections. *See* Nakashima, *supra* note 7443; Mark Niesse, *Paper Ballots Ruled Out, for Now*, Atlanta J.-Const., Sept. 19, 2018, at 1A.

for seven of the defendants, although three consented to removal.[7449] Judge Totenberg ordered service on the remaining four defendants by 5:00 p.m. on the following day.[7450]

On August 18, Judge Totenberg noted the filing in state court of a notice of a related case there, and she ordered the parties to provide her with the status and records of that case.[7451] She also noted the plaintiffs' right to file with her an amended state-court complaint.[7452] At an August 22 telephonic status conference,[7453] the plaintiffs' attorney noted that his clients' recent hiring of new counsel could delay their filing of the preliminary-injunction motion.[7454] Judge Totenberg sought guidance on the case's time pressure:

> We're not facing a major election cycle. I'm not trying to minimize the officeholders who are up for election or what is happening in the city. But it is not clear to me that having a preliminary injunction hearing on a thin record under these circumstances or ruling, even if I have a hearing, is really in anyone's interest. Not that I won't do it if I think it is warranted. But I'm not clear what the emergency is at this juncture, other than obviously there is great value in voting and having integrity in the voting system. But why that won't be protected by having a more considered development of the record and a proper hearing at a later point in time I'm not clear.[7455]

On the day after the conference, Judge Totenberg directed the plaintiffs to decide whether they wanted to move quickly to seek relief for the 2017 election or instead direct their efforts to the 2018 election:

> The Court . . . encourages Plaintiffs' counsel to seriously review the information filed by Defendants . . . regarding the time schedule for election preparation . . . by August 29, 2017. . . . If Plaintiffs determine they wish to proceed with the current established schedule and plan, they are advised to focus their motion for preliminary injunctive relief realistically

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7449. Order at 2–3, *Curling*, No. 1:17-cv-2989 (N.D. Ga. Aug. 14, 2017), D.E. 5.

7450. *Id.* at 3.

7451. Order at 2, *id.* (Aug. 18, 2017), D.E. 14.

7452. *Id.* at 1; *see* Amended Complaint, *id.* (Aug. 18, 2017), D.E. 15.

7453. Minutes, *id.* (Aug. 22, 2017), D.E. 41.

7454. Transcript at 6–7, *id.* (Aug. 22, 2017, filed Aug. 24, 2017), D.E. 42; *see id.* at 5 (Judge Totenberg's observing, "It seemed to me that I needed to chat with you about the status of this case as soon as possible at this juncture before we just splurged in ten different directions.").

7455. *Id.* at 16–17.

> on the limited set of issues and claims they deem essential to be resolved in this current 2017 election cycle.[7456]

On August 30, 2017, the plaintiffs filed a motion to grant them an extension until September 5 to file their preliminary-injunction motion.[7457] At an August 31 conference,[7458] the plaintiffs stated that they could file the injunction motion by 6:00 p.m. on September 1,[7459] and Judge Totenberg allowed them to do that.[7460] The plaintiffs decided, however, not to immediately pursue a preliminary injunction.[7461]

The plaintiffs filed a second amended complaint two weeks later[7462] and a third amended complaint nine months after that.[7463] On August 3[7464] and 7,[7465] 2018, each of two groups of plaintiffs filed a motion for a preliminary injunction requiring the use of paper ballots.[7466]

On September 12, "[a] crowd of more than 125 people spilled into an overflow courtroom during a long day of testimony from voting technology experts who warned of the dangers of hacking and election officials who said a quick switch to paper ballots would create more problems."[7467] Judge Totenberg would have held the hearing in the larger overflow courtroom, but it was not equipped for some of the technology that the parties wanted to use.[7468] "We are making available, of course, the audio in the overflow courtroom as well as . . . screens in there that will show any exhibits. But

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7456. Order, *id.* (Aug. 23, 2017), D.E. 40.

7457. Motion, *id.* (Aug. 30, 2017), D.E. 51; *see* Transcript at 4, *id.* (Aug. 31, 2017, filed Sept. 8, 2017), D.E. 59 [hereinafter Aug. 31, 2017, *Curling* Transcript] ("THE COURT: Frankly, I just was surprised by the late motion for an extension.").

7458. Minutes, *id.* (Aug. 31, 2017), D.E. 54.

7459. Aug. 31, 2017, *Curling* Transcript, *supra* note 7457, at 6, 9.

7460. Order, *Curling*, No. 1:17-cv-2989 (N.D. Ga. Aug. 31, 2017), D.E. 53.

7461. *See* Transcript at 4, *id.* (Sept. 1, 2017, filed Sept. 8, 2017), D.E. 60.

7462. Second Amended Complaint, *id.* (Sept. 15, 2017), D.E. 70.

7463. Third Amended Complaint, *id.* (June 13, 2018), D.E. 226.

7464. Preliminary-Injunction Motion, *id.* (Aug. 3, 2018), D.E. 258; *see* Mark Niesse, *Judge Might Shift Georgia Voting to Paper Ballots by November*, Atlanta J.-Const., Aug. 9, 2018, at 1B.

7465. Preliminary-Injunction Motion, *Curling*, No. 1:17-cv-2989 (N.D. Ga. Aug. 7, 2018), D.E. 260; *see* Amended Preliminary-Injunction Motion, *id.* (Aug. 20, 2018), D.E. 271.

7466. Curling v. Raffensperger, ___ F. Supp. 3d ___, ___, 2023 WL 7463462 (N.D. Ga. 2023) (p.18 of opinion filed at N.D. Ga. No. 1:17-cv-2989, D.E. 1705).

7467. Mark Niesse, *Judge May Force Paper-Ballot Vote*, Atlanta J.-Const., Sept. 13, 2018, at 1B.

7468. Transcript at 9–10, *Curling*, No. 1:17-cv-2989 (N.D. Ga. Sept. 5, 2018, filed Sept. 17, 2018), D.E. 307.

unfortunately or fortunately you won't get to see some of the witnesses. There is no video presentation."[7469]

Acknowledging the merits of the plaintiffs' claims, Judge Totenberg ruled on September 17 that the motions had been filed too late for effective relief in the 2018 general election.[7470] On the one hand, "[t]he State of Georgia Defendants have delayed in grappling with the heightened critical cybersecurity issues of our era posed for the State's dated, vulnerable voting system that provides no independent paper audit trail."[7471] On the other hand, "[l]ast-minute, wholesale changes in the voting process operating in over 2,600 precincts, along with scheduled early voting arrangements, could predictably run the voting process and voter participation amuck."[7472]

> Plaintiffs shine a spotlight on the serious security flaws and vulnerabilities in the State's DRE system—including unverifiable election results, outdated software susceptible to malware and viruses, and a central server that was already hacked multiple times. . . .
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> . . .
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> While Plaintiffs have shown the threat of real harms to their constitutional interests, the eleventh-hour timing of their motions and an instant grant of the paper ballot relief requested could just as readily jeopardize the upcoming elections, voter turnout, and the orderly administration of the election.
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> . . .
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> The Court attempted to expedite this case at earlier times to no avail.
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> . . .
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> Meanwhile, the State Defendants have also stood by for far too long, given the mounting tide of evidence of the inadequacy and security risks of Georgia's DRE voting system and software.
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> . . .
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> . . . [T]he Court finds that the Plaintiffs have not carried their burden of persuasion to establish these prerequisites for such extraordinary injunctive relief in the immediate 2018 election time frame ahead.

7469. *Id.* at 10.

7470. Curling v. Kemp, 334 F. Supp. 3d 1303 (N.D. Ga. 2018); Curling v. Raffensperger, ___ F. Supp. 3d at ___, 2023 WL 7463462 (p.20 of opinion filed at N.D. Ga. No. 1:17-cv-2989, D.E. 1705); Curling v. Raffensperger, 397 F. Supp. 3d 1334, 1338 (N.D. Ga. 2019); *see* Richard L. Hasen, Election Meltdown 70–71 (2020); Ellen Nakashima, *Motion to Force Georgia to Use Paper Ballots in Midterm Elections Is Denied*, Wash. Post, Sept. 19, 2018, at A3; Niesse, *supra* note 7448.

7471. *Curling*, 334 F. Supp. 3d at 1307.

7472. *Id.*

> **V. Conclusion**
> While Plaintiffs' motions for preliminary injunction are **DENIED**, the Court advises the Defendants that further delay is not tolerable in their confronting and tackling the challenges before the State's election balloting system. . . .
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> . . .
>
> . . . The 2020 elections are around the corner. If a new balloting system is to be launched in Georgia in an effective manner, it should address democracy's critical need for transparent, fair, accurate, and verifiable election processes that guarantee each citizen's fundamental right to cast an accountable vote.[7473]

Voting machines used in the 2018 election were sequestered pending further litigation, pursuant to Judge Totenberg's December 2017 preservation order.[7474] In an interlocutory appeal, the court of appeals determined on February 7, 2019, that "the State Defendants are neither entitled to Eleventh Amendment immunity nor legislative immunity and their standing arguments are not yet reviewable."[7475]

On April 2, 2019, a new governor signed a bill replacing Georgia's electronic voting machines with touchscreen-and-paper machines.[7476] On May 21, Judge Totenberg ruled that her 2017 case could proceed to discovery.[7477] She issued a 153-page opinion on August 15 allowing old technology through 2019 elections but prohibiting it beyond then.[7478]

Suit Seeking the Recusal of Georgia's Secretary of State

On the day of the November 6, 2018, general election, five voters filed a federal complaint in the Northern District seeking relief from Georgia's secretary of state's administering the election while also seeking the office

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7473. *Id.* at 1322, 1326–28 (record citation omitted); *see* Alan Judd & Bill Rankin, *Security Doubts Not Over After Race Ends*, Atlanta J.-Const., Nov. 18, 2018, at 1A.

7474. *See* Preservation Order, *Curling*, No. 1:17-cv-2989 (N.D. Ga. Dec. 15, 2018), D.E. 122; *see also* Mark Niesse, *Why Did Some Voting Machines Sit Unused?*, Atlanta J.-Const., Nov. 8, 2018, at 1A.

7475. Curling v. Kemp, 761 F. App'x 927, 930 (11th Cir. 2019); *see Curling*, 397 F. Supp. 3d at 1338 n.1.

7476. Ga. Act No. 24 (2019–2020), www.legis.ga.gov/legislation/en-US/Display/20192020/HB/316; *see Curling*, 397 F. Supp. 3d at 1340; *see also* Greg Bluestein & Mark Niesse, *Governor Signs Bill for New Voting Machines*, Atlanta J.-Const., Apr. 5, 2019, at 1A; *see also* Cameron McWhirter, *Voting Machine Bill Passes in Georgia*, Wall St. J., Mar. 14, 2019, at A3.

7477. Curling v. Raffensperger, 403 F. Supp. 3d 1311 (N.D. Ga. 2019).

7478. *Curling*, 397 F. Supp. 3d 1334. *See generally* Danny Hakim, Reid J. Epstein & Stephanie Sul, *Anatomy of an Election "Meltdown" in Georgia*, N.Y. Times, July 26, 2020, at A1.

of governor.[7479] Among the allegations in the complaint was a claim that the secretary falsely and publicly accused the opposing party of cybercrimes.[7480] With their complaint, the voters filed a motion for a temporary restraining order against the secretary's exercising any authority over the election.[7481]

On the next day, the plaintiffs provided notice that the case was related to the one filed by Common Cause a day earlier,[7482] and Judge William M. Ray II set the case for hearing on the morning after that.[7483] At the hearing, Judge Ray received a copy of the secretary's letter of resignation.[7484] Two days after the election, it appeared that the secretary probably had enough votes to win the governorship without a runoff election.[7485] His challenger conceded defeat on November 16.[7486]

Judge Ray dismissed the case as moot on November 30.[7487]

Further Litigation on Provisional Ballots

Common Cause filed a motion for a temporary restraining order and expedited discovery on November 7, the day after election day.[7488] That day, Judge Totenberg set the case for hearing on the following day.[7489] On No-

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7479. Complaint, Brown v. Kemp, No. 1:18-cv-5121 (N.D. Ga. Nov. 6, 2018), D.E. 1.

7480. *Id.* at 8–10.

7481. Temporary-Restraining-Order Motion, *id.* (Nov. 6, 2018), D.E. 2.

7482. Notice, *id.* (Nov. 7, 2018), D.E. 8.

7483. Order, *id.* (Nov. 7, 2018), D.E. 3; *see* Richard Fausset & Alan Blinder, *Republican in the Lead, Georgia Governor Race Quickly Goes to Court*, N.Y. Times, Nov. 8, 2018, at F15.

7484. Minutes, *Brown*, No. 1:18-cv-5121 (N.D. Ga. Nov. 8, 2018), D.E. 15; *see* Bill Barrow & Kate Brumback, *Georgia's Democratic Candidate for Governor Vows to Fight On*, Miami Herald, Nov. 9, 2018, at 7A; Jim Galloway, *Amid Ballot Fight, a Race to Decide Who Should Count Them in Future*, Atlanta J.-Const., Nov. 14, 2018, at 1B; Judd & Rankin, *supra* note 7473; *see also Common Cause of Ga.* Transcript, *supra* note 7445, at 5 (statement by an attorney for the secretary of state that "Secretary Kemp has resigned effective noon today.").

7485. *See* Fausset & Blinder, *supra* note 7483.

7486. *See* Alan Blinder & Richard Fausset, *Democrat Ends Bid in Georgia for Governor*, N.Y. Times, Nov. 17, 2018, at A1; Vanessa Williams & Felicia Sonmez, *Abrams Acknowledges Kemp's Gubernatorial Win, Remains Critical of Election*, Wash. Post, Nov. 17, 2018, at A4 ("Kemp's 50.22 percent of the tally put the Republican just above the 50 percent-plus-one-vote threshold required to avoid a runoff election in December.").

7487. Order, *Brown*, No. 1:18-cv-5121 (N.D. Ga. Nov. 30, 2018), D.E. 16.

7488. Motion, Common Cause of Ga. v. Kemp, No. 1:18-cv-5102 (N.D. Ga. Nov. 7, 2018), D.E. 15; Common Cause Ga. v. Secretary, 17 F.4th 102, 105 (11th Cir. 2021).

7489. Order, *Common Cause of Ga.*, No. 1:18-cv-5102 (N.D. Ga. Nov. 7, 2018), D.E. 17; *see Common Cause Ga.*, 17 F.4th at 105.

vember 7 and 8, she issued three orders explaining to the parties what information she required them to present at the hearing.[7490] On November 9, she ordered the plaintiffs to file by 3:00 p.m. that day an affidavit from a qualified statistician "regarding whether or not there is a statistically significant increase in the percentage of provisional ballots cast, relative to the total number of ballots cast," comparing the 2018 election with the elections in 2014 and 2016.[7491]

On November 12, Judge Totenberg ordered, pursuant to the Help America Vote Act,[7492]

> the Secretary of State's Office to immediately establish and publicize on its website a secure and free-access hotline or website for provisional ballot voters to access to determine whether their provisional ballots were counted and if not, the reason why. The Court further **ORDERS** the Secretary of State to direct each of the 159 county election superintendents to similarly publicize the availability of the hotline or secure website on the county and county election websites.[7493]

In light of intervening statutory actions, the parties stipulated dismissal of the case on June 14, 2019.[7494] Judge Totenberg awarded the plaintiff $166,210.09 in attorney fees and costs on May 29, 2020.[7495] The court of appeals affirmed the award on October 28, 2021.[7496]

7490. Orders, *Common Cause of Ga.*, No. 1:18-cv-5102 (N.D. Ga. Nov. 7 and 8, 2018), D.E. 18, 20, 21.

7491. Order, *id.* (Nov. 9, 2018), D.E. 41.

7492. Pub. L. No. 107-252, 116 Stat. 1666 (2002), *as amended*, 52 U.S.C. §§ 20901–21145. *See generally* Marie Leary & Robert Timothy Reagan, The Help America Vote Act (Federal Judicial Center 2012); Symposium, *HAVA @ 10*, 12 Election L.J. 111 (2013).

7493. Common Cause of Ga. v. Kemp, 347 F. Supp. 3d 1270, 1299–300 (N.D. Ga. 2018); *Common Cause Ga.*, 17 F.4th at 106; *see* Greg Bluestein & Mark Niesse, *Vote Count Plays Out in Counties, Courts*, Atlanta J.-Const., Nov. 14, 2018, at 1A; Allison McCann & Karen Yourish, *In Some Races, Results May Still Be Weeks Away*, N.Y. Times, Nov. 14, 2018, at A18; Sean Sullivan, Beth Reinhard, Vanessa Williams & Lori Rozsa, *New Court Moves Could Prolong Fla., Ga. Races*, Wash. Post, Nov. 14, 2018, at A1; *see also* Judd & Rankin, *supra* note 7473 ("last week, Totenberg detailed instances of mismanagement by county election officers").

7494. Stipulation, *Common Cause of Ga.*, No. 1:18-cv-5102 (N.D. Ga. June 14, 2019), D.E. 116.

7495. Opinion, *id.* (May 29, 2020), D.E. 123, 2020 WL 12948010; *Common Cause Ga.*, 17 F.4th at 106.

7496. *Common Cause Ga.*, 17 F.4th 102.

Further Litigation on Election Technology

Pending before Judge Totenberg is an October 15, 2019, amended complaint challenging Georgia's election technology.[7497]

On August 7, 2020, Judge Totenberg again declined to grant the plaintiffs a preliminary injunction, noting that the record by then had become out of date.[7498] On September 28, however, Judge Totenberg was able to conclude that a preliminary injunction should require election officials to provide at each polling place by the close of early voting during the November 3 general election a paper record of eligible voters in light of historical problems with electronic records.[7499] On October 11, Judge Totenberg provided further injunctive relief protecting electronic voting procedures from malfunction and interference.[7500]

On October 24, 2020, the court of appeals stayed the September 28 injunction.[7501] On October 5, 2022, the court of appeals determined that the deadline for paper voter lists was an abuse of discretion: "As with other reasonable, nondiscriminatory voting rules, we consider not what the best policy would be, but whether the State's administrative concerns justify the one in place."[7502]

On November 10, 2023, Judge Totenberg agreed that some of the plaintiffs' claims were suitable for trial, which is set to begin on January 9, 2024.[7503]

7497. Supplemental Complaint, Curling v. Raffensperger, No. 1:17-cv-2989 (N.D. Ga. Oct. 15, 2019), D.E. 628; Third Amended Complaint, *id.* (Oct. 15, 2019), D.E. 627; Curling v. Raffensperger, ___ F. Supp. 3d ___, ___, 2023 WL 7463462 (N.D. Ga. 2023) (pp.32–33 of opinion filed at N.D. Ga. No. 1:17-cv-2989, D.E. 1705); *see* Opinion, *Curling*, No. 1:17-cv-2989 (N.D. Ga. July 30, 2020), D.E. 751 (dismissing a procedural-due-process claim).

7498. Opinion, *id.* (Aug. 7, 2020), D.E. 768.

7499. Curling v. Raffensperger, 491 F. Supp. 3d 1289 (N.D. Ga. 2020); *id.* at 1293 (noting that the injunction was issued "in light of new evidence brought to light by Plaintiffs in the late evening hours on Friday, September 25, 2020"); *see* Order, *Curling*, No. 1:17-cv-2989 (N.D. Ga. Oct. 14, 2020), D.E. 969 (denying a stay); Orders, *id.* (Oct. 12, 2020), D.E. 965, 966 (clarifying the injunction).

7500. Curling v. Raffensperger, 493 F. Supp. 3d 1264 (N.D. Ga. 2020); *Curling*, ___ F. Supp. 3d at ___, 2023 WL 7463462 (p.38 of opinion filed at N.D. Ga. No. 1:17-cv-2989, D.E. 1705).

7501. Curling v. Sec'y of State, No. 20-13730 (11th Cir. Oct. 24, 2020), 2020 WL 6301847.

7502. Curling v. Raffensperger, 50 F.4th 1114, 1117 (11th Cir. 2022).

7503. *Curling*, ___ F. Supp. 3d ___, 2023 WL 7463462 (opinion filed at N.D. Ga. No. 1:17-cv-2989, D.E. 1705); Order, *Curling*, No. 1:17-cv-2989 (N.D. Ga. Oct. 13, 2023), D.E. 1700.

Further Litigation on Election Management
Judge Steve C. Jones conducted a bench trial from April 11 to June 23, 2022,[7504] in a November 27, 2018, action generally challenging Georgia's oversight of elections.[7505] He did not find any flaws in the way that Georgia conducted elections requiring a judicial remedy.[7506]

Moving a Town's Only Polling Place Outside of Town to Accommodate Civic-Center Construction

LULAC Kansas v. Cox (Daniel D. Crabtree, D. Kan. 2:18-cv-2572)

> A district judge denied an emergency injunction against moving a town's sole polling place to a location outside of town after the judge heard testimony that voters would be provided with transportation to the new location.
>
> *Topics:* Poll locations; recusal; case assignment.

Eleven days before the November 6, 2018, general election, a civil-rights organization and a voter filed a federal complaint in the District of Kansas's Kansas City courthouse against the Ford County clerk, challenging her decision to move Dodge City's sole voting location to a place outside the city and alleging that this would have a disproportionate impact on Hispanic voters.[7507] With their complaint, the plaintiffs filed a motion for a

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7504. Minutes, Fair Fight Action v. Crittenden, No. 1:18-cv-5391 (N.D. Ga. June 23, 2022), D.E. 852; Minutes, *id.* (Apr. 11, 2022), D.E. 789; Fair Fight Action, Inc. v. Raffensperger, 634 F. Supp. 3d 1128, 1148 (N.D. Ga. 2022) ("[a]fter a delay in the start of trial due to the Omicron variant of COVID-19"); *id.* at 1143 ("what is believed to have been the longest voting rights bench trial in the history of the Northern District of Georgia").

7505. Docket Sheet, *Fair Fight Action*, No. 1:18-cv-5391 (N.D. Ga. Nov. 27, 2018); Second Amended Complaint, *id.* (Dec. 3, 2020), D.E. 582; Amended Complaint, *id.* (Feb. 19, 2019), D.E. 41; Complaint at 39–41, *id.* (Nov. 27, 2018), D.E. 1; *see* Fair Fight Action v. Raffensperger, 413 F. Supp. 3d 1251 (N.D. Ga. 2019) (denying a motion to dismiss the amended complaint on standing, mootness, and other grounds, but dismissing the state election board from some claims for sovereign immunity); *see also* Valerie Bauerlein, *Suit Alleges Georgia Curbed Black Voters*, Wall St. J., Nov. 28, 2018, at A4; Richard Fausset, *Supporters of Candidate Who Lost Georgia Race Take the State to Court*, N.Y. Times, Nov. 28, 2018, at A19; Vanessa Williams, *Lawsuit by Abrams's PAC Alleges Voter Suppression in Georgia*, Wash. Post, Nov. 30, 2018, at A4.

7506. *Fair Fight Action, Inc.*, 634 F. Supp. 3d 1128; *see* Matthew Brown, *Judge Upholds Ga. Law in Challenge Brought by Abrams After 2018 Loss*, Wash. Post, Oct. 2, 2022, at A8.

7507. Complaint, LULAC Kan. v. Cox, No. 2:18-cv-2572 (D. Kan. Oct. 26, 2018), D.E. 1; Rangel-Lopez v. Cox, 344 F. Supp. 3d 1285, 1287 (D. Kan. 2018); *see* Amended Complaint, *LULAC Kan.*, No. 2:18-cv-2572 (D. Kan. Oct. 28, 2018), D.E. 7.

temporary restraining order requiring the clerk to add a polling place within the city.[7508]

The reason for the move was planned construction near the civic center.[7509]

On the day that the case was filed, Judge John W. Lungstrum recused himself from hearing the case, so the court reassigned it to Judge Daniel D. Crabtree.[7510] Three days later, the county clerk moved for a transfer of the case to the closer Wichita courthouse.[7511] On Monday, October 29, Judge Crabtree had a telephone conference with the parties,[7512] and he held a hearing on November 1.[7513] He began,

> Let me just give you an overview of what my availability is and isn't. I have a person over on the Kansas City criminal docket who arguably is eligible for release from federal custody today, and his sentencing hearing is set at 1:30. And so I plan to be there for that sentencing hearing. I've set aside the time that I have available. I do want to travel over there in compliance with the traffic laws.[7514]

At the hearing, the county clerk testified that notices in English and in Spanish notified voters that the county would provide door-to-door transportation to the new polling place, that notices of the move would be posted at the old polling place, and that transportation would be provided to voters from there to the new polling place.[7515]

On the day of the hearing, Judge Crabtree declined for two main reasons to order that the civic-center polling place be reopened: (1) it would not be in the public interest to change the polling location so close to the election, and (2) the plaintiffs had not demonstrated a constitutional violation.[7516] But Judge Crabtree was troubled by evidence of the county clerk's possibly dismissive responses to efforts by the ACLU to facilitate voter participation.[7517]

7508. Temporary-Restraining-Order Motion, *LULAC Kan.*, No. 2:18-cv-2572 (D. Kan. Oct. 26, 2018), D.E. 4; *Rangel-Lopez*, 344 F. Supp. 3d at 1287.

7509. *Rangel-Lopez*, 344 F. Supp. 3d at 1287.

7510. Docket Sheet, *LULAC Kan.*, No. 2:18-cv-2572 (D. Kan. Oct. 26, 2018) (D.E. 6).

7511. Transfer Motion, *id.* (Oct. 29, 2018), D.E. 13.

7512. Minutes, *id.* (Oct. 29, 2018), D.E. 15.

7513. Minutes, *id.* (Nov. 1, 2018), D.E. 21.

7514. Transcript at 5, *id.* (Oct. 29, 2018, filed Nov. 2, 2018), D.E. 23.

7515. Rangel-Lopez v. Cox, 344 F. Supp. 3d 1285, 1288 (D. Kan. 2018).

7516. *Id.* at 1290–91.

7517. *Id.* at 1288–89, 1291; *see* Amy Gardner, *Fears for Ballot Integrity and Access Are Growing*, Wash. Post, Nov. 5, 2018, at A1.

Judge Crabtree granted a voluntary dismissal of the action on January 30, 2019.[7518]

No Relief from Digital Electronic Voting Machines

Shelby Advocates for Valid Elections v. Hargett (Thomas L. Parker, W.D. Tenn. 2:18-cv-2706)

> A district judge denied immediate relief from the use of digital electronic voting machines that did not provide a paper record of votes. The judge did not find use of such machines fundamentally unfair. Nearly a year later, the judge dismissed an amended complaint as no more than a generalized grievance.
>
> *Topics:* Voting technology; early voting.

On Friday, October 12, 2018, five days before early voting was to begin for a general election, an organization promoting voters' interests and four individuals filed a federal complaint in the Western District of Tennessee.[7519] The plaintiffs alleged that the digital electronic voting machines that would be used by Shelby County, which includes Memphis,

> are insecure, lack a voter-verified paper audit capacity, and fail to meet minimum statutory requirements, [so] requiring voters to use those machines violates the voters' constitutional rights to have their votes recorded in a fair, precise, verifiable, and anonymous manner, and to have their votes counted and reported in an accurate, auditable, legal, and transparent process.[7520]

On Monday, the plaintiffs filed an application for a temporary restraining order and a writ of mandamus.[7521] Judge Thomas L. Parker set the case for a status conference the following morning[7522] and a hearing that afternoon.[7523]

7518. Dismissal Order, *LULAC Kan.*, No. 2:18-cv-2572 (D. Kan. Jan. 30, 2019), D.E. 39.

7519. Complaint, Shelby Advocates for Valid Elections v. Hargett, No. 2:18-cv-2706 (W.D. Tenn. Oct. 12, 2018), D.E. 1 [hereinafter *Shelby Advocates for Valid Elections* Complaint]; Shelby Cty. Advocates for Valid Elections v. Hargett, 348 F. Supp. 3d 764, 768 (W.D. Tenn. 2018).

7520. *Shelby Advocates for Valid Elections* Complaint, *supra* note 7519, at 2; *see* Shelby Advocates for Valid Elections v. Hargett, 947 F.3d 977, 979 (6th Cir. 2020); *Shelby Cty. Advocates for Valid Elections*, 348 F. Supp. 3d at 768.

7521. Application, *Shelby Advocates for Valid Elections*, No. 2:18-cv-2706 (W.D. Tenn. Oct. 15, 2018), D.E. 23; *Shelby Cty. Advocates for Valid Elections*, 348 F. Supp. 3d at 767–68; *see Shelby Advocates for Valid Elections*, 947 F.3d at 980.

7522. Notice of Setting, *Shelby Advocates for Valid Elections*, No. 2:18-cv-2706 (W.D. Tenn. Oct. 16, 2018), D.E. 28.

7523. Notice of Setting, *id.* (Oct. 15, 2018), D.E. 24; *Shelby Cty. Advocates for Valid*

At the conclusion of the hearing, Judge Parker announced that "the Court is not convinced that the plaintiff has established and has overcome its burden."[7524]

> In this case, the plaintiffs are asking this federal court to substitute its judgment for that of the elected officials and the election officials for the state of Tennessee and Shelby County. . . .
>
> . . .
>
> . . . [U]nlike many temporary restraining orders, the plaintiff is not just asking for the status quo to be maintained.[7525]

Judge Parker filed an opinion eight days later: "Plaintiffs here have not shown that Shelby County's voting system is fundamentally unfair."[7526]

Judge Parker dismissed an amended complaint on September 13, 2019, finding that the court did not have jurisdiction to review the plaintiffs' policy preferences different from government officials'.[7527] The court of appeals affirmed the dismissal on January 24, 2020: "The long and short of it is that the plaintiffs failed to demonstrate the imminence of any injury in fact, depriving them of Article III standing to bring this claim."[7528]

Unsuccessful Complaint That Municipal Officers Were Too Incompetent to Oversee an Election

Underwood v. Gulley (Madeline Hughes Haikala, N.D. Ala. 2:18-cv-1310)

> A federal judge denied plaintiffs a preliminary injunction against municipal officers' overseeing an election scheduled days later. Although there was evidence of improper activity in the past, the evidence was not strong enough to show that the court's interference with the upcoming election was justified.
>
> *Topics:* Enjoining elections; case assignment.

Six individuals filed a federal complaint in the Northern District of Alabama on Thursday, August 16, 2018, against officials of the City of Bessemer—including the mayor and city-council members—who the

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Elections, 348 F. Supp. 3d at 767.

7524. Transcript at 80, *Shelby Advocates for Valid Elections*, No. 2:18-cv-2706 (W.D. Tenn. Oct. 16, 2018, filed Oct. 26, 2018), D.E. 44 [hereinafter *Shelby Advocates for Valid Elections* Transcript]; *see Shelby Cty. Advocates for Valid Elections*, 348 F. Supp. 3d at 767.

7525. *Shelby Advocates for Valid Elections* Transcript, *supra* note 7524, at 79.

7526. *Shelby Cty. Advocates for Valid Elections*, 348 F. Supp. 3d at 771.

7527. Opinion, *Shelby Advocates for Valid Elections*, No. 2:18-cv-2706 (W.D. Tenn. Sept. 13, 2019), D.E. 140, 2019 WL 4394754; *see* Second Amended Complaint, *id.* (Apr. 16, 2019), D.E. 104; *see also* Amended Complaint, *id.* (Jan. 11, 2019), D.E. 63.

7528. Shelby Advocates for Valid Elections v. Hargett, 947 F.3d 977, 983 (6th Cir.), *cert. denied*, 592 U.S. ___, 141 S. Ct. 257 (2020).

complaint alleged "should be viewed as unfit to oversee another municipal election."[7529] Among the relief sought was "a preliminary injunction to enjoin each Defendant from having any other role in the upcoming August 2018 elections outside of being allowed to cast a vote or run as a candidate."[7530] On the day that the case was filed, the court reassigned it from Magistrate Judge John H. England III to District Judge Madeline Hughes Haikala.[7531]

On Friday, Judge Haikala set the case for a telephone conference that afternoon,[7532] and she held a hearing on Monday.[7533] Four days later, she denied the plaintiffs immediate relief.[7534]

> [T]he plaintiffs have offered evidence that suggests that there may have been some voter intimidation during the 2014 municipal election in Bessemer and that election officials may have tampered with absentee ballots and ballots cast on the day of the election. If ultimately proven on a full record, these would be serious election violations.[7535]

But "on the record before it, the Court . . . cannot conclude that there is a substantial likelihood that the plaintiffs will succeed in proving a constitutional violation or a violation of the Voting Rights Act with respect to the August 28, 2018 election."[7536] Moreover: "Delaying next week's election to accommodate new officials would impose significant logistical and financial challenges."[7537]

Several months after the election, Judge Haikala dismissed the case as moot without opposition from the plaintiffs.[7538]

Spanish-Language Ballots for Puerto Rican Voters Outside Puerto Rico

Rivera Madera v. Detzner (Mark E. Walker, N.D. Fla. 1:18-cv-152)

> A federal district judge ordered counties in Florida with English-only ballots and a substantial population of voters from Puerto Rico to prepare Spanish-language sample ballots to bring the

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7529. Complaint at 2, Underwood v. Gulley, No. 2:18-cv-1310 (N.D. Ala. Aug. 16, 2018), D.E. 1.

7530. *Id.* at 11; *see* Preliminary-Injunction Motion, *id.* (Aug. 16, 2018), D.E. 2.

7531. Reassignment Notice, *id.* (Aug. 16, 2018), D.E. 4.

7532. Docket Sheet, *id.* (Aug. 16, 2018).

7533. *Id.*

7534. Opinion, *id.* (Aug. 24, 2018), D.E. 17, 2018 WL 4052174.

7535. *Id.* at 3 (citation omitted).

7536. *Id.* at 4.

7537. *Id.* at 6.

7538. Order, *id.* (Feb. 12, 2019), D.E. 21.

> counties in compliance with section 4(e) of the Voting Rights Act.
>
> *Topic:* Ballot language.

A voter, who was born and educated in Puerto Rico, and five organizations filed a federal class-action complaint against Florida's secretary of state and a county supervisor of elections on behalf of other county supervisors of elections on Thursday, August 16, 2018, in the Northern District of Florida.[7539] The complaint alleged a failure by approximately half of Florida's counties to provide "Spanish-language ballots, registration and other election materials and assistance" in violation of section 4(e) of the Voting Rights Act.[7540]

> **Completion of requisite grade level of education in American-flag schools in which the predominant classroom language was other than English**
>
> (1) Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.
>
> (2) No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language, except that in States in which State law provides that a different level of education is presumptive of literacy, he shall demonstrate that he has successfully completed an equivalent level of education in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto

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7539. Complaint, Rivera Madera v. Detzner, No. 1:18-cv-152 (N.D. Fla. Aug. 16, 2018), D.E. 1 [hereinafter *Rivera Madera* Complaint]; Rivera Madera v. Detzner, 325 F. Supp. 3d 1269, 1275 (N.D. Fla. 2018); *see* Steve Bousquet, *Citing Hurricane in Puerto Rico, Lawsuit Seeks Bilingual Ballots in 32 More Florida Counties*, Tampa Bay Times, Aug. 16, 2018; Arelis R. Hernández, *Florida Suit Seeks Spanish-Language Voting Services*, Wash. Post, Aug. 17, 2018, at A2.

7540. *Rivera Madera* Complaint, *supra* note 7539, at 1.

> Rico in which the predominant classroom language was other than English.[7541]

With their complaint, the plaintiffs filed a motion for a preliminary injunction,[7542] a motion to certify a plaintiff class,[7543] and a motion to certify a defendant class.[7544] Judge Mark E. Walker denied these motions without prejudice in 2019: "Put simply, the classes are not necessary."[7545]

On the day that the case was filed, Judge Walker set it for a telephonic scheduling conference on Tuesday, August 22, 2018.[7546] He did not want his inaction to determine the outcome of a case, so he embraced active case management.[7547] "This Court recognizes that Defendants have not been served and thus counsel for Defendants have not made an appearance. However, time is of the essence and counsel for Plaintiffs can certainly contact the [defendants' attorneys]."[7548]

Following a September 5 hearing,[7549] Judge Walker issued a preliminary injunction on September 7.[7550] "Due to the timeline of this lawsuit

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7541. Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(e), 79 Stat. 437, 437, *as amended*, 52 U.S.C. § 10303(e).

7542. Preliminary-Injunction Motion, *Rivera Madera*, No. 1:18-cv-152 (N.D. Fla. Aug. 16, 2018), D.E. 2.

7543. Plaintiff-Class Motion, *id.* (Aug. 16, 2018), D.E. 4.

7544. Defendant-Class Motion, *id.* (Aug. 16, 2018), D.E. 5.

7545. Order, *id.* (Mar. 5, 2019), D.E. 107, 2019 WL 1054671.

Tim Reagan interviewed Judge Walker for this report by telephone on December 12, 2018.

7546. Scheduling Order, *id.* (Aug. 16, 2018), D.E. 6 [hereinafter *Rivera Madera* Scheduling Order]; *see* Minutes, *id.* (Aug. 22, 2018, filed Aug. 22, 2018), D.E. 27; Minutes, *id.* (Aug. 22, 2018), D.E. 27.

A docket entry gave parties and the public dial-in information. Docket Sheet, *id.* (Aug. 16, 2018) (D.E. 7).

7547. Interview with Judge Mark E. Walker, Dec. 12, 2018.

7548. *Rivera Madera* Scheduling Order, *supra* note 7546, at 1–2.

7549. Minutes, *Rivera Madera*, No. 1:18-cv-152 (N.D. Fla. Sept. 5, 2018), D.E. 55; *see* Steve Bousquet, *Spanish-Language Ballots an "Impossibility," 32 Counties Say*, Tampa Bay Times, Sept. 5, 2018; Jim Saunders, *Judge to Weigh Spanish-Language Ballot Dispute*, Daytona Beach News-Journal, Sept. 5, 2018, at C4.

The Florida State Association of Supervisors of Elections was permitted to participate as an amicus curiae. Order, *Rivera Madera*, No. 1:18-cv-152 (N.D. Fla. Aug. 23, 2018), D.E. 31; Motion, *id.* (Aug. 23, 2018), D.E. 30; *see* Brief, *id.* (Aug. 30, 2018), D.E. 40.

7550. Opinion, *Rivera Madera*, No. 1:18-cv-152 (Sept. 7), D.E. 57, *amended,* Rivera Madera v. Detzner, 325 F. Supp. 3d 1284 (N.D. Fla. 2018); *see* Steve Bousquet, *Judge Orders 32 Counties to Provide Bilingual Sample Ballots*, Tampa Bay Times, Sept. 7, 2018; Martin E. Comas, *Judge: Counties Must Offer Spanish Sample Ballots*, Orlando Sentinel, Sept. 8, 2018, at B1.

and the looming deadlines Florida election officials face, this Court does not order all of Plaintiffs' requested relief. Rather, it orders attainable compliance with Section 4(e)."[7551] "[T]he Counties shall not be required to provide official Spanish-language ballots and such other relief requested by Plaintiffs which this Court deems infeasible at this late juncture."[7552] Instead, Judge Walker ordered the preparation of Spanish-language sample ballots, and if the counties mailed out sample ballots, the Spanish-language versions had to be included.[7553]

> Puerto Ricans are American citizens. Unique among Americans, they are not educated primarily in English—and do not need to be. But, like all American citizens, they possess the fundamental right to vote. The issue in this case is whether Florida officials, consistent with longstanding federal law, must provide assistance to Puerto Rican voters who wish to vote. Under the plain language of the Voting Rights Act, they must.
>
> . . . This Court is issuing this Order on an expedited basis to give the Secretary and the Scott administration ample opportunity to appeal if they seek to block their fellow citizens, many of whom fled after Hurricane Maria devastated Puerto Rico, from casting meaningful ballots.[7554]

In emergency cases, Judge Walker liked to rule promptly so that his rulings were not beyond appellate review.[7555]

Judge Walker concluded that of Florida's sixty-seven counties, twenty-seven already provided Spanish-language election materials, and the plaintiffs identified thirty-two of the remaining counties with substantial Puerto Rican populations.[7556] The individual plaintiff, who was not fluent in English, moved to Florida following the 2017 devastation in Puerto Rico caused by Hurricane Maria.[7557]

Florida's governor notified news media that Florida would comply with Judge Walker's preliminary injunction,[7558] and the secretary filed a notice of compliance a few days later.[7559]

7551. *Rivera Madera*, 325 F. Supp. 3d at 1284.

"I can't enjoin somebody or order somebody to do the impossible." Transcript at 11, *Rivera Madera*, No. 1:18-cv-152 (N.D. Fla. Sept. 5, 2018, filed Sept. 8, 2018), D.E. 58.

7552. *Rivera Madera*, 325 F. Supp. 3d at 1284.

7553. *Id.*

7554. *Id.* at 1273–74.

7555. Interview with Judge Mark E. Walker, Dec. 12, 2018.

7556. *Rivera Madera*, 325 F. Supp. 3d at 1274–75, 1280.

7557. *Id.* at 1275.

7558. *See* Bousquet, *supra* note 7550.

7559. Notice of Compliance, Rivera Madera v. Detzner, No. 1:18-cv-152 (N.D. Fla. Sept. 11, 2018), D.E. 61.

> Two days before election day, at 11:57 p.m. on Sunday, November 4, after the end of the early-voting period and on the eve of Election Day, Plaintiffs have filed an emergency motion seeking to ensure compliance with this Court's order on preliminary injunction. The cause of this motion was Duval County Supervisor of Elections Mike Hogan's strained and selective reading of this Court's preliminary injunction order. His reading, which inexplicably ignored this Court's unambiguous language to "make available a facsimile sample ballot in Spanish to voters who fall within the ambit of Section 4(e) of the Voting Rights Act" apparently, and unfortunately, resulted in no Spanish-language sample ballots being provided during the early-voting period in Duval County. With early voting now concluded, remedies related to early voting have left the station.[7560]

Considering the motion without a hearing and deciding it before 1:00 p.m. on November 5, Judge Walker ordered Florida's secretary of state to notify election officials in the thirty-two counties covered by Judge Walker's injunction that compliance was not optional.[7561] The secretary filed a notice of compliance that day.[7562]

Judge Walker often required notice of compliance in election litigation so that there would be a public record of compliance with election requirements.[7563] On January 22, 2019, Judge Walker ordered the newly appointed secretary of state

> to collect from the 32 counties at issue in this litigation the following information: (1) what specific steps each individual county took to comply with this Court's order granting preliminary injunction, ECF No. 59, in the November 2018 elections; and (2) how many sample Spanish ballots each county distributed, to the extent each county kept track of this information.[7564]

7560. Opinion, *id.* (Nov. 5, 2018), D.E. 79 [hereinafter *Rivera Madera* Injunction-Enforcement Opinion], 2018 WL 7506109 (citation omitted); *see* Motion, *id.* (Nov. 4, 2018), D.E. 77.

7561. *Rivera Madera* Injunction-Enforcement Opinion, *supra* note 7560, at 1, 5.

7562. Notice of Compliance, *Rivera Madera*, No. 1:18-cv-152 (N.D. Fla. Nov. 5, 2018), D.E. 80.

7563. Interview with Judge Mark E. Walker, Dec. 12, 2018; *see* Rivera Madera v. Detzner, 325 F. Supp. 3d 1269, 1284 (N.D. Fla. 2018); *Rivera Madera* Injunction-Enforcement Opinion, *supra* note 7560, at 5–6.

7564. Order, *Rivera Madera*, No. 1:18-cv-152 (N.D. Fla. Jan. 22, 2019), D.E. 95.

The secretary resigned a couple of days later because photographs surfaced of him in a 2005 blackface Halloween costume mocking victims of Hurricane Katrina. *See* Adeel Hassan, *New Florida Secretary of State Quits After Offensive Photos Emerge*, N.Y. Times, Jan. 25, 2019, at A18; Elizabeth Koh, *Black face Pics Lead Secretary of State to Resign*, Miami

According to the 178-page notice of compliance filed on February 28 and including data from all thirty-two counties, all complied with Judge Walker's order, and seventeen counties provided additional resources.[7565]

Following an April 11 notice by Florida's secretary of state of pending rules bringing Florida into compliance with section 4(e),[7566] Judge Walker extended his injunction in the case as feasible to govern until the effective date of the state's final rules.[7567]

In an action against Florida's secretary of state over the order of candidates on ballots, the U.S. Court of Appeals held on April 29, 2020, that because the secretary was not the one who applied Florida law to determine candidate order on ballots, she was not a proper defendant.[7568] So Judge Walker dismissed her as a defendant in the ballot-language case.[7569]

With one county supervisor of elections as the only remaining defendant, Judge Walker ordered briefing on possible certification of a defendant class.[7570] Judge Walker invited optional amicus curiae input from the Florida State Association of Supervisors "addressing the issue of whether this Court should certify a defendant class or require Plaintiffs to join all 31 additional supervisors who are the subject of this litigation."[7571] On December 14, Judge Walker decided not to certify a defendant class because of "differences in factual circumstances between counties, such as there being 4,505 Puerto Rico-born registered voters in Pasco County compared

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Herald, Jan. 25, 2019, at 1A. The governor then appointed Circuit Judge Laurel Lee secretary of state, and she was substituted as a defendant. Notice, *Rivera Madera*, No. 1:18-cv-152 (N.D. Fla. Feb. 5, 2019), D.E. 98; *see* Lawrence Mower, *DeSantis Taps Local Judge*, Tampa Bay Times, Jan. 29, 2019, at A1.

7565. Notice of Compliance, *Rivera Madera*, No. 1:18-cv-152 (N.D. Fla. Feb. 28, 2019), D.E. 105; *see also* Notices of Compliance, *id.* (May 13, Aug. 1, Sept. 3, Oct. 1, Nov. 1, and Dec. 2, 2019, and Jan. 2 and 22, Feb. 3, Mar. 2, Apr. 3, May 1, June 1, July 2, and Aug. 3, 2020), D.E. 132 to 138, 144, 148, 151, 155, 160, 166, 168 (updated compliance notices).

7566. Notice of Rulemaking, *id.* (Apr. 11, 2019), D.E. 114.

7567. Opinion, *id.* (May 10, 2019), D.E. 131, 2019 WL 2077037; *see* Transcript at 4, *id.* (May 6, 2019, filed May 7, 2019), D.E. 128 (Judge Walker's noting that lengthy telephonic proceedings are very hard on a court reporter, so the preliminary-injunction hearing was conducted in person).

7568. Jacobson v. Fla. Sec'y of State, 957 F.3d 1193 (11th Cir. 2020).

7569. Order, *Rivera Madera*, No. 1:18-cv-152 (N.D. Fla. Aug. 7, 2020), D.E. 170.

7570. Order, *id.* (Sept. 16, 2020), D.E. 172.

Judge Walker ruled on December 9, 2020, that "Defendant's promise to abide by the new rules and the terms of the injunction is insufficient to make the case moot." Opinion at 2, *id.* (Dec. 9, 2020), D.E. 188, 2020 WL 7350208.

7571. *Id.* at 3.

to four in Taylor County. And there may be differences in the availability of Spanish-speaking poll workers across counties, as well as other relevant variables."[7572]

On February 1, 2021, Judge Walker dismissed the case as settled.[7573]

> Plaintiffs have entered into a settlement agreement with 31 of the 32 county Supervisors of Elections whom Plaintiffs alleged were in violation of Section 4(e) of the Voting Rights Act, [excluding Charlotte County's.]
>
> Pursuant to the settlement agreement, the 31 Supervisors of Elections (the "Supervisors") have agreed to provide Spanish-language ballots, election materials, and assistance as required by the Secretary of State's current rules. In addition, the Supervisors have further agreed to provide Spanish-language vote-by-mail applications, ballots, and materials; Spanish translations of the Supervisors' websites; access to county-specific Spanish-language hotlines for voter assistance; and signage at the Supervisors' offices informing voters of the availability of these Spanish-language resources.[7574]

Unsuccessful Challenge to Holding a Caucus

Napierski v. Guilderland Democratic Committee (Glenn T. Suddaby, N.D.N.Y. 1:18-cv-846)

> A district judge denied relief to a prospective candidate who challenged the plaintiff's party picking nominees for local offices using a caucus instead of a primary election, as other parties used. Receptive to claims that the caucus would not be adequately accessible to persons with disabilities, however, the judge obtained remedial assurances from the defendants.
>
> *Topics:* Getting on the ballot; party procedures; primary election; enjoining elections; equal protection; recusal; case assignment.

An intended candidate for town justice—who was the incumbent because of a recent appointment to fill a vacancy—and a voter—the candidate's father—filed a federal complaint in the Northern District of New York on July 18, 2018, challenging one major party's policy in Guilderland, New York, of selecting party nominees for local office using a caucus process instead of a primary election.[7575] With their complaint, the plaintiffs filed a

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7572. Opinion at 4, *id.* (Dec. 14, 2020), D.E. 190, 2020 WL 7350207.

7573. Order, *id.* (Feb. 1, 2021), D.E. 196 ("not retain[ing] jurisdiction to enforce the settlement agreement, or for any other purpose").

7574. Voluntary-Dismissal Motion at 1–2, *id.* (Feb. 1, 2021), D.E. 195 (citation omitted).

7575. Complaint, Napierski v. Guilderland Democratic Comm., No. 1:18-cv-846

proposed order to show cause why the plaintiffs should not be granted a preliminary injunction.[7576]

On the following day, Judge Mae A. D'Agostino recused herself,[7577] and the court reassigned the case to Judge Glenn T. Suddaby.[7578] He declined to issue the order to show cause:

> [W]hile the Court is certainly disturbed by the asserted actions by Defendants (particularly with regards to the alleged [Americans with Disabilities Act] violation), the Court is hesitant to find that the standard for a Temporary Restraining Order has been met (particularly the likelihood-of-success prong) without briefing by Defendants.[7579]

Judge Suddaby set the case for hearing on July 23.[7580]

On the day after the hearing, Judge Suddaby held a telephonic conference to assess the extent to which the defendants would voluntarily satisfy his concerns about accommodating disabilities and not starting the caucus until everyone who arrived at the venue could enter and join.[7581] Later that day, Judge Suddaby denied the plaintiffs an injunction against use of a caucus to select a nominee, finding no equal-protection violation arising from one party using a caucus and other parties using primary elections.[7582] Judge Suddaby did order specific accommodations for persons with disabilities, recognizing, "In this case, Defendants have offered to make a number of modifications to the pavilion and surrounding park ar-

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(N.D.N.Y. July 18, 2018), D.E. 1; *see* Brendan J. Lyons, *Judge Decries Caucus System*, Albany Times-Union, July 24, 2018, at A1.

"Justice Richard Sherwood was suspended from the bench following his arrest on charges of stealing more than $11 million from estates associated with a deceased couple who had used him for legal services. Sherwood later pleaded guilty to felony charges and is awaiting sentencing." Lyons, *supra*.

7576. Proposed Order, *Napierski*, No. 1:18-cv-846 (N.D.N.Y. July 18, 2018), D.E. 5.

7577. Order of Recusal, *id.* (July 19, 2018), D.E. 8.

7578. Docket Sheet, *id.* (July 18, 2018).

7579. *Id.* (D.E. 9).

7580. *Id.*

"A recently appointed Guilderland town justice who is seeking to be elected to the position testified in federal court Monday that town Democratic Committee operatives had pledged to undermine her political career for continuing her campaign against their 'hand-selected' candidate." Lyons, *supra* note 7575.

7581. Transcript, *Napierski*, No. 1:18-cv-846 (N.D.N.Y. July 24, 2018, filed Aug. 15, 2018), D.E. 40.

7582. Opinion at 17, *id.* (July 24, 2018), D.E. 30 [hereinafter *Napierski* Opinion]; *see* Brendan J. Lyons, *Ruling: Caucus Can Happen*, Albany Times-Union, July 25, 2018, at C6.

ea in order to ameliorate the accessibility concerns raised in Plaintiffs' motion."[7583]

With heavy turnout, the plaintiff candidate was defeated at the party caucus 153 to 132.[7584] She came in third in the general election.[7585]

The case was resolved by a stipulated dismissal on January 15, 2019.[7586]

Ranked-Choice Voting

Maine Republican Party v. Dunlap (Jon D. Levy, 1:18-cv-179) and Baber v. Dunlap (Lance E. Walker, 1:18-cv-465) (D. Me.)

> For federal elections in 2018, Maine used ranked-choice voting, a voting method that provides instant-runoff votes if no candidate gets a majority of first-choice votes. In May, a political party sought a federal injunction against the use of ranked-choice voting in its primary election. A federal district judge denied the party relief. In November, neither major-party candidate earned a majority of first-place votes in a congressional election. The plurality winner's efforts at a federal injunction against counting second and third choices of voters who ranked independent candidates first were unsuccessful.
>
> *Topics:* Instant runoff; enjoining certification; party procedures; primary election; intervention.

Ranked-choice voting functions as an instant-runoff election.[7587] In addition to selecting a top choice for an office, a voter may rank order other choices so that the voter's preference can be counted even if the voter's top choice does not receive enough votes to have a chance of winning.[7588] By initiative, Maine voters decided that Maine would use ranked-choice voting for elections beginning in 2018.[7589] If there are more than two candidates and no candidate receives a majority of the votes, then candidates beginning with the last-place candidate are eliminated and votes for elimi-

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7583. *Napierski* Opinion, *supra* note 7582, at 15.

7584. *See* Lyons, *supra* note 7575.

7585. *See Unofficial Results*, Albany Times-Union, Nov. 7, 2018, at A5.

7586. Stipulated Dismissal, *Napierski*, No. 1:18-cv-846 (N.D.N.Y. Jan. 15, 2019), D.E. 72.

7587. *See* Baber v. Dunlap, 376 F. Supp. 3d 125, 129–32 (D. Me. 2018); Me. Republican Party v. Dunlap, 324 F. Supp. 3d 202, 205 (D. Me. 2018).

7588. *See* Kate Taylor & Liam Stack, *Maine's Voting Method Puts B.O.P. Seat in Jeopardy*, N.Y. Times, Nov. 14, 2018, at A18.

7589. Me. Rev. Stat. tit. 21-A, § 723-A; *see* Me. Senate v. Sec'y of State, 2018 Me. 52, 183 A.3d 749, 751 (2018); Opinion of the Justices, 2017 Me. 100, 162 A.3d 188, 197 (2017); *see also* Baber v. Dunlap, 349 F. Supp. 3d 68, 72 (D. Me. 2018).

nated candidates are allocated to voters' top choices among candidates not eliminated until one candidate has a majority.[7590]

In 2018, a district judge determined that ranked-choice voting in a primary election did not improperly infringe on a political party's association rights.[7591] After ranked-choice voting procedures determined the winner of a congressional race in the general election, the defeated incumbent's federal suit to declare him the plurality winner instead was also unsuccessful.[7592]

A Primary Election

The Maine Republican Party filed a federal complaint against Maine's secretary of state on Friday, May 4, 2018, in the District of Maine's Bangor courthouse, asking the court "to declare the Act to Establish Ranked-Choice Voting (the 'RCV Act'), to be unconstitutional as applied to the Party's process for nominating its candidates for federal and state elected office."[7593]

With their complaint, the party filed motions for a preliminary injunction permitting the party to select its nominees in a June 12 primary election by traditional plurality winner[7594] with expedited briefing and a non-evidentiary hearing.[7595]

Judge Jon D. Levy held a telephonic status conference on Monday[7596] and set the case for hearing on May 23.[7597]

Also on Monday, May 7, the Committee on Ranked-Choice Voting, "the public interest group [that] drafted the law, campaigned for its passage in 2016 and litigated its constitutionality in Maine state court," moved to intervene in the case.[7598] On May 16, Judge Levy denied intervention because the committee did not show that its defense of ranked-choice voting would differ substantially from the secretary's, and adding an addi-

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7590. Me. Rev. Stat. tit. 21-A, § 723-A; *see Opinion of the Justices*, 2017 Me. 100, 162 A.3d at 204.

7591. *Me. Republican Party*, 324 F. Supp. 3d 202.

7592. *Baber* 376 F. Supp. 3d 125; *Baber*, 349 F. Supp. 3d 68.

7593. Complaint at 1, Me. Republican Party v. Dunlap, No. 1:18-cv-179 (D. Me. May 4, 2018), D.E. 1; *see* Christopher Cousins, *Maine Republicans Take Defiant Stand Against Ranked-Choice Voting*, Bangor Daily News, May 4, 2018.

7594. Preliminary-Injunction Motion, *Me. Republican Party*, No. 1:18-cv-179 (D. Me. May 4, 2018), D.E. 3.

7595. Motion, *id.* (May 4, 2018), D.E. 4.

7596. Docket Sheet, *id.* (May 4, 2018) (D.E. 7).

7597. Order, *id.* (May 7, 2018), D.E. 10.

7598. Intervention Motion, *id.* (May 7, 2018), D.E. 9.

tional party could delay resolution of the preliminary-injunction motion.[7599]

Six days after the May 23 hearing, Judge Levy denied the party an injunction.[7600] Judge Levy acknowledged "the fact that ranked-choice voting may produce a standard-bearer for a particular office who is different than the candidate who would have won the primary had a simple plurality been required."[7601] On the other hand, Maine has an interest in establishing a uniform set of rules for all parties and for both primary and general elections.[7602]

> Because the RCV Act does not regulate who may participate in a primary or intrude on the Maine Republican Party's internal governance or processes, its effect on Maine's primary process does not impose a severe or heavy burden on the Maine Republican Party's associational rights.
>
> . . .
>
> The RCV Act also advances the state interest in requiring that candidates for public office demonstrate a preliminary showing of substantial support to appear on the general election ballot.[7603]

A General Election

The November 6 general election gave the Republican incumbent member of the U.S. House of Representatives from Maine's second district 46.3% of the first-choice vote and the Democratic challenger 45.6%; two additional challengers split the remaining 8.1%.[7604] Some observers expected the Democratic challenger to prevail as a result of the instant-runoff election.[7605]

7599. Opinion, *id.* (May 16, 2018), D.E. 16, 2018 WL 2248583.

7600. Me. Republican Party v. Dunlap, 324 F. Supp. 3d 202 (D. Me. 2018); *see* Michael Shepherd, *Maine GOP Must Use Ranked-Choice Voting in Primary, Judge Rules*, Bangor Daily News, May 29, 2018.

7601. *Me. Republican Party*, 324 F. Supp. 3d at 211.

7602. *Id.* at 212.

7603. *Id.* at 212–13.

7604. Baber v. Dunlap, 349 F. Supp. 3d 68, 74 (D. Me. 2018); *see* Baber v. Dunlap, 376 F. Supp. 3d 125, 130 (D. Me. 2018).

7605. *See* Michael Shepherd, *Poliquin Sues Dunlap to Stop Ranked-Choice Count in Maine's 2nd District*, Bangor Daily News, Nov. 13, 2018 ("[Democrat] Golden is favored to win when [independent] Bond's and [independent] Hoar's votes are reallocated, according to an Election Day exit poll of 534 voters in the 2nd District conducted by the *Bangor Daily News*, FairVote and Colby College."). But *see Baber*, 349 F. Supp. 3d at 75 ("Neither Plaintiffs nor Defendant has suggested that the outcome of the RCV election is known at this time.").

On November 13, the incumbent and three voters who voted for him and did not cast ranked votes for any other candidate filed a federal complaint against the secretary in the District of Maine seeking the incumbent's right to a plurality victory.[7606] With their complaint, the plaintiffs filed motions for a preliminary injunction[7607] and, later in the day, a temporary restraining order.[7608]

On that same day, the Democratic challenger filed,[7609] and Judge Lance E. Walker granted,[7610] an unopposed motion to intervene. The third-place finisher and two voters filed an unopposed motion to intervene on the next day stating that the candidate "entered the race with the expectation that Maine's ranked-choice voting procedures ensured that an independent candidate for federal office would never become a so-called 'spoiler' by diverting votes from either major party."[7611] Judge Walker granted the second intervention motion on November 15.[7612]

Judge Walker heard the case on the morning of November 14.[7613] On the next day, he ruled that the plaintiffs were not entitled to a temporary restraining order and the case would proceed to consideration of a preliminary injunction in the normal course.[7614] He reasoned that although the plaintiffs' legal arguments showed that statutes and courts have permitted elections by plurality, it did not follow that plurality victors were entitled

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7606. Complaint, Baber v. Dunlap, No. 1:18-cv-465 (D. Me. Nov. 13, 2018), D.E. 1; *Baber*, 349 F. Supp. 3d at 72–73; *see* Amended Complaint, *Baber*, No. 1:18-cv-465 (D. Me. Nov. 27, 2018), D.E. 36; *see also* Allison McCann & Karen Yourish, *In Some Races, Results May Still Be Weeks Away*, N.Y. Times, Nov. 14, 2018, at A18; Shepherd, *supra* note 7605.

7607. Preliminary-Injunction Motion, *Baber*, No. 1:18-cv-465 (D. Me. Nov. 13, 2018), D.E. 3.

7608. Temporary-Restraining-Order Motion, *id.* (Nov. 13, 2018), D.E. 13 (arguing that immediate relief was necessary because the secretary did not cease plans for counting the ranked votes upon the plaintiffs' filing their complaint); *see Baber*, 349 F. Supp. 3d at 76; *see also* Motion to Consolidate Hearing on Preliminary Injunction and Temporary Restraining Order, *Baber*, No. 1:18-cv-465 (D. Me. Nov. 14, 2018), D.E. 19.

7609. Intervention Motion, *Baber*, No. 1:18-cv-465 (D. Me. Nov. 13, 2018), D.E. 5.

7610. Docket Sheet, *id.* (Nov. 13, 2018) [hereinafter *Baber* Docket Sheet] (D.E. 11).

7611. Intervention Motion, *id.* (Nov. 14, 2018), D.E. 23.

7612. *Baber* Docket Sheet, *supra* note 7610 (D.E. 28).

7613. Transcript, *Baber*, No. 1:18-cv-465 (D. Me. Nov. 14, 2018, filed Nov. 17, 2018), D.E. 32; *Baber* Docket Sheet, *supra* note 7610 (D.E. 25); *Baber*, 349 F. Supp. 3d at 73; *see* Judy Harrison, *Judge Denies Poliquin's Request to Stop Ranked-Choice Count as Decision Nears*, Bangor Daily News, Nov. 15, 2018 (reporting that the hearing lasted two and a half hours).

7614. *Baber*, 349 F. Supp. 3d at 73; *see* Jon Kamp, *Democrat Declared Winner in Maine*, Wall St. J., Nov. 16, 2018, at A4.

to office in opposition to a procedure for determining the preference of a majority.[7615] "Moreover, for this Court to change the rules of the election, after the votes have been cast, could well offend due process."[7616] Judge Walker set the case for hearing again on December 5.[7617]

After consideration of the ranked choices of voters who ranked either of the third- and fourth-place finishers, the Democratic candidate had 50.6% of the vote, the Republican incumbent and plaintiff had 49.4% of the vote, and the secretary certified the incumbent as defeated.[7618]

At the December 5 hearing, Judge Walker granted the plaintiffs' motion to consolidate consideration of a preliminary injunction with the final merits of the case.[7619] He determined on December 13 that the plaintiffs had not shown that Maine was legally forbidden from using ranked-choice voting to determine a majority preference.[7620]

On December 21, the court of appeals declined to issue an injunction pending appeal,[7621] and the appeal was voluntarily dismissed a week later.[7622]

7615. *Baber*, 349 F. Supp. 3d at 75.

7616. *Id.* at 76.

7617. *Baber* Docket Sheet, *supra* note 7610 (D.E. 31, 53); Baber v. Dunlap, 376 F. Supp. 3d 125, 131 (D. Me. 2018); *see* Judy Harrison, *Dunlap Sends Election Certification to House Naming Golden 2nd District Winner*, Bangor Daily News, Dec. 19, 2018.

7618. *Baber*, 376 F. Supp. 3d at 131; *see* Michael Shepherd, *Golden Defeats Poliquin in Contested 2nd District Ranked-Choice Count*, Bangor Daily News, Nov. 15, 2018 ("[Democrat] Golden received 44.5 percent of the [independent] Bond or [independent] Hoar voters, with 20.4 percent going to [incumbent Republican] Poliquin and 35.1 percent of them expressing no preference between the party candidates."); *see also* Judy Harrison, *Poliquin Asks Judge to Order New Election If He's Not Declared Winner in 2nd District Race*, Bangor Daily News, Nov. 28, 2018; Kamp, *supra* note 7614.

7619. *Baber* Docket Sheet, *supra* note 7610 (D.E. 53, 54); Transcript at 4–5, Baber v. Dunlap, No. 1:18-cv-465 (D. Me. filed Dec. 7, 2018), D.E. 62; *Baber*, 376 F. Supp. 3d at 128.

7620. *Baber*, 376 F. Supp. 3d 125; *see* Judy Harrison, *Judge Rejects Poliquin's Challenge to Ranked-Choice Voting*, Bangor Daily News, Dec. 13, 2018.

7621. Order, Baber v. Dunlap, No. 18-2250 (1st Cir. Dec. 21, 2018); *see* Judy Harrison, *1st Circuit Ends Poliquin's Efforts to Keep House Seat*, Bangor Daily News, Dec. 21, 2018; *see also* Michael Shepherd, *Poliquin to Appeal Ruling That Rejected His Legal Challenge to Ranked-Choice Voting*, Bangor Daily News, Dec. 17, 2018.

7622. Judgment, *Baber*, No. 18-2250 (1st Cir. Dec. 28, 2018); *see* Michael Shepherd, *Poliquin Announces He Is Giving Up Legal Challenge to Ranked-Choice Voting*, Bangor Daily News, Dec. 24, 2018; Kate Taylor, *Maine Republican Concedes, Ending Voting Law Dispute*, N.Y. Times, Dec. 25, 2018, at A16.

Limiting Poll Watchers to Counties of Residence

Republican Party of Pennsylvania v. Cortés (Gerald J. Pappert, E.D. Pa. 2:16-cv-5524)

> Two and one-half weeks before a presidential election, a federal lawsuit challenged a state statute that required poll watchers to serve only in their counties of residence. Five days before the election, the district judge denied the plaintiffs immediate relief because the requirement had a rational basis and because the last-minute filing was not justified.
>
> *Topics:* Laches; intervention.

A political party and eight voters filed a federal complaint in the Eastern District of Pennsylvania on October 21, 2016, two and one-half weeks before the presidential election, challenging a requirement that poll watchers serve only in the county of their residence.[7623] With their complaint, the plaintiffs filed a motion for a temporary restraining order and a permanent injunction.[7624]

The court set the case for conference on the afternoon of October 24 before Judge Gerald J. Pappert.[7625] Following the telephone conference, Judge Pappert set the case for hearing on October 28.[7626] On the day of the hearing, "a coalition of Latino community-based organizations serving Philadelphia" moved to intervene as a defendant.[7627]

Judge Pappert denied the plaintiffs immediate relief on November 3.[7628] "States have the power to regulate elections."[7629] There was a rational basis for the requirement: "In short, Pennsylvania opted to design a county-by-county system of elections; in doing so, it ensured as much coherency in this patchwork system as possible."[7630]

Finding that the plaintiffs unreasonably delayed bringing the action, Judge Pappert observed, "There is good reason to avoid last-minute intervention in a state's election process."[7631]

He accepted the plaintiffs' voluntary dismissal on January 27, 2017.[7632]

7623. Complaint, Republican Party of Pa. v. Cortés, No. 2:16-cv-5524 (E.D. Pa. Oct. 21, 2016), D.E. 1.

7624. Motion, *id.* (Oct. 21, 2016), D.E. 2.

7625. Notice, *id.* (Oct. 24, 2016), D.E. 4.

7626. Order, *id.* (Oct. 28, 2016), D.E. 5.

7627. Intervention Motion, *id.* (Oct. 28, 2016), D.E. 14.

7628. Republican Party of Pa. v. Cortés, 218 F. Supp. 3d 396 (E.D. Pa. 2016).

7629. *Id.* at 401.

7630. *Id.* at 409.

7631. *Id.* at 404.

7632. Opinion, *Republican Party of Pa.*, No. 2:16-cv-5524 (E.D. Pa. Jan. 27, 2017),

Informing Independent Voters of the Right to Vote in a Presidential Primary Election

Voting Rights Defense Project v. Depuis (William Alsup, N.D. Cal. 3:16-cv-2739)

> A federal complaint filed eighteen nights before a primary election accused election officials in two counties of not adequately informing independent voters of their rights to vote in some parties' presidential primary elections. A week later, the plaintiffs sought to shorten time on a motion for a preliminary injunction, but they did not file their injunction motion until the district judge brought the deficit to their attention. Six days before the election, the judge held a hearing and denied immediate relief. On the one hand, the plaintiffs waited too long to achieve effective relief. On the other hand, there was only a weak showing of federal jurisdiction.
>
> *Topics:* Matters for state courts; laches; primary election; party procedures; early voting; case assignment.

An organization supporting Bernie Sanders for President, the American Independent Party, and two voters filed a federal complaint in the Northern District of California against Alameda County and San Francisco election officials at 7:00 p.m. on Friday, May 20, 2016, claiming that independent voters were excessively ill-informed about their abilities to vote in the June 7 presidential primaries for the Democratic, American Independent, and Libertarian parties.[7633] On the same day, the plaintiffs filed an amended complaint adding California's secretary of state as a defendant and substituting "American Independent Party" for "American Independence Party" as a plaintiff in the caption.[7634]

One week later, the plaintiffs filed two motions to shorten time for a hearing on a motion for a preliminary injunction, but they did not file an

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D.E. 27, 2017 WL 386603.

7633. Complaint, Voting Rights Def. Project v. Depuis, No. 3:16-cv-2739 (N.D. Cal. May 20, 2016), D.E. 1; Opinion at 6, *id.* (June 2, 2016), D.E. 46, 2016 WL 3092079; *see* Bob Egelko, *Sanders Backers Drop Suit Over Voter Assistance*, S.F. Chron., June 5, 2016, at C2 [hereinafter *Backers Drop Suit*] ("Only registered Republicans are allowed to vote in the GOP primary."); *see also* Bob Egelko, *S.F. Official Slams Suit by Sanders' Backers*, S.F. Chron., May 25, 2016, at D2; John Myers, *Sanders Backers Slam Voter Rules*, L.A. Times, May 23, 2016, at B1; Richel Swan, *Sanders Supporters, Independents Sue Over Voting*, S.F. Chron., May 23, 2016, at A8.

7634. Amended Complaint, Voting Rights Def. Project v. Padilla, No. 3:16-cv-2739 (N.D. Cal. May 20, 2016), D.E. 2.

injunction motion.[7635] That day, Judge William Alsup issued an order pointing out that the injunction motion was absent,[7636] and such a motion was filed that day.[7637] Judge Alsup set the case for hearing on June 1.[7638]

Judge Alsup's first question at the hearing was what was the federal question?[7639] Later, he also asked about a remedy:

> THE COURT: . . . Let me ask the Plaintiffs a question. Here we are, on June 1. You didn't even file this lawsuit until May 20. You didn't ask for any kind of relief on an emergency basis until May 27th, seven days later. So we set it up for as fast as we could possibly set up a hearing.
>
> [COUNSEL]: (Nods head)
>
> THE COURT: Now, give me one example of some relief that would be practical that a judge could issue between now and the election day that could actually be done. I frankly don't see anything, but maybe you have a better idea.[7640]

At the end of the hearing, Judge Alsup denied the plaintiffs immediate relief:

> THE COURT: . . . All relief is denied on preliminary injunction. Here are the basic reasons: Plaintiffs waited way too long before bringing this lawsuit, and waited way too long before asking for a preliminary injunction. So that, alone, is [a] show-stopper, period.
>
> But there is more to it than that. Almost all of these claims are state-law claims. This is a Federal Court. We also have state courts. Most of this case should have been brought in state court, because that's the set of judges that know the state election code. And federal judges are not up to speed on it, but we don't have jurisdiction over that anyway.
>
> . . .
>
> With respect to the federal claims, the Court would have jurisdiction, but there's absolutely no showing of any federal violation, either under the equal protection clause or under the Voting Rights Act.
>
> . . .

7635. Order on Missing Motion, *id.* (May 27, 2016), D.E. 15; Motion, *id.* (May 27, 2016), D.E. 14; Motion, *id.* (May 27, 2016), D.E. 13.

7636. *Voting Rights Def. Project* Order on Missing Motion, *supra* note 7635.

7637. Motion, *Voting Rights Def. Project*, No. 3:16-cv-2739 (N.D. Cal. May 27, 2016), D.E. 17.

7638. Scheduling Order, *id.* (May 27, 2016), D.E. 18.

7639. Transcript at 4, *id.* (June 1, 2016, filed Aug. 20, 2016), D.E. 61.

7640. *Id.* at 20–21; *see Voting Rights Def. Project* Opinion, *supra* note 7633, at 6 ("although the Court set a briefing and hearing schedule just three minutes after the motion was filed, plaintiffs' delays ensured that the motion could not be heard and decided until June 1, less than a week before the primary").

> If time permits, I'll get out a memorandum opinion. But this order on the record of the Court will constitute the denial of the motion for preliminary injunction.[7641]

Judge Alsup memorialized his conclusions in a seven-page opinion on the following day.[7642]

According to the *San Francisco Chronicle*, "After a rebuff from a federal judge, backers of Sen. Bernie Sanders of Vermont say they'll drop their legal effort to require elections officials to give more help to nonaligned voters in casting ballots for president in Tuesday's primary and instead will take their message to local registrars' offices."[7643]

On August 26, Judge Alsup granted the defendants' motion to dismiss the complaint as moot.[7644] On April 13, 2017, the court of appeals granted a voluntary dismissal.[7645]

Voting in a Primary Election at Seventeen If Eighteen by the General Election

Smith v. Husted (George C. Smith, S.D. Ohio 2:16-cv-212)

> A federal complaint challenged a state secretary of state's advisory that a law permitting seventeen-year-olds to vote in a primary election if they will be eighteen by the time of the general election did not apply to a presidential primary election because voters in the state's presidential primary election are not voting for a nomination but are voting for delegates to a convention. The federal judge abstained from a ruling on the merits because of pending state litigation over interpretation of the relevant statute. The state court ruled in favor of the federal plaintiffs' position.
>
> *Topics:* Primary election; matters for state courts; laches.

On March 8, 2016, one week before a presidential primary election, six mothers of minor voters and the Bernie Sanders presidential campaign filed a federal complaint in the Southern District of Ohio challenging "a new interpretation of the Threshold Voter Law [which allows 17-year-olds to vote in primary elections if the voters will be 18 at the time of the general election], stating that, 'In presidential primary elections, a 17-year-old

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7641. *Voting Rights Def. Project* Transcript, *supra* note 7639, at 32–34; *see* Bob Egelko, *U.S. Judge Rejects Suit by Sanders Supporters*, S.F. Chron., June 2, 2016, at E1.

7642. *Voting Rights Def. Project* Opinion, *supra* note 7633.

7643. Egelko, *Backers Drop Suit*, *supra* note 7633.

7644. Dismissal Order, *Voting Rights Def. Project*, No. 3:16-cv-2739 (N.D. Cal. Aug. 26, 2016), D.E. 74.

7645. Order, Voting Rights Def. Project v. Padilla, No. 16-16717 (9th Cir. Apr. 13, 2017), D.E. 14.

voter is not permitted to vote for presidential delegates, because delegates are elected and not nominated.'"[7646] That day, Judge George C. Smith set the case for a conference call on March 9.[7647]

At the conference, Judge Smith and the parties agreed that expedited briefing would conclude by March 11 and be followed by a ruling without oral argument.[7648] The plaintiffs filed a motion for a temporary restraining order and a preliminary injunction on March 10.[7649]

On March 11, Judge Smith decided to abstain from ruling on the injunction motion because of pending litigation on the same question in state court.[7650] He rejected the argument by Ohio's secretary of state that the federal action should be barred by laches; the secretary's argument that the injunction would prejudice threshold voters whose presidential primary votes had already been rejected was not prejudice against the *defendant*.[7651] Following relief granted the plaintiffs in state court,[7652] they voluntarily dismissed their federal case.[7653]

7646. Docket Sheet, Smith v. Husted, No. 2:16-cv-212 (S.D. Ohio Mar. 8, 2016) (D.E. 1); Redacted Complaint, *id.* (Mar. 10, 2016), D.E. 10 (redacting minors' birthdays); *see* Ohio Rev. Code § 3503.011; *see also* William T. Perkins, *Suits Fight for 17-Year-Old Voters*, Columbus Dispatch, Mar. 9, 2016, at 1B.

7647. Order, *Smith*, No. 2:16-cv-212 (S.D. Ohio Mar. 8, 2016), D.E. 3.

Judge Smith died on April 15, 2020. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

7648. Order, *Smith*, No. 2:16-cv-212 (S.D. Ohio Mar. 9, 2016), D.E. 6.

7649. Motion, *id.* (Mar. 10, 2016), D.E. 8.

7650. Abstention Opinion, *id.* (Mar. 11, 2016), D.E. 14 [hereinafter *Smith* Abstention Opinion]; *see* Complaint, Schwerdtfeger v. Husted, No. 16-cv-2346 (Ohio Ct. Common Pleas Franklin Cty. Mar. 8, 2016), fcdcfcjs.co.franklin.oh.us/CaseInformationOnline/imageLinkProcessor.pdf?coords=vIHVxmLC4Uo1NVdyBdD4Ahdmyf%2BSifV9VogpVV7dH%2FaV%2FJ%2B7bZwqiiK9GtM36UnvwUP5zWCuGLt13u3OUmV9FUw%2B70lKMceUsnTPsDpE3%2FM4MJOZfZWttf73BcInnm7er%2FLb3GrY28QXkY56yG68vHhzGbvW%2Bql7%2BCuhtJUQGog%3D; *see also* Lynn Hulsey, *Group Sues Ohio Over Voting Age*, Dayton Daily News, Mar. 9, 2016, at B2; Doug Livingston, *Young Voters Denied at Primary*, Akron Beacon J., Mar. 10, 2016, at A1; Ann Sanner, *Judge Hears Dispute Involving Ohio's Youngest Primary Voters*, Cincinnati Enquirer, Mar. 11, 2016, at A5.

7651. *Smith* Abstention Opinion, *supra* note 7650, at 6–9.

7652. Opinion, *Schwerdtfeger*, No. 16-cv-2346 (Ohio Ct. Common Pleas Franklin Cty. Mar. 11, 2016), fcdcfcjs.co.franklin.oh.us/CaseInformationOnline/imageLinkProcessor.pdf?coords=plUUQyLO8l5cKGXEU6qmzlfA6YzYwEs8XFCJprYNmOMeiCSFEVV%2B4RIAP9nBnXbAY6H4MtFi41tXqM6SehFujxkpPBFxOYwgrG7JA%2FRyOxpZg7Rr48FysmOGy0MfHbmqp3F%2FjaVQ0m0Fno6GqIlFyhBYkUI9bjXLRuOgrvHNEIc%3D; *see* William T. Perkins, *Judge Oks Vote for Those Who Are 17*, Columbus Dispatch, Mar. 12, 2016, at 1B.

7653. Notice, *Smith*, No. 2:16-cv-212 (S.D. Ohio Apr. 29, 2016), D.E. 15.

Loyalty Oath

Parson v. Alcorn (M. Hannah Lauck, E.D. Va. 3:16-cv-13)

> Days before the distribution of absentee ballots was to begin, three voters filed a challenge to a party's requirement that voters in its presidential primary election sign a statement that the voters are members of the party. The district judge heard the case one week after it was filed and denied the plaintiffs immediate relief, reasoning, "A private, unenforceable pledge does not pose a severe burden." The party decided not to use the loyalty oath after all, and the plaintiffs dismissed their appeal.
>
> *Topics:* Party procedures; primary election; absentee ballots.

Three voters filed a federal complaint in the Eastern District of Virginia on January 6, 2016, against commonwealth election officials, alleging that ballots that would begin to be mailed out beginning the following week for a March 1 Republican presidential primary election would improperly include a loyalty oath requiring the voter to sign a statement that the voter was a Republican.[7654] With their complaint, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction.[7655]

On January 8, Judge M. Hannah Lauck ordered briefing completed by January 12 and set a hearing for January 13.[7656] Also on January 8, the defendants moved for joinder of the Republican Party as a necessary party.[7657] Judge Lauck granted the motion on January 11.[7658]

The January 13 hearing concluded at 2:30 p.m., and Judge Lauck asked for supplemental briefing served by email by 6:00.[7659] "I don't think I will be able to issue a memorandum opinion tomorrow, but I think I'm going

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7654. Complaint, Parson v. Alcorn, No. 3:16-cv-13 (E.D. Va. Jan. 6, 2016), D.E. 1; Parson v. Alcorn, 157 F. Supp. 3d 479, 490 (E.D. Va. 2016); *see* Jenna Portnoy, *Trump Backers Sue Over GOP Oath*, Wash. Post, Jan. 7, 2016, at B1.

7655. Motion, *Parson*, No. 3:16-cv-13 (E.D. Va. Jan. 6, 2016), D.E. 2, 3; *Parson*, 157 F. Supp. 3d at 490; Transcript at 4, *Parson*, No. 3:16-cv-13 (E.D. Va. Jan. 13, 2016, filed Feb. 2, 2016), D.E. 39 [hereinafter *Parson* Transcript].

7656. Order, *Parson*, No. 3:16-cv-13 (E.D. Va. Jan. 8, 2016), D.E. 6; *see Parson* Transcript, *supra* note 7655; *Parson*, 157 F. Supp. 3d at 490; Minutes, *Parson*, No. 3:16-cv-13 (E.D. Va. Jan. 13, 2016), D.E. 21.

7657. Motion, *Parson*, No. 3:16-cv-13 (E.D. Va. Jan. 8, 2016), D.E. 7; *Parson*, 157 F. Supp. 3d at 490.

7658. Order, *Parson*, No. 3:16-cv-13 (E.D. Va. Jan. 11, 2016), D.E. 11; *Parson*, 157 F. Supp. 3d at 490; *Parson* Transcript, *supra* note 7655, at 4 (noting also, "The Republican Party of Virginia did not file a written response to the pending motions").

7659. *Parson* Transcript, *supra* note 7655, at 107–08.

to issue an order tomorrow."[7660]

Judge Lauck denied the plaintiffs immediate relief on January 14, promising an opinion to follow.[7661] "A private, unenforceable pledge does not pose a severe burden."[7662] The plaintiffs immediately appealed,[7663] and Judge Lauck issued her opinion on the following day.[7664]

The Republican Party decided not to use the loyalty oath after all, but only after absentee voting had begun.[7665] The plaintiffs voluntarily dismissed their appeal on February 18.[7666] Their candidate finished first in the primary election.[7667]

Invalid Primary Election

Young v. West Point Municipal Election Commission (Michael P. Mills, N.D. Miss. 1:13-cv-99)

> Five voters, including an unsuccessful incumbent in a primary election, filed a federal complaint alleging that a municipal election commission conducted a sham primary election, because the municipal party executive committee was without members and therefore could not properly convey to the election commission the authority to conduct the election. The district judge determined that the plaintiffs had not made a showing sufficient to enjoin the next day's runoff election.
>
> *Topics:* Enjoining elections; primary election; party procedures; case assignment.

7660. *Id.* at 107.

7661. Order, *Parson*, No. 3:16-cv-13 (E.D. Va. Jan. 14, 2016), D.E. 27; *Parson*, 157 F. Supp. 3d at 485, 490.

7662. *Parson*, 157 F. Supp. 3d at 494.

7663. Notice of Appeal, *Parson*, No. 3:16-cv-13 (E.D. Va. Jan. 14, 2016), D.E. 31.

Both the court of appeals and Judge Lauck denied the plaintiffs an injunction pending appeal. Order, Parson v. Alcorn, No. 16-1051 (4th Cir. Jan. 14, 2016), D.E. 10; Order, *Parson*, No. 3:16-cv-13 (E.D. Va. Jan. 14, 2016), D.E. 33; *Parson*, 157 F. Supp. 3d at 490.

7664. *Parson*, 157 F. Supp. 3d 479; *see* Antonio Olivo, *Va. Ruling Keeps GOP Oath in Play*, Wash. Post, Jan. 15, 2016, at B1.

7665. *See* Laura Vozzella & Antonio Olivo, *GOP Scraps Loyalty Pledge Trump Called "Suicidal,"* Wash. Post, Jan. 31, 2016, at C12.

Another judge in the same courthouse later lamented about the case that a settlement reached so late in the game required a substantial expenditure of resources that could have been saved had the settlement been reached earlier. Transcript at 20, Correll v. Herring, No. 3:16-cv-467 (E.D. Va. June 28, 2016, filed July 5, 2016), D.E. 31.

7666. Order, *Parson*, No. 16-1051 (4th Cir. Jan. 18, 2016), D.E. 20.

7667. *See* Graham Moomaw, *Rural Voters Lift Trump Over Rubio*, Richmond Times-Dispatch, Mar. 2, 2016, at 1A; Paul Schwartzman, *Trump Fends Off a Strong Rubio; Clinton Sails*, Wash. Post, Mar. 2, 2016, at A1.

On Friday, May 17, 2013, five voters filed a federal complaint in the Northern District of Mississippi claiming that the West Point Municipal Election Commission conducted a sham Democratic primary election for municipal offices on May 7.[7668] With their complaint, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction.[7669]

The court originally assigned the case to Judge Sharion Aycock, but on the day that the complaint was filed, the court reassigned the case to Judge Michael P. Mills, who set the matter for hearing on Monday, the day before a scheduled runoff primary election.[7670]

At the hearing, the plaintiffs presented evidence that the Municipal Election Democratic Executive Committee had not properly conveyed to the election commission the authority to conduct the primary election, because the party committee no longer had members.[7671] One of the plaintiffs was an unsuccessful incumbent in the primary election.[7672]

At the conclusion of the hearing, Judge Mills ruled that the plaintiffs had not made a showing sufficient to enjoin the next day's election.[7673] On August 2, the parties stipulated dismissal of the action.[7674]

No-Bid Contract for Election Software

Fitrakis v. Husted (Gregory L. Frost, S.D. Ohio 2:12-cv-1015)

> On the day before a general election, a voter filed a complaint charging the secretary of state with contracting for voting software and equipment without public bidding. The judge held a teleconference on the day that the case was filed and heard evidence on election morning. The state offered evidence that the purpose of the software was not the tabulation of votes but the reporting of tabulations by the counties to the secretary's office. The judge found the plaintiff's concerns too speculative for immediate relief.
>
> *Topic:* Voting technology.

7668. Complaint, Young v. West Point Mun. Election Comm'n, No. 1:13-cv-99 (N.D. Miss. May 17, 2013), D.E. 1; Transcript at 25–26, *id.* (May 20, 2013, filed May 21, 2013), D.E. 12 [hereinafter *Young* Transcript] (testimony that the five plaintiffs were voters in five West Point wards).

7669. Motion, *id.* (May 17, 2013), D.E. 3.

7670. Notice, *id.* (May 17, 2013), D.E. 4; Docket Sheet, *id.* (May 17, 2013); *Young* Transcript, *supra* note 7668, at 43; Minutes, *Young*, No. 1:13-cv-99 (N.D. Miss. May 20, 2013), D.E. 7.

7671. *Young* Transcript, *supra* note 7668, at 6–20.

7672. *Id.* at 21–30, 61–62.

7673. *Id.* at 62–64; Order, *Young*, No. 1:13-cv-99 (N.D. Miss. May 21, 2013), D.E. 11.

7674. Stipulation, *Young*, No. 1:13-cv-99 (N.D. Miss. Aug. 2, 2013), D.E. 29.

A voter filed a federal complaint[7675] and a motion for a temporary restraining order[7676] in the Southern District of Ohio on the day before the 2012 general election, complaining that Ohio's secretary of state had entered into contracts for voting software and equipment on September 18 without opening them up to public bidding.

Judge Gregory L. Frost held a telephonic conference at 2:30 p.m. on the day that the case was filed[7677] and set the matter for hearing at 9:00 a.m. on election day.[7678] One expert testified at the hearing by telephone.[7679] After the hearing, Judge Frost denied the plaintiff immediate relief.[7680] Ohio's evidence was that the purpose of the software was not the tabulation of votes but the reporting of tabulations by the counties to the secretary's office.[7681] Judge Frost found the plaintiff's concerns too speculative for immediate relief.[7682]

The plaintiff dismissed the case voluntarily on November 20.[7683]

Preventing Long Lines

Florida Democratic Party v. Detzner (Joan A. Lenard and Ursula Ungaro, S.D. Fla. 1:12-cv-24000)

> Late on the Saturday before the 2012 general election, because of long lines during early voting, a party filed a complaint seeking relief from anticipated long lines on election day at the polls in three counties. The assigned judge was out of the district when the case was filed, so another judge, selected at random, handled the emergency motion. In response to the lawsuit, the counties created additional opportunities for in-person absentee voting.
>
> *Topics:* Absentee ballots; early voting; case assignment.

Late on the Saturday before the 2012 general election, Florida's Democratic Party filed a federal complaint in the Southern District of Florida, seeking relief from anticipated long lines on election day in Broward, Miami-

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7675. Complaint, Fitrakis v. Husted, No. 2:12-cv-1015 (S.D. Ohio Nov. 5, 2012), D.E. 2.

7676. Temporary-Restraining-Order Motion, *id.* (Nov. 5, 2012), D.E. 3.

7677. Notice, *id.* (Nov. 5, 2012), D.E. 6.

7678. Notice, *id.* (Nov. 6, 2012), D.E. 8; *see* Minutes, *id.* (Nov. 6, 2012), D.E. 12.

7679. Opinion at 3, *id.* (Nov. 6, 2012), D.E. 13 [hereinafter *Fitrakis* Opinion], 2012 WL 5411381.

7680. *Id.* at 1, 10; *see* Mary Beth Lane, *Voter Finds Maiden Name in Poll Book*, Columbus Dispatch, Nov. 8, 2012, at 8A.

7681. *Fitrakis* Opinion, *supra* note 7679, at 4–6.

7682. *Id.* at 7.

7683. Notice, *Fitrakis*, No. 2:12-cv-1015 (S.D. Ohio Nov. 20, 2012), D.E. 14.

Dade, and Palm Beach Counties, because of long lines during early voting.[7684] With its complaint, the party filed a motion for a temporary restraining order.[7685]

Judge Joan A. Lenard drew the case, but she was out of the district when the case arrived, so the emergency motion was randomly assigned to Judge Ursula Ungaro.[7686]

Apparently as a result of the lawsuit, the three defendant counties allowed in-person absentee voting on Sunday and Monday.[7687]

On Monday, the plaintiff's attorney filed a stipulation for each county by which each county agreed to provide election-day in-person absentee voting at county offices.[7688] That day, Judge Ungaro approved the stipulations, retaining the court's jurisdiction to enforce them.[7689]

On the day after the election, Judge Lenard issued an order to show cause why the case should not be dismissed as moot.[7690] On November 14, the party dismissed the action voluntarily.[7691]

A Citizenship Checkbox on Ballot Applications

Bryanton v. Johnson (Paul D. Borman, E.D. Mich. 2:12-cv-14114)

> On September 17, 2012, a county clerk and three voters filed a federal complaint against a state's secretary of state challenging her planned inclusion of a citizenship verification question on ballot applications in the upcoming general election. The district court heard a motion for a preliminary injunction on October 5. After a six-hour hearing, the court granted the injunction. The ballot-application question violated equal protection because it was not applied uniformly and because evidence at the hearing

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7684. Complaint, Fla. Democratic Party v. Detzner, No. 1:12-cv-24000 (S.D. Fla. Nov. 4, 2012), D.E. 1; *see* Lloyd Dunkelberger, *Lawsuit Is Filed in Florida After Early Voting Ends*, Sarasota Herald Trib., Nov. 5, 2012, at A4; Jane Musgrave, Scott Eyman & Dara Kam, *Elections Office Taking Absentee Ballots Today*, Palm Beach Post, Nov. 5, 2012, at 1A.

7685. Temporary-Restraining-Order Motion, *Fla. Democratic Party*, No. 1:12-cv-24000 (S.D. Fla. Nov. 5, 2012), D.E. 6.

7686. Email from Judge Joan A. Lenard to Tim Reagan, Dec. 5, 2012.

Judge Ungaro retired on May 31, 2021. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

7687. *See* Dunkelberger, *supra* note 7684; Musgrave et al., *supra* note 7684.

7688. Stipulations, *Fla. Democratic Party*, No. 1:12-cv-24000 (S.D. Fla. Nov. 5, 2012), D.E. 18–20.

7689. Order, *id.* (Nov. 5, 2012), D.E. 21.

7690. Docket Sheet, *id.* (Nov. 4, 2012).

7691. Notice, *id.* (Nov. 14, 2012), D.E. 24.

showed that voters who failed to check the box would still be permitted to vote.

Topics: Citizenship; equal protection; case assignment.

Ingham County's clerk and three voters filed a federal complaint against Michigan's secretary of state in the Eastern District of Michigan on September 17, 2012, challenging the secretary's planned inclusion of a citizenship-verification question on voters' ballot applications for the upcoming general election.[7692] Three days later, the plaintiffs filed a motion for a preliminary injunction.[7693]

The court assigned the case to Judge Nancy G. Edmunds, who was immersed in a criminal trial against Detroit's former mayor, so she disqualified herself from this time-sensitive case and the case was randomly reassigned to Judge Paul D. Borman.[7694]

Judge Borman set a hearing for October 5 and ordered the attorneys to meet with each other in advance and prepare for the hearing as they would prepare for a bench trial.[7695] He wanted the parties to have an opportunity to come to an agreement.[7696]

On the day before the hearing, Judge Borman denied an evidentiary motion in limine[7697] and a motion by the secretary for a subordinate to appear in her place.[7698] Among the important reasons for the secretary's presence was her settlement authority.[7699] After the six-hour hearing, Judge Borman granted the plaintiffs a preliminary injunction.[7700] In an opinion

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7692. Complaint, Bryanton v. Johnson, No. 2:12-cv-14114 (E.D. Mich. Sept. 17, 2012), D.E. 1; *see Secretary of State Defends Citizenship Question on Ballots*, Detroit News, Sept. 26, 2012, at A4.

7693. Preliminary-Injunction Motion, *Bryanton*, No. 2:12-cv-14114 (E.D. Mich. Sept. 20, 2012), D.E. 4.

7694. Reassignment Order, *id.* (Sept. 20, 2012), D.E. 5; Interview with Judge Nancy G. Edmunds, Oct. 24, 2012; *see* Robert Snell & Mike Wilkinson, *Kilpatrick Faces Diverse Jury*, Detroit News, Sept. 20, 2012, at A4.

Tim Reagan interviewed Judge Edmunds for this report by telephone on October 24, 2012, and Tim Reagan interviewed Judge Borman for this report by telephone on November 9, 2012.

7695. Order, *Bryanton*, No. 2:12-cv-14114 (E.D. Mich. Sept. 27, 2012), D.E. 15.

7696. Interview with Judge Paul D. Borman, Nov. 9, 2012.

7697. Order, *Bryanton*, No. 2:12-cv-14114 (E.D. Mich. Sept. 4, 2012), D.E. 32.

7698. Order, *id.* (Sept. 4, 2012), D.E. 31; *see* Transcript at 6–7, *id.* (Oct. 5, 2012, filed Oct. 24, 2012), D.E. 42 [hereinafter *Bryanton* Transcript] (noting the secretary's presence); *see also* Christina Hall, *Checking the Check Boxes*, Manistee News Advocate, Oct. 6, 2012, at 6A.

7699. Interview with Judge Paul D. Borman, Nov. 9, 2012.

7700. *Bryanton* Transcript, *supra* note 7698, at 191–97; *see Citizen Box Ordered Off*

issued five days later, he explained that the secretary's ballot-application question violated equal protection because it was not applied uniformly, because it would create time-consuming questioning and confusion at the polls, and because evidence at the hearing showed that voters who failed to check the box would still be permitted to vote.[7701]

The action was dismissed by stipulation on May 29, 2013.[7702]

Order of Names on the Ballot

Crim v. Tennessee Democratic Party (Kevin H. Sharp, M.D. Tenn. 3:12-cv-838)

> A losing primary candidate filed a federal complaint alleging that the victor was improperly included on the ballot and improperly positioned on the ballot because his name was listed alphabetically first. On the next day, after a hearing, the district judge denied the plaintiff immediate relief, finding no wrongdoing and also observing that the plaintiff could have challenged the ballot before the election.
>
> *Topics:* Enjoining certification; getting on the ballot; laches; equal protection; intervention.

Thirteen days after the August 2, 2012, Democratic primary for United States Senate in Tennessee, losing candidate Larry Crim filed a federal complaint against the Democratic Party and the state division of elections alleging that winning candidate Mark Clayton was improperly placed on the ballot and he received a disproportionate number of votes because his name was listed alphabetically first.[7703] The complaint sought a temporary restraining order and an emergency hearing.[7704] News media reported that Clayton's victory in the primary election was an embarrassment to the party.[7705]

Judge Kevin H. Sharp held a hearing on August 16, the day after the complaint was filed.[7706] He granted Clayton's motion to intervene.[7707] Judge

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Ballot Applications, Detroit News, Oct. 11, 2012, at A5; *Citizenship Question Ordered Off Voter Form*, Detroit News, Oct. 6, 2012, at A1.

7701. Bryanton v. Johnson, 902 F. Supp. 2d 983 (E.D. Mich. 2012).

7702. Order, *Bryanton*, No. 2:12-cv-14114 (E.D. Mich. May 29, 2013), D.E. 48.

7703. Complaint, Crim v. Tenn. Democratic Party, No. 3:12-cv-838 (M.D. Tenn. Aug. 15, 2012), D.E. 1.

7704. *Id.* at 17.

7705. *See* Richard Locker, *Tenn. Democrats Disavow Winner of Senate Primary*, Memphis Commercial Appeal, Aug. 4, 2012, at 1.

7706. Docket Sheet, *Crim*, No. 3:12-cv-838 (M.D. Tenn. Aug. 15, 2012); *see* Transcript Excerpt, *id.* (Aug. 16, 2012, filed Sept. 4, 2012), D.E. 19 (argument by the party's lawyer).

Sharp also denied Crim immediate relief.[7708] Crim demonstrated no wrongdoing, and he could have challenged the ballot before the election.[7709]

On August 30, Judge Sharp granted Crim a voluntary dismissal.[7710]

Write-In Candidates Closing a Primary Election

Mazzilli v. Townsley (William J. Zloch, S.D. Fla. 1:12-cv-22432)

> A Florida statute provided that a primary election would be open to all voters if only one party fielded a candidate for the general election. A ruling by Florida's secretary of state specified that if anyone registered as a write-in candidate for the general election, then the primary election would remain closed to voters who were not party members. Several weeks before a primary election in which only one party had candidates, two voters challenged the secretary's ruling. Less than one month later, the court denied immediate injunctive relief because the plaintiffs had failed to include the secretary of state as a defendant. Twelve days later, reviewing an amended complaint, the court held the secretary's ruling a reasonable interpretation of an unambiguous statute serving legitimate interests.
>
> *Topics:* Primary election; write-in candidate.

On June 29, 2012, six and one-half weeks before the 2012 Democratic primary election for Miami-Dade County's state attorney, an unaffiliated voter and a Republican voter filed a federal complaint against the county's supervisor of elections seeking an injunction opening the primary election to all voters because no other party was fielding a candidate for the office.[7711] Florida's constitution was amended in 1998 to make primary elections open to all voters when no other party was fielding a candidate, but a subsequent secretary of state ruled that primaries had to be closed when a

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7707. Order, *id.* (Aug. 16, 2012), D.E. 8; *see* Intervention Motion, *id.* (Aug. 16, 2012), D.E. 6.

7708. Order, *id.* (Aug. 16, 2012), D.E. 9; *see* Tom Humphrey, *Judge Leaves U.S. Senate Candidate Clayton on Ballot*, Knoxville News-Sentinel, Aug. 17, 2012.

7709. *See Mark Clayton Victory in Democratic Primary Upheld by Nashville Judge*, Nashville Tennessean, Aug. 16, 2012 (describing the hearing as "pointed and at times lively").

7710. Order, *Crim*, No. 3:12-cv-838 (M.D. Tenn. Aug. 30, 2012), D.E. 17.

7711. Complaint, Mazzilli v. Townsley, No. 1:12-cv-22432 (S.D. Fla. June 29, 2012), D.E. 1; Lacasa v. Townsley, 883 F. Supp. 2d 1231, 1232–33 (S.D. Fla. 2012); *see* Amended Complaint, *Mazzilli*, No. 1:12-cv-22432 (S.D. Fla. July 3, 2012), D.E. 6; *see also* David Ovalle, *Suit Filed in State Attorney's Race*, Miami Herald, June 30, 2012, at 3B.

write-in candidate registered for the general election.[7712] The court assigned the case to Judge William J. Zloch.[7713]

Four days later, the plaintiffs filed a motion for a preliminary injunction[7714] and an agreed motion for a briefing schedule culminating in a July 13 hearing.[7715] The agreed schedule reflected an understanding that Judge Zloch wanted the case to move quickly.[7716] The day that the proposed schedule was filed, Judge Zloch shortened the schedule by an additional day.[7717] As a further accommodation of the case's time pressure, he moved filing deadlines to noon from the proposed deadline of 5:00 p.m.[7718] The case proceeded very smoothly in part because of the efficient time schedule.[7719] It helped that there were no disputes as to facts.[7720]

On July 5, the Ron Brown South Dade Democratic Caucus Chapter of the Democratic Caucus of Florida moved to intervene.[7721] On the following day, finding that the caucus's interests would be adequately represented by the county supervisor, Judge Zloch denied intervention.[7722]

On July 13, Judge Zloch denied the plaintiffs a preliminary injunction because they did not join as defendants Florida's secretary of state and its elections canvassing commission.[7723]

7712. *Lacasa*, 883 F. Supp. 2d at 1233; *see* David Ovalle, *Write-In Candidates Spark Controversy*, Miami Herald, June 22, 2012, at 1B (reporting that some write-in candidates may not actually seek election but register only to allow primary-election winners to continue to raise funds until the general election or to make primary elections closed); *see also* Michael Van Sickler, *Write-In Elections Write Off Plenty of Voters*, Miami Herald, Oct. 23, 2012, at 1B.

7713. Docket Sheet, *Mazzilli*, No. 1:12-cv-22432 (S.D. Fla. June 29, 2012).

Tim Reagan interviewed Judge Zloch for this report by telephone on October 3, 2012.

7714. Preliminary-Injunction Motion, *Mazzilli*, No. 1:12-cv-22432 (S.D. Fla. July 3, 2012), D.E. 9; *Lacasa*, 883 F. Supp. 2d at 1232.

7715. Briefing Motion, *Mazzilli*, No. 1:12-cv-22432 (S.D. Fla. July 3, 2012), D.E. 10.

7716. Interview with Judge William J. Zloch, Oct. 3, 2012.

7717. Briefing Order, *Mazzilli*, No. 1:12-cv-22432 (S.D. Fla. July 3, 2012), D.E. 12 [hereinafter *Mazzilli* Briefing Order]; *see also* Order, *id.* (July 10, 2012), D.E. 19 (moving the hearing from 10:30 a.m. to 9:30 a.m.); Order, *id.* (July 9, 2012), D.E. 17 (instructing parties to address the court's subject-matter jurisdiction).

7718. *Mazzilli* Briefing Order, *supra* note 7717.

7719. Interview with Judge William J. Zloch, Oct. 3, 2012.

7720. *Id.*

7721. Intervention Motion, *Mazzilli*, No. 1:12-cv-22432 (S.D. Fla. July 5, 2012), D.E. 13.

7722. Intervention Order, *id.* (July 6, 2012), D.E. 15.

7723. Opinion, *id.* (July 13, 2012), D.E. 23; Lacasa v. Townsley, 883 F. Supp. 2d 1231, 1232–33 (S.D. Fla. 2012).

Reviewing an amended complaint,[7724] Judge Zloch dismissed the action on July 25.[7725] The 1998 amendment was unambiguous, the secretary's interpretation of it was reasonable, the state had a legitimate interest in preserving party integrity, and the plaintiffs' desire to vote in another party's primary election did not overcome these factors.[7726]

A state-court judge in Broward County reached a similar conclusion in a lawsuit filed there.[7727] Before he ruled, the state judge obtained a copy of Judge Zloch's opinion from Judge Zloch's chambers.[7728]

"None of These Candidates"

Townley v. Nevada (Robert C. Jones, D. Nev. 3:12-cv-310)

> A June 8 federal complaint sought to prohibit a state from including "none of these candidates" on the ballot, because state law prevented that choice from prevailing. On August 22, the judge granted the plaintiffs relief, but the court of appeals stayed the injunction. Later, the court of appeals determined that the plaintiffs did not have standing because the relief sought—elimination of the none-of-these choice—would not redress the alleged impropriety—not counting none-of-these votes when determining the winner.
>
> *Topics:* Intervention; recusal; case assignment; Electoral College.

On June 8, 2012, nine voters and two Electoral College candidates in Nevada filed a federal complaint seeking an order prohibiting Nevada from including "none of these candidates" on the 2012 general-election ballot because Nevada law did not permit "none of these candidates" to win.[7729]

On June 11, Judge Edward C. Reed, Jr., recused himself in light of his decision to cease presiding over cases as of September 30.[7730] Chief Judge

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7724. Second Amended Complaint, *Mazzilli*, No. 1:12-cv-22432 (S.D. Fla. July 13, 2012), D.E. 24.

7725. *Lacasa*, 883 F. Supp. 2d 1231; *see* David Ovalle, *Judge: Only Democrats Can Vote in Race*, Miami Herald, July 26, 2012, at 3B.

7726. *Lacasa*, 883 F. Supp. 2d 1231.

7727. *See* Brittany Wallman, *Judge Rejects Primary Lawsuit*, Miami Herald, Aug. 4, 2012, at 5B.

7728. Interview with Judge William J. Zloch, Oct. 3, 2012.

7729. Complaint, Townley v. Nevada, No. 3:12-cv-310 (D. Nev. June 8, 2012), D.E. 1; Townley v. Miller, 722 F.3d 1128, 1131–32 (9th Cir. 2013).

7730. Notice, *Townley*, No. 3:12-cv-310 (D. Nev. June 11, 2012), D.E. 6; Order, *id.* (Sept. 5, 2012), D.E. 51 [hereinafter Sept. 5, 2012, *Townley* Order].

Judge Reed died on June 1, 2013. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

Robert C. Jones assigned the case to himself in light of the case's time pressures.[7731]

The plaintiffs filed an amended complaint on June 20.[7732] They moved for a preliminary injunction on June 28.[7733]

On July 13, a voter moved to intervene in defense of Nevada's law and his opportunity to vote for "none of these candidates."[7734] On August 22, Judge Jones granted intervention and granted the plaintiffs a preliminary injunction.[7735] A preliminary question was whether Nevada's voting machines allowed voters to skip parts of the ballot rather than select "none of these candidates" based on an out-of-court representation by the judge's assistant.[7736] Based in part on an out-of-court representation by his mother, the attorney for Nevada assured the court that the voting machines did warn voters if they skipped an item on the ballot, but the machines did allow voters to skip items.[7737]

Both Nevada and the intervenor appealed.[7738] Relying on a docket entry reflecting Judge Jones's oral decision, the court of appeals, on September 4, stayed the injunction.[7739] In concurrence, one circuit judge scolded Judge Jones for his delay in assigning the case, his delay in holding the hearing, and his not issuing an appealable written order.[7740]

7731. Sept. 5, 2012, *Townley* Order, *supra* note 7730; Docket Sheet, *Townley*, No. 3:12-cv-310 (D. Nev. June 8, 2011) [hereinafter D. Nev. *Townley* Docket Sheet] (D.E. 21).

7732. Amended Complaint, *Townley*, No. 3:12-cv-310 (D. Nev. June 20, 2012), D.E. 10.

7733. Preliminary-Injunction Motion, *id.* (June 28, 2012), D.E. 15; *Townley*, 722 F.3d at 1132.

7734. Intervention Motion, *Townley*, No. 3:12-cv-310 (D. Nev. July 13, 2012), D.E. 26.

7735. Transcript at 2–3, 50, *id.* (Aug. 22, 2012, filed Aug. 29, 2012), D.E. 46 [hereinafter *Townley* Transcript]; D. Nev. *Townley* Docket Sheet, *supra* note 7731 (D.E. 39); *Townley*, 722 F.3d at 1132; *see* Sarah Wheaton, *The Protest Vote: "None" Judged a Loser in Nevada*, N.Y. Times, Aug. 23, 2012, at A13.

7736. *Townley* Transcript, *supra* note 7735, at 3.

7737. *Id.* at 4–6.

7738. Docket Sheet, Townley v. Miller, No. 12-16882 (9th Cir. Aug. 27, 2012) (intervenor's appeal); Docket Sheet, Townley v. Miller, No. 12-16881 (9th Cir. Aug. 27, 2012) (Nevada's appeal); *Townley*, 722 F.3d at 1132.

7739. Townley v. Miller, 693 F.3d 1041, 1042 (9th Cir. 2012); *Townley*, 722 F.3d at 1132; *see* Sandra Chereb, *In Nevada, "None" Will Still be an Option in Nov.*, Wash. Post, Sept. 6, 2012, at A5.

7740. *Townley*, 693 F.3d at 1042–45 (Reinhardt, concurring); *see* Chereb, *supra* note 7739.

The appeal was heard on March 11, 2013.[7741] While the appeal was pending, on July 9, Judge Jones allowed the plaintiffs to amend their complaint to add Nevada's Republican Party as a plaintiff.[7742] On the following day, the court of appeals determined that the plaintiffs on appeal did not have standing because the relief sought—eliminating the none-of-these choice—would not redress the alleged impropriety—not counting none-of-these votes when determining the winner.[7743] On August 14, Judge Jones ordered "that the mandate be spread upon the records of" the court.[7744]

School-Bond Opposition Dilution

Duke v. Lawson (Charles Everingham IV, E.D. Tex. 2:11-cv-246)

> Voters opposing a school bond filed a federal complaint to enjoin the opening of school facilities for early voting. A magistrate judge denied the plaintiffs immediate relief, so the plaintiffs voluntarily dismissed the case.
>
> *Topics:* Poll locations; early voting.

Five voters opposing a school bond filed a federal action during early voting on the bond, claiming that the school district's opening up school facilities for early voting diluted the votes of bond opponents.[7745] The school bond election was set to coincide with a May 14, 2011, municipal election for an overlapping municipality.[7746] Early voting was set for May 2 through 10.[7747] The complaint, which sought a temporary restraining order, was filed on May 5.[7748]

The case was referred to Magistrate Judge Charles Everingham IV, pursuant to a standing order.[7749] On May 9, Judge Everingham heard and

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7741. Oral Argument, *Townley*, No. 12-16881 (9th Cir. Mar. 11, 2013), D.E. 43, www.ca9.uscourts.gov/media/audio/?20130311/12-16881/ (audio recording).

7742. Order, Townley v. Nevada, No. 3:12-cv-310 (D. Nev. July 9, 2013), D.E. 59.

7743. *Townley*, 722 F.3d 1128, *cert. denied*, 571 U.S. 1127 (2014); *see* Sean Whaley, *Court Rules Silver State Voters Retain "None" Option*, Las Vegas Rev.-J., July 11, 2013, at 3B.

7744. Order, *Townley*, No. 3:12-cv-310 (D. Nev. Aug. 14, 2013), D.E. 63; *see* Order, *id.* (Sept. 16, 2013), D.E. 64 (dismissing the action for lack of standing).

7745. Complaint, Duke v. Lawson, No. 2:11-cv-246 (E.D. Tex. May 5, 2011), D.E. 1.

7746. *See id.* at 4.

7747. *See id.* at 3.

7748. Docket Sheet, *id.* (May 5, 2011) (D.E. 1, 6).

7749. Order, *id.* (May 6, 2011), D.E. 2.

Judge Everingham retired on October 1, 2011. General Order Appointing U.S. Magistrate Judge Roy S. Payne, No. 11-14 (E.D. Tex. Oct. 3, 2011), txed.uscourts.gov/sites/default/files/goFiles/GO-11-14.pdf.

denied the plaintiffs' motion.[7750] The plaintiffs voluntarily dismissed the action on May 16.[7751]

Challenge to Weighted Voting in Party-Endorsement Procedures

Kehoe v. Casadei (Thomas J. McAvoy, N.D.N.Y. 6:11-cv-408)

> Members of a city's party committee filed a federal complaint challenging the elimination of weighted voting, which weighted members' votes for endorsements by the number of party members each represented. The district judge issued a temporary restraining order against the change, and the case settled two years later with a return to weighted voting.
>
> *Topics:* Party procedures; class action; attorney fees.

Five days before an April 18, 2011, meeting of Rome, New York's Republican Committee, as the committee began its candidate-endorsement process, two members of the committee filed a federal class-action complaint challenging April 4 changes to the committee's bylaws.[7752] The plaintiffs objected to "the elimination of weighted voting, the elimination of the use of proxies and the use of secret ballots for the endorsement of candidates."[7753] "Under the weighted voting system, the voting power of a committee member is weighted in accordance with the number of registered Republicans in their respective election district."[7754]

On April 15, Judge Thomas J. McAvoy issued a temporary restraining order enjoining the committee's screening or endorsing candidates pending an April 22 hearing.[7755] He forgave the plaintiffs' ex parte application for relief, but ordered immediate service.[7756] At the request of counsel for the defendants—the committee and its chair—the hearing was rescheduled for May 9.[7757]

Counsel for the defendants notified the court on April 28 that they did not oppose the plaintiffs' injunction motion and they intended a rescission

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7750. Minutes, *Duke*, No. 2:11-cv-246 (E.D. Tex. May 9, 2011), D.E. 7.

7751. Order, *id.* (May 18, 2011), D.E. 9; Notice, *id.* (May 16, 2011), D.E. 8.

7752. Complaint, Kehoe v. Casadei, No. 6:11-cv-408 (N.D.N.Y. Apr. 13, 2011), D.E. 1; Opinion, *id.* (Apr. 15, 2011), D.E. 6 [hereinafter *Kehoe* Temporary-Restraining-Order Opinion].

7753. *Kehoe* Complaint, *supra* note 7752, at 3–4.

7754. *Kehoe* Temporary-Restraining-Order Opinion, *supra* note 7752, at 3 n.1.

7755. *Id.* at 5.

7756. *Id.* at 5–6.

7757. Docket Sheet, *Kehoe*, No. 6:11-cv-408 (N.D.N.Y. Apr. 13, 2011); Minutes, *id.* (Apr. 22, 2011), D.E. 9.

of the bylaws change.[7758] On September 6, Judge McAvoy noted the absence of a filed settlement agreement and issued the preliminary injunction.[7759] On October 20, he denied the defendants' motion to dismiss the complaint "on the ground that the endorsement of candidates by the [committee] is not an electoral function."[7760]

Two years later, the parties filed a settlement agreement: "the Rome Republican Committee endorsement of Republican city-wide candidates for elections shall be done by weighted secret ballots without the benefit of proxies."[7761]

Write-In Lists

Rudolph v. Fenumiai (Ralph R. Beistline, D. Alaska 3:10-cv-243)

> Voters challenged Alaska's providing polling places with lists of write-in candidates so that voters could refresh their recollection about who was running and how to spell their names. While a motion for a temporary restraining order was pending, the Justice Department precleared the procedure, so the motion was denied as moot.
>
> *Topics:* Section 5 preclearance; write-in candidate.

On the day before the 2010 general election, in which Alaska's Senator Lisa Murkowski was up for reelection, five voters sought a temporary restraining order from the U.S. District Court for the District of Alaska proscribing distribution to polling places of lists of write-in candidates.[7762] The voters claimed that the write-in-candidate lists had not received preclearance from the Justice Department, as required by section 5 of the Voting Rights Act.[7763] The court assigned the case to Judge Ralph R. Beistline.[7764]

7758. Letter, *id.* (Apr. 28, 2011), D.E. 10.

7759. Letter, *id.* (Sept. 6, 2011), D.E. 17.

7760. Opinion, *id.* (Oct. 20, 2011), D.E. 26, 2011 WL 5008044.

7761. Settlement Agreement, *id.* (Oct. 28, 2013), D.E. 59 (noting also the payment of $2,000 to the plaintiffs); Judgment, *id.* (June 27, 2013), D.E. 53; *see* Amended Complaint, *id.* (Dec. 19, 2012), D.E. 43.

7762. Temporary-Restraining-Order Motion, Rudolph v. Fenumiai, No. 3:10-cv-243 (D. Alaska Nov. 1, 2010), D.E. 3; Complaint, *id.* (Nov. 1, 2010), D.E. 1 [hereinafter *Rudolph* Complaint]; *see* Chad Flanders, *How Do You Spell M-U-R-K-O-W-S-K-I? Part I: The Question of Assistance to the Voter*, 28 Alaska L. Rev. 1, 5 (2011) ("the Alaska Division of Elections sent to polling places a written list of write-in candidates and their party affiliations, a move unprecedented in the history of Alaska elections"). *See generally* Justin Levitt, *Fault and the Murkowski Voter: A Reply to Flanders*, 28 Alaska L. Rev. 39 (2011); Justin Levitt, *Resolving Election Error: The Dynamic Assessment of Materiality*, 54 Wm. & Mary L. Rev. 83, 89–90, 133 (2012).

7763. *Rudolph* Complaint, *supra* note 7762, at 2, 4–5; *see* Voting Rights Act of 1965,

Senator Murkowski lost the Republican primary election in August, so she was running as a write-in candidate.[7765] On October 26, Alaska obtained preclearance for a plan to provide polling places with write-in lists.[7766] In state court, both the Republican Party and the Democratic Party objected to the state's efforts to inform voters of the identities of write-in candidates and the spellings of their names.[7767] On October 27, Alaska's supreme court ruled that poll workers could provide voters with a list of write-in candidates only on the voter's request, and the list must not show the candidates' party affiliations as originally planned.[7768] In the federal action, the plaintiffs complained that providing lists without party affiliation had not yet been precleared.[7769]

Judge Beistline ordered Alaska to respond to the motion for a temporary restraining order by 1:00 p.m. on the day that the suit was filed; the plaintiffs' reply was due at 3:00 p.m.[7770] By the time the reply brief was filed, the amended write-in-list procedure had been precleared.[7771] Judge Beistline, therefore, denied the motion for a temporary restraining order as moot.[7772] On November 23, he approved a voluntary dismissal of the action.[7773] No proceeding was required for this case.[7774]

Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination).

7764. Docket Sheet, *Rudolph*, No. 3:10-cv-243 (D. Alaska Nov. 1, 2010).

Tim Reagan interviewed Judge Beistline for this report by telephone on May 8, 2012.

7765. *See* Erika Bolstad, *Write-In Lawsuit Unites Rivals*, Anchorage Daily News, Oct. 26, 2010, at A1.

7766. Exs. A–B, *Rudolph* Complaint, *supra* note 7762.

7767. *See* Bolstad, *supra* note 7765.

7768. Order, Alaska v. Alaska Democratic Party, No. S-14054 (Alaska Oct. 29, 2010), *attached as Rudolph* Ex. C, Complaint, *supra* note 7762; Order, *id.* (Oct. 27, 2010), *attached as* Ex. H, Alaska Opposition, *Rudolph*, No. 3:10-cv-243 (D. Alaska Nov. 1, 2010), D.E. 10; *see* Erika Bolstad, *High Court Says Voters Entitled to Write-In Lists*, Anchorage Daily News, Oct. 28, 2010, at A1; William Yardley, *Bipartisanship Fails in Court*, N.Y. Times, Oct. 28, 2010, at A19; *see also* Flanders, *supra* note 7762, at 8 (reporting that by the time of the ruling the list included over 150 names).

7769. *Rudolph* Complaint, *supra* note 7762, at 4–5.

7770. *Rudolph* Docket Sheet, *supra* note 7764.

7771. Reply Brief at 2–3, *Rudolph*, No. 3:10-cv-243 (D. Alaska Nov. 1, 2010), D.E. 13; Notice, *id.* (Nov. 1, 2010), D.E. 12.

7772. *Rudolph* Docket Sheet, *supra* note 7764.

7773. *Id.*

7774. Interview with Judge Ralph R. Beistline, May 8, 2012.

Enjoining Temperamental Voting Machines

Fetzer v. Barlett (Malcolm J. Howard and David W. Daniel, E.D.N.C. 4:10-cv-158)

> A federal complaint filed on Friday, October 29, 2010, challenged the planned use of touchscreen voting machines that the complaint alleged would default to votes for the other party. The district judge assigned to the case was at an airport returning from a week out of town, and he referred the case to a magistrate judge for a status conference on the day that the complaint was filed. On Saturday, the district judge heard the case and issued a temporary restraining order requiring warning notices at polling places instructing voters to review carefully the machines' registration of the voters' choices.
>
> *Topics:* Voting technology; election errors; case assignment.

Four Republican Party county chairs, another voter, and a Republican candidate filed a federal complaint in the Eastern District of North Carolina on Friday, October 29, 2010, to enjoin the use of allegedly defective touchscreen voting equipment in the following Tuesday's general election.[7775] The complaint alleged that if the machines were not calibrated properly Republican voters' choices could be counted for Democratic candidates.[7776] The complaint included a prayer that the court regard it as a motion for a temporary restraining order.[7777]

The court assigned the case to Judge Malcolm J. Howard, who was out of town that week in service to the Foreign Intelligence Surveillance Court.[7778] He learned of the filing while waiting for his plane at National Airport.[7779] He referred the case to Magistrate Judge David W. Daniel for a 4:00 p.m. status conference that day.[7780] Judge Howard, whose chambers

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7775. Complaint, Fetzer v. Barlett, No. 4:10-cv-158 (E.D.N.C. Oct. 29, 2010), D.E. 1 [hereinafter *Fetzer* Complaint]; *see* Lynn Bonner, *GOP Files Suit, Saying Electronic Voting Machines Are Flawed*, Raleigh News & Observer, Oct. 29, 2010.

7776. *Fetzer* Complaint, *supra* note 7775; *see Voting-Machine Maker Denies GOP Claim*, Raleigh News & Observer, Nov. 2, 2010 ("The manufacturer of North Carolina's touch-screen voting machines says the devices can't be programmed to default votes to Democrats, as alleged last week by Tom Fetzer, the state Republican Party chairman.").

7777. *Fetzer* Complaint, *supra* note 7775, at 17–18.

7778. Docket Sheet, *Fetzer*, No. 4:10-cv-158 (E.D.N.C. Oct. 29, 2010) [hereinafter *Fetzer* Docket Sheet]; Interview with Judge Malcolm J. Howard, Apr. 15, 2014.

Tim Reagan interviewed Judge Howard for this report by telephone.

7779. Interview with Judge Malcolm J. Howard, Apr. 15, 2014.

7780. Order, *Fetzer*, No. 4:10-cv-158 (E.D.N.C. Oct. 29, 2010), D.E. 4.

Judge Daniel died on July 20, 2012. Judicial Milestones, www.uscourts.gov/judicial-

were in Greenville, heard motions in Raleigh on Saturday afternoon[7781] and granted the plaintiffs a temporary restraining order.[7782] The order required polls using the machines in dispute—just a few of the state's 100 counties—to warn voters that the touchscreens were sensitive and so the voters should review their choices carefully.[7783] The order also required preservation of evidence concerning how the machines functioned.[7784]

After the election, the plaintiffs withdrew their request for a hearing on a preliminary injunction.[7785] Later that month, the plaintiffs voluntarily dismissed the case.[7786]

Election Observers

Tucker v. Hosemann (W. Allen Pepper, Jr., N.D. Miss. 2:10-cv-178)

> A federal complaint filed thirteen days before the 2010 general election alleged that election practices discriminated against Black voters. According to the presiding judge, "Though it was unclear from their pleadings the exact nature of the relief sought by the plaintiffs, the court was able to pinpoint the issue during the [temporary-restraining-order] hearing [held six days after the complaint was filed]." The judge concluded that the practice by offices of Mississippi's secretary of state and attorney general of sending observers to federal and state elections held in Mississippi was not a new practice requiring preclearance pursuant to section 5 of the Voting Rights Act.
>
> *Topic:* Section 5 preclearance.

Thirteen days before the 2010 general election, four voters filed a federal complaint in the Northern District of Mississippi against state election officials, alleging election practices that discriminated against Black voters.[7787] With their complaint, the plaintiffs filed a motion for a temporary

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milestones/david-w-daniel.

7781. *Fetzer* Docket Sheet, *supra* note 7778.

7782. Temporary Restraining Order, *Fetzer*, No. 4:10-cv-158 (E.D.N.C. Oct. 30, 2010), D.E. 7 [hereinafter *Fetzer* Temporary Restraining Order]; *see* Lynn Bonner, *Judge Orders Voting Machine Alerts*, Raleigh News & Observer, Oct. 31, 2010; Laura Oleniacz, *Judge Orders That Voters Be Warned About Voting Machine Issues*, New Bern Sun J., Nov. 1, 2010.

7783. *Fetzer* Temporary Restraining Order, *supra* note 7782; Interview with Judge Malcolm J. Howard, Apr. 15, 2014.

7784. *Fetzer* Temporary Restraining Order, *supra* note 7782.

7785. Notice, *Fetzer*, No. 4:10-cv-158 (E.D.N.C. Nov. 8, 2010), D.E. 18.

7786. Voluntary Dismissal, *id.* (Nov. 24, 2010), D.E. 21.

7787. Complaint, Tucker v. Hosemann, No. 2:10-cv-178 (N.D. Miss. Oct. 20, 2010), D.E. 1.

restraining order (TRO).[7788] Four days later, the plaintiffs moved to expedite the case to save on expenses.[7789]

Judge W. Allen Pepper, Jr.'s chambers responded to the plaintiffs' telephone request for a hearing date, set a hearing for October 26, and provided the defendants with notice on October 22.[7790]

Judge Pepper determined that the motion to expedite the case was presented improperly but ultimately moot.[7791]

> Essentially, this motion sought to convert their motion for temporary restraining order to a final trial on the merits. First, Rule 65(a)(2) requires a pending motion for preliminary injunction, as opposed to one for a temporary restraining order, to convert to a trial on the merits. Since the plaintiffs did not move for preliminary injunction, conversion is premature. Second, the motion should be denied because it was filed only two days before the TRO hearing set for October 26, 2010 and a mere four days after the plaintiffs filed the complaint. To have converted the hearing to a full trial with less than a week's notice to the defendants would have denied the State due process. Third, since plaintiffs' counsel stated near the end of the hearing that after the court ruled on the motion for TRO there would be no more outstanding issues, the motion to convert to a final trial is essentially moot.
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> . . .
>
> Though it was unclear from their pleadings the exact nature of the relief sought by the plaintiffs, the court was able to pinpoint the issue during the TRO hearing. The court confirmed with plaintiff counsel on the record that the sole issue for which the plaintiffs seek specific relief involves the practice of the Secretary of State's office and the Attorney General's office of sending observers to federal and state elections held in Mississippi.[7792]

Judge Pepper concluded that Mississippi's observer practice was not a new practice requiring preclearance pursuant to section 5 of the Voting Rights Act.[7793]

7788. Temporary-Restraining-Order Motion, *id.* (Oct. 20, 2010), D.E. 2.

7789. Motion, *id.* (Oct. 24, 2010), D.E. 6.

7790. Opinion, *id.* (Oct. 26, 2010), D.E. 16, 2010 WL 4384223; *see* Minutes, *id.* (Oct. 26, 2010), D.E. 12.

Judge Pepper died on January 24, 2012. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

7791. *Tucker* Opinion, *supra* note 7790, at 1–2.

7792. *Id.*

7793. *Id.* at 2–6; *see* Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination).

The appeal was dismissed for failure "to timely order transcripts and make financial arrangements with court reporter."[7794]

Unsuccessful Challenge to Straight-Ticket Voting

Meyer v. Texas (Kenneth M. Hoyt, S.D. Tex. 4:10-cv-3860)

> An independent write-in candidate for Congress filed a pro se federal complaint challenging the constitutionality of state election laws favoring party candidates, including straight-ticket voting. The district judge concluded that the complaint did not allege a constitutional violation, and the state laws served the state's interest in regulating elections.
>
> *Topics:* Pro se party; write-in candidate.

On Friday, October 15, 2010, an independent write-in candidate for Congress filed a pro se federal complaint in the Southern District of Texas challenging the constitutionality of state election laws favoring party candidates.[7795] The complaint included a prayer for a temporary restraining order against straight-ticket voting.[7796] The plaintiff filed an amended complaint and request for a temporary restraining order on Monday.[7797] The court set the case for a telephone conference on Wednesday.[7798]

Judge Kenneth M. Hoyt denied the plaintiff immediate relief on October 22.[7799] "The fact that early voters would be disenfranchised were an injunction or restraining order to issue is sufficient cause to deny the plaintiff's request."[7800] On May 11, 2011, Judge Hoyt dismissed the complaint.[7801]

> The Texas Election Code does not prevent the plaintiff from being placed on the ballot, nor does it unconstitutionally burden him. The contested laws merely serve to: (1) cause the plaintiff's supporters to write his name

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7794. Order, Tucker v. Hosemann, No. 10-60859 (5th Cir. Jan. 20, 2011).

7795. Complaint, Meyer v. Texas, No. 4:10-cv-3860 (S.D. Tex. Oct. 15, 2010), D.E. 1 [hereinafter *Meyer* Complaint]; *see* Temporary-Restraining-Order Denial at 1, *id.* (Oct. 20, 2010), D.E. 10 [hereinafter *Meyer* Temporary-Restraining-Order Denial].

7796. *Meyer* Complaint, *supra* note 7795, at 5.

7797. Amended Complaint, *Meyer*, No. 4:10-cv-3860 (S.D. Tex. Oct. 18, 2010), D.E. 4; *see* Order, *id.* (Oct. 20, 2010), D.E. 6 (granting permission for an amended complaint).

7798. Notice, *id.* (Oct. 18, 2010), D.E. 2.

7799. *Meyer* Temporary-Restraining-Order Denial, *supra* note 7795.

7800. *Id.* at 3; *see also id.* at 1 (observing that "ballots for the November 2 election have been printed and early voting commenced on October 18. As well, ballots have been mailed to military personnel serving overseas and locally to citizens who desire to vote by mail.").

7801. Opinion, *Meyer*, No. 4:10-cv-3860 (S.D. Tex. May 11, 2011), D.E. 16, 2011 WL 1806524.

> on the ballot rather than to check a box beside his name; (2) prevent him from being the first candidate listed on the ballot; and (3) require that he obtain petition signatures from non-primary voters. None of these facts amount to constitutional violations. Furthermore, even if he had properly alleged any constitutional burden, that slight burden would be outweighed by the state's important interests in regulating elections.[7802]

An appeal was dismissed for lack of prosecution.[7803]

Suit to Reopen Polling Places on an Indian Reservation

Spirit Lake Tribe v. Benson County (Ralph R. Erickson, D.N.D. 2:10-cv-95)

> Approximately one month before election day, a tribe filed a federal complaint challenging a county decision the previous year to close seven out of eight polling places to promote voting by mail. The district judge issued a preliminary injunction reopening the two polling places on the tribe's reservation on evidence that both traveling to the remaining polling place and voting by mail were especially difficult for members of the tribe. The parties converted the preliminary injunction into a consent decree.
>
> *Topics:* Poll locations; section 2 discrimination.

An American Indian tribe and a voter filed a federal complaint against Benson County in the District of North Dakota on October 8, 2010, challenging the elimination of three polling places serving the tribe's reservation.[7804] Four days later, the tribe filed a motion for a preliminary injunction.[7805] Judge Ralph R. Erickson set the case for hearing on October 19.[7806]

The county eliminated seven of its eight polling places in December 2009 as part of a move to voting by mail.[7807] Judge Erickson heard evidence that travel to the remaining polling place was especially difficult and vot-

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7802. *Id.* at 4.

7803. Order, Meyer v. Texas, No. 11-20512 (5th Cir. Aug. 1, 2011); *see* Order, *id.* (Jan. 6, 2012) (denying a motion to reopen the appeal).

7804. Complaint, Spirit Lake Tribe v. Benson County, No. 2:10-cv-95 (D.N.D. Oct. 8, 2010), D.E. 1; *see Tribe Going to Court in Polling Site Dispute*, Bismarck Trib., Oct. 12, 2010, at B1.

7805. Preliminary-Injunction Motion, *Spirit Lake Tribe*, No. 2:10-cv-95 (D.N.D. Oct. 10, 2010), D.E. 10.

7806. Order, *id.* (Oct. 13, 2010), D.E. 13; *see* Minutes, *id.* (Oct. 19, 2010), D.E. 35.

Judge Erickson was elevated to the court of appeals on October 12, 2017. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

7807. Opinion at 2, *Spirit Lake Tribe*, No. 2:10-cv-95 (D.N.D. Oct. 21, 2010), D.E. 38, 2010 WL 4226614.

ing by mail was especially impractical for transient tribe members.[7808] Judge Erickson issued a preliminary injunction reopening two polling places within the reservation, but he denied the request to reopen a third polling place near the reservation.[7809] An agreement to keep the two reservation polling places open was established by a consent decree approved on October 6, 2011.[7810]

Fusion Voting

Conservative Party of New York State v. New York State Board of Elections (Jed S. Rakoff, S.D.N.Y. 1:10-cv-6923)

> Minor parties in a state that allows candidates to appear as nominees of multiple parties filed an action against a rule established for new voting technology that would give voting preferences in some cases to the major parties. The judge denied immediate relief because the action was brought too close to the election, but the case ultimately resulted in a consent judgment and an award of $199,000 in attorney fees.
>
> *Topics:* Voting technology; laches; attorney fees.

Two months before the 2010 general election, which included an election for governor of New York, the state's Conservative Party and the state's Working Families party filed a federal complaint in the Southern District of New York challenging how minor parties would receive credit for votes in favor of their candidates who were also the candidates of other parties.[7811] A candidate nominated by more than one party was listed separately on the ballot for each nomination.[7812] Lever voting machines mechanically prevented a voter from voting for the same candidate more than once, but the state had switched to optical-scan voting, which allowed for multiple votes for the same candidate to be counted as a single valid vote.[7813] The plaintiffs called this form of double-voting fusion voting.[7814]

7808. *Id.* at 3.

7809. *Id.* at 1, 3, 10–11.

7810. Consent Decree, *id.* (Oct. 6, 2011), D.E. 61; *see* Dismissal, *id.* (May 21, 2012), D.E. 70 (dismissing the action on the parties' settling the matter of attorney fees).

7811. Complaint, Conservative Party of N.Y. State v. N.Y. State Bd. of Elections, No. 1:10-cv-6923 (S.D.N.Y. Sept. 14, 2010), D.E. 1 [hereinafter *Conservative Party* Complaint]; Conservative Party v. Walsh, 818 F. Supp. 2d 670, 672 (S.D.N.Y. 2011); *see* David W. Chen, *Before Vote, City Officials Fretted About New System*, N.Y. Times, Sept. 16, 2010, at A27.

7812. *Conservative Party*, 818 F. Supp. 2d at 671; Order at 1–2, *Conservative Party*, No. 1:10-cv-6923 (S.D.N.Y. Oct. 15, 2010), D.E. 41 [hereinafter *Conservative Party* Order Denying Preliminary Injunction], 2010 WL 4455867.

7813. *Conservative Party*, 818 F. Supp. 2d at 674; *Conservative Party* Order Denying

The party receiving credit for the vote was going to be the first party listed on the ballot, and parties were listed in the order of votes received in the last gubernatorial election.[7815] A party's right to appear on the ballot also was determined from the votes it received in the last gubernatorial election.[7816]

It was initially thought that New York's attorney general would represent the defendants, but he determined that this case was not within his responsibilities.[7817]

The court assigned the case to District Judge Jed S. Rakoff.[7818] It was his practice to communicate with the parties on how the case would move forward within a week of the case's filing.[7819] At the time this case was filed, he did this by telephone, but he later did it by email.[7820]

After telephone consultation with the parties,[7821] Judge Rakoff scheduled a case-management conference for September 30, which was sixteen days after the complaint was filed.[7822] At the conference, he expressed concern about how close to the election the action had been filed[7823] and curiosity about whether the risk of injury was de minimus.[7824] He wanted legal briefing first, to be followed by an evidentiary hearing if the legal briefing did not resolve the case.[7825]

In response to Judge Rakoff's concerns about timeliness, the plaintiffs filed a motion for a preliminary injunction on Friday, October 1.[7826] The

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Preliminary Injunction, *supra* note 7812, at 2 n.2; Transcript at 6–7, 17, *Conservative Party*, No. 1:10-cv-6923 (S.D.N.Y. Sept. 30, 2010, filed Nov. 5, 2010), D.E. 43 [hereinafter Sept. 30, 2010, *Conservative Party* Transcript].

7814. *Conservative Party* Complaint, *supra* note 7811, at 1–2.

7815. *Conservative Party*, 818 F. Supp. 2d at 671–74; *Conservative Party* Order Denying Preliminary Injunction, *supra* note 7812, at 1–2 & n.1.

7816. *Conservative Party*, 818 F. Supp. 2d at 674.

7817. Sept. 30, 2010, *Conservative Party* Transcript, *supra* note 7813, at 22; Interview with Judge Jed S. Rakoff, May 9, 2012.

Tim Reagan interviewed Judge Rakoff for this report by telephone.

7818. Docket Sheet, *Conservative Party*, No. 1:10-cv-6923 (S.D.N.Y. Sept. 14, 2010) [hereinafter *Conservative Party* Docket Sheet].

7819. Interview with Judge Jed S. Rakoff, May 9, 2012.

7820. *Id.*

7821. Sept. 30, 2010, *Conservative Party* Transcript, *supra* note 7813, at 22.

7822. Sept. 30, 2010, *Conservative Party* Transcript, *supra* note 7813.

7823. *Id.* at 8.

7824. *Id.* at 10–11, 16–19, 29.

7825. *Id.* at 21.

7826. Preliminary-Injunction Brief, Conservative Party of N.Y. State v. N.Y. State Bd. of Elections, No. 1:10-cv-6923 (S.D.N.Y. Oct. 1, 2010), D.E. 24; Preliminary-Injunction

defendants filed their opposition brief a week later.[7827] Judge Rakoff asked the parties to exchange preliminary witness lists for the possible evidentiary hearing over the Columbus Day weekend,[7828] and Judge Rakoff held a discovery status conference on Tuesday, October 12.[7829]

The defendants argued that the plaintiffs' proposed remedies would require cumbersome last-minute reprogramming of the vote-scanning machines, and even the plaintiffs' alternative proposal of posted warning signs would require Justice Department approval in some places and would be otherwise cumbersome.[7830] On October 15, Judge Rakoff denied the preliminary-injunction motion because the plaintiffs had waited until too close to the election to seek it.[7831]

The case continued after the election.[7832] Following first[7833] and second[7834] amended complaints, Judge Rakoff denied New York's motion to dismiss the case, concluding that the plaintiffs had articulated colorable constitutional claims.[7835] After settlement conferences in May 2011 conducted by Magistrate Judge Frank Maas[7836] and Judge Rakoff,[7837] Judge

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Motion, *id.* (Oct. 1, 2010), D.E. 19; *see* Sept. 30, 2010, *Conservative Party* Transcript, *supra* note 7813, at 22–23.

7827. New York Brief, *Conservative Party*, No. 1:10-cv-6923 (S.D.N.Y. Oct. 8, 2010), D.E. 36; *see* Sept. 30, 2010, *Conservative Party* Transcript, *supra* note 7813, at 21.

7828. Sept. 30, 2010, *Conservative Party* Transcript, *supra* note 7813, at 28–29.

7829. Transcript, *Conservative Party*, No. 1:10-cv-6923 (S.D.N.Y. Oct. 12, 2010, filed Nov. 5, 2010), D.E. 42; *see* Sept. 30, 2010, *Conservative Party* Transcript, *supra* note 7813, at 27–29.

7830. *Conservative Party* Order Denying Preliminary Injunction, *supra* note 7812, at 2–3.

7831. *Id.* at 4–5; Conservative Party v. Walsh, 818 F. Supp. 2d 670, 672 (S.D.N.Y. 2011).

7832. *Conservative Party* Docket Sheet, *supra* note 7818.

7833. First Amended Complaint, *Conservative Party*, No. 1:10-cv-6923 (S.D.N.Y. Dec. 20, 2010), D.E. 56.

7834. Second Amended Complaint, *id.* (Feb. 3, 2011), D.E. 72.

7835. *Conservative Party*, 818 F. Supp. 2d at 678 ("plaintiffs had adequately alleged that the Statute and Regulation severely burdened their First and Fourteenth Amendment rights and the State had not yet established, at a minimum, that the State had chosen the least restrictive alternative to achieve its purported justification"); Order Denying Motion to Dismiss, *Conservative Party*, No. 1:10-cv-6923 (S.D.N.Y. Feb. 20, 2011), D.E. 74.

7836. *Conservative Party* Docket Sheet, *supra* note 7818 (noting a settlement conference on May 2, 2011).

Judge Maas retired on September 29, 2016. Judicial Milestones, www.uscourts.gov/judicial-milestones/frank-s-maas.

7837. *Conservative Party* Docket Sheet, *supra* note 7818 (noting a settlement conference on May 6, 2011).

Rakoff signed a consent judgment on September 8, 2011.[7838] Among other provisions, New York agreed to reprogram its vote scan machines to alert voters who vote for the same candidate more than once, and New York agreed to prepare polling-place notices of the consequences of double voting.[7839] The consent decree also awarded the plaintiffs $199,000 in attorney fees.[7840]

Had this case required more immediate action than it did on filing, it might have been referred to the court's duty-day judge, known in the district as the Part I judge.[7841] Approximately every eighteen months, judges in the district's Manhattan courthouse sign up, in order of seniority, for two weeks of duty days.[7842] Part I responsibilities include miscellaneous and emergency matters in civil and criminal cases.[7843]

No Right to Cast a Paper Ballot

Bryan v. Abramson (Harvey Bartle III, D.V.I. 1:10-cv-79)

> A pro se complaint sought a right to cast a paper ballot instead of voting electronically or casting a provisional ballot. The court determined that the complaint did not present a federal question. A local court determined that the claim was without merit.
>
> *Topics:* Matters for state courts; provisional ballots; voting technology; pro se party; Help America Vote Act (HAVA).

A former Virgin Islands senator filed a pro se federal complaint in the District of the Virgin Islands on August 17, 2010, claiming that there was no legal authority for a plan to require voters who elected not to cast votes electronically to vote using provisional ballots.[7844] Among the relief sought in the complaint were a temporary restraining order and a preliminary injunction.[7845]

7838. Consent Judgment, *Conservative Party*, No. 1:10-cv-6923 (S.D.N.Y. Sept. 8, 2011), D.E. 86; *see* Sam Roberts, *Minor Parties Succeed in a Voting Dispute*, N.Y. Times, Sept. 10, 2011, at A22.

7839. *Conservative Party* Consent Judgment, *supra* note 7838.

7840. *Id.*

7841. Interview with Judge Jed S. Rakoff, May 9, 2012.

7842. S.D.N.Y. R. Div. of Bus. 3; Interview with Judge Jed S. Rakoff, May 9, 2012.

7843. S.D.N.Y. R. Div. of Bus. 3.

7844. Complaint, Bryan v. Abramson, No. 1:10-cv-79 (D.V.I. Aug. 17, 2010), D.E. 1 [hereinafter *Bryan* Complaint]; *see* Bill Kossler, *Elections Board Hoping to Bolster Faith in Voting Machines*, St. Croix Source, Sept. 27, 2010.

7845. *Bryan* Complaint, *supra* note 7844, at 5; Scheduling Order, *Bryan*, No. 1:10-cv-79 (D.V.I. Aug. 24, 2010), D.E. 8 [hereinafter *Bryan* Scheduling Order].

Chief Judge Curtis V. Gómez issued an order on August 24 setting an August 26 hearing before Judge Harvey Bartle III and ordering notice to Virgin Islands election officials.[7846]

> At a hearing held on this matter, plaintiff contended that the electronic voting machines have a record of failing to record votes accurately and that provisional ballots are not counted at the polling sites but are sent to a central location where they are tabulated under the aegis of the Joint Board of Elections. He objects to this counting procedure because, in his view, the Joint Board is rife with conflicts of interest as a number of the board members are employees of the government or its elected officials.[7847]

Judge Bartle dismissed the complaint for lack of federal jurisdiction on August 31.[7848] Although the plaintiff cited the Help America Vote Act[7849] in his complaint, and the act does provide for provisional ballots, the plaintiff did not allege how the Virgin Islands plan violated federal law.[7850]

On October 10, the Virgin Islands' superior court also denied the plaintiff relief sought in a complaint also filed on August 17.[7851]

Preserving Voting-Machine Data

Bursey v. South Carolina Election Commission (Cameron McGowan Currie, D.S.C. 3:10-cv-1545)

> After an unknown candidate defeated a well-known candidate for the Democratic nomination to challenge a Republican incumbent U.S. Senator, a pro se plaintiff filed a federal complaint to enjoin election officials from clearing the primary-election data from the election machines. After he learned more about the election data, the plaintiff dropped his plea for emergency relief and eventually dismissed his action voluntarily.

7846. *Bryan* Scheduling Order, *supra* note 7845.

Judge Gómez was replaced by Judge Robert Molloy in 2020. *See* Judicial Milestones, www.uscourts.gov/judicial-milestones/robert-molloy; Suzanne Carlson, *AG: 17-Year-Old VLT Contract Was Never Legal*, V.I. Daily News, May 12, 2020; Suzanne Carlson, *Judge Robert Molloy Confirmed to District Court*, V.I. Daily News, Feb. 26, 2020.

7847. Opinion, *Bryan*, No. 1:10-cv-79 (D.V.I. Aug. 31, 2010), D.E. 17 [hereinafter D.V.I. *Bryan* Opinion].

7848. *Id.* at 11.

7849. Pub. L. No. 107-252, 116 Stat. 1666 (2002), *as amended*, 52 U.S.C. §§ 20901–21145. *See generally* Marie Leary & Robert Timothy Reagan, The Help America Vote Act (Federal Judicial Center 2012); Symposium, *HAVA @ 10*, 12 Election L.J. 111 (2013).

7850. D.V.I. *Bryan* Opinion, *supra* note 7847.

7851. Opinion, Bryan v. Abramson, No. SX-10-CV-0000363 (V.I. Super. Ct. Oct. 10, 2010), 2010 WL 7746073.

Topics: Election errors; pro se party; voting technology.

A pro se plaintiff filed a form federal civil complaint in the District of South Carolina's Columbia courthouse on June 16, 2010, asking the court to require South Carolina's election commission to preserve primary-election data in voting machines that were about to be erased for a June 22 runoff election.[7852] The plaintiff, a frequent and capable pro se litigator on matters of public concern,[7853] filed with his complaint a hand-written motion for a temporary restraining order.[7854]

South Carolina's June 8 primary election had delivered a surprising result. Essentially unknown candidate Alvin Greene defeated well-known Vic Rawl as the Democratic nominee to run against Republican Senator Jim DeMint.[7855] Concerns about the reliability of voting machines were among the suspicions about the event.[7856]

On the case's second day, the plaintiff moved to relieve the court of expedited consideration of his complaint, because "all of the voting machine flash card memories have been, or will have been, erased before an order to stop the erasing can be considered by this court."[7857] Judge Cameron McGowan Currie granted this motion, noting that the parties agreed to cooperate in devising a plan for compliance with the federal statute requir-

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7852. Complaint, Bursey v. S.C. State Election Comm'n, No. 3:10-cv-1545 (D.S.C. June 16, 2010), D.E. 1.

7853. Interview with Judge Cameron McGowan Currie, Sept. 6, 2012.

Tim Reagan interviewed Judge Currie for this report by telephone.

7854. Temporary-Restraining-Order Motion, *Bursey*, No. 3:10-cv-1545 (D.S.C. June 16, 2010), D.E. 2.

7855. *See* David Slade & Schuyler Kropf, *Greene Certified as Winner*, Charleston Post & Courier, June 12, 2010, at A1.

7856. *See* Robert Behre & Schuyler Kropf, *Surprise Winner Greene Adamant About Staying in Senate Race*, Charleston Post & Courier, June 11, 2010, at A1; Kate Phillips, *Calls Mount for Inquiry Into Primary in S. Carolina*, N.Y. Times, June 11, 2010, at A15; Manuel Roig-Franzia, *Scrutinizing an Election Surprise*, Wash. Post, June 15, 2010, at C10; *Senator Wants Voting Machines Impounded*, Greenville News, June 15, 2010; Glenn Smith, *Rawl Files Protest in Primary Upset*, Charleston Post & Courier, June 15, 2010, at A1.

An analysis by political scientists concluded "that voting patterns in Greene's victory over Rawl do not exhibit peculiarities and are instead consistent with the types of regularities observed in American elections more generally." Joseph Bafumi, Michael C. Herron, Seth J. Hill & Jeffrey B. Lewis, *Alvin Greene? Who? How Did He Win the United States Senate Nomination in South Carolina?*, 11 Election L.J. 358, 360 (2012).

7857. Motion, *Bursey*, No. 3:10-cv-1545 (D.S.C. June 17, 2010), D.E. 1; *see also* Continuance Motion, *id.* (June 17, 2010), D.E. 12.

ing preservation of election records.[7858] Judge Currie required from the plaintiff within thirty days either a status report or a voluntary dismissal.[7859]

The plaintiff filed a status report on July 19, indicating no resolution of the dispute,[7860] and the defendant filed a motion to dismiss the action on August 20.[7861] Judge Currie dismissed it on October 4, finding that the federal statute requiring preservation of election records for twenty-two months did not afford a private right of action.[7862]

Senator DeMint won reelection on November 2.[7863]

Adequate Polling-Place Resources

Virginia State Conference of NAACP Branches v. Kaine (Richard L. Williams and Dennis W. Dohnal, E.D. Va. 3:08-cv-692)

> Eight days before the 2008 general election, voters filed a federal complaint charging Virginia with unequal allocation of polling-place resources. A magistrate judge held a settlement conference on the case's third day, after which the plaintiffs decided to withdraw their motion for a preliminary injunction. Two days later, the plaintiffs again sought a preliminary injunction, which the district judge denied on the day before the election. Instead, the judge ordered the posting of notices about curbside voting and that anyone in line at closing time would be able to vote.
>
> *Topics:* Equal protection; polling hours; intervention; case assignment.

Eight days before the 2008 general election, the Virginia NAACP and three voters filed a federal complaint in the Eastern District of Virginia's Richmond courthouse against Commonwealth of Virginia election officials, charging Virginia with allocating polling place resources improperly.[7864] On the following day, the plaintiffs filed a motion for a preliminary in-

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7858. Docket Sheet, *id.* (June 16, 2010) (citing 42 U.S.C. § 1974).

7859. *Id.*

7860. Status Report, *id.* (July 19, 2010), D.E. 19.

7861. Motion to Dismiss, *id.* (Aug. 20, 2010), D.E. 23.

7862. Opinion, *id.* (Oct. 4, 2010), D.E. 26, 2010 WL 3938390; *see* 42 U.S.C. § 1974.

7863. *See* Schuyler Kropf, *DeMint Wins Second Senate Term*, Charleston Post & Courier, Nov. 3, 2010, at A5.

7864. Complaint, Va. State Conference of NAACP Branches v. Kaine, No. 3:08-cv-692 (E.D. Va. Oct. 27, 2008), D.E. 1; *see* Rob Johnson & Michael Sluss, *Concerns Dog Prep for Voting*, Roanoke Times-Dispatch, Oct. 29, 2008, at B1; Tyler Whitley & Olympia Meola, *Voter-Protection Group Sues on NAACP's Behalf*, Oct. 28, 2008, at A6.

junction.[7865] Local Republican Party organizations moved to intervene on the third day.[7866]

The court assigned the case to Judge Richard L. Williams, and it was his practice to refer civil cases to Magistrate Judge Dennis W. Dohnal for preliminary matters and settlement discussions.[7867] Judge Dohnal held a settlement conference on the case's third day, October 29.[7868] As a result of assurances that the plaintiffs received at the settlement conference, they decided to withdraw their motion for a preliminary injunction.[7869] On the case's fifth day, however, the plaintiffs again sought a preliminary injunction.[7870] Judge Williams set a hearing on the motion for the next court day, the day before election day.[7871]

At the hearing, Judge Williams granted intervention[7872] and denied injunction.[7873] He ordered Virginia to post by that evening the availability of curbside voting and the fact that any voter in line by 7:00 p.m. would be allowed to vote.[7874] "Additional dissemination of this information will reduce confusion and help ensure as many Virginians as possible can vote in this election."[7875]

7865. Preliminary-Injunction Motion, *Va. State Conference of NAACP Branches*, No. 3:08-cv-692 (E.D. Va. Oct. 28, 2008), D.E. 4.

7866. Intervention Motion, *id.* (Oct. 29, 2008), D.E. 7.

7867. Interview with Dennis W. Dohnal, Oct. 26, 2012.

Tim Reagan interviewed retired Judge Dohnal for this report by telephone. Judge Dohnal retired in 2011 and died on May 10, 2015. Judicial Milestones, www.uscourts.gov/judicial-milestones/dennis-w-dohnal; *see* Ellen Robertson, *Service Will Be Tuesday for Dennis W. Dohnal, Former Judge, Mediator*, Richmond Times-Dispatch, May 15, 2015, at 5B. Judge Williams died on February 19, 2011. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

7868. Docket Sheet, *Va. State Conference of NAACP Branches*, No. 3:08-cv-692 (E.D. Va. Oct. 27, 2008).

7869. Order, *id.* (Oct. 30, 2008), D.E. 13; Motion, *id.* (Oct. 30, 2008), D.E. 12; *see* Tyler Whitley, *NAACP Drops Voting Lawsuit*, Richmond Times-Dispatch, Oct. 31, 2008, at A8.

7870. Preliminary-Injunction Motion, *Va. State Conference of NAACP Branches*, No. 3:08-cv-692 (E.D. Va. Oct. 31, 2008), D.E. 17.

7871. Order, *id.* (Oct. 31, 2008), D.E. 19.

7872. Intervention Order, *id.* (Nov. 3, 2008), D.E. 44; Minutes, *id.* (Nov. 3, 2008), D.E. 43 [hereinafter *Va. State Conference of NAACP Branches* Minutes].

7873. Injunction Denial, *id.* (Nov. 3, 2008), D.E. 45 [hereinafter *Va. State Conference of NAACP Branches* Injunction Denial]; *Va. State Conference of NAACP Branches* Minutes, *supra* note 7872.

7874. *Va. State Conference of NAACP Branches* Injunction Denial, *supra* note 7873; *Va. State Conference of NAACP Branches* Minutes, *supra* note 7872.

7875. *Va. State Conference of NAACP Branches* Injunction Denial, *supra* note 7873.

The plaintiffs dismissed their action voluntarily on November 17.[7876]

Preparing for Voting-Machine Failure

NAACP State Conference of Pennsylvania v. Cortés (Harvey Bartle III, E.D. Pa. 2:08-cv-5048)

> A federal complaint filed twelve days before a general election challenged a directive allowing the use of paper ballots only when all voting machines fail. A day after a hearing, held five days after the complaint was filed, the district judge issued a preliminary injunction requiring the offering of paper ballots when half or more of the voting machines cease to work.
>
> *Topics:* Voting technology; case assignment; intervention.

Three voters and two voting-rights organizations filed a federal complaint in the Eastern District of Pennsylvania on October 23, 2008, twelve days before a general election, claiming that "the new rule promulgated by the Pennsylvania Secretary of the Commonwealth directing the use of emergency paper ballots only when *all* of the voting machines in a precinct fail is nothing short of perverse."[7877] With their complaint, the plaintiffs filed a motion for a preliminary injunction and expedited hearing.[7878]

The court assigned the case to Senior Judge Bruce W. Kauffman, but on the day after the case was filed the court reassigned the case to Chief Judge Harvey Bartle III.[7879]

Another voter and the Republican Party moved on October 24 to intervene on behalf of the plaintiffs.[7880] Judge Bartle set the matter for hearing on Tuesday, October 28, at 1:00 p.m.[7881] He held pretrial conferences

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7876. Order, *Va. State Conference of NAACP Branches*, No. 3:08-cv-692 (E.D. Va. Nov. 18, 2008), D.E. 51.

7877. Complaint at 2, NAACP State Conference of Pa. v. Cortés, No. 2:08-cv-5048 (E.D. Pa. Oct. 23, 2008), D.E. 1; NAACP State Conference of Pa. v. Cortés, 591 F. Supp. 2d 757, 758 (E.D. Pa. 2008); *see* Tom Barnes, *Elections Officials Face GOP, NAACP Lawsuits*, Pittsburgh Post-Gazette, Oct. 24, 2008, at A8; Bob Driehaus, *Lawsuit Is Filed Over Ballot Rule in Pennsylvania*, N.Y. Times, Oct. 24, 2008, at A19; Cynthia Henry, *Pa. Lawsuit Seeks Paper Backup Nov. 4*, Phila. Inquirer, Oct. 24, 2008, at B11; Jenna Portnoy, *Voters' Rights Groups Sue State*, Phila. Intelligencer, Oct. 24, 2008, at 1.

7878. Motion, *NAACP State Conference of Pa.*, No. 2:08-cv-5048 (E.D. Pa. Oct. 23, 2008), D.E. 2.

7879. Order, *id.* (Oct. 24, 2008), D.E. 3.

Judge Kauffman died on November 29, 2021. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

7880. Intervention Motion, *NAACP State Conference of Pa.*, No. 2:08-cv-5048 (E.D. Pa. Oct. 24, 2008), D.E. 4.

7881. Notice, *id.* (Oct. 27, 2008), D.E. 12; *see NAACP State Conference of Pa.*, 591 F.

on October 24 and 27.[7882] After the first conference, the motion to intervene was withdrawn.[7883]

At the October 28 hearing, the plaintiffs called nine witnesses, and the defendants called three; closing arguments began at 8:34 p.m.[7884] The hearing ended at 9:00.[7885]

On October 29, Judge Bartle issued a preliminary injunction mandating that polling places offer voters paper ballots when half or more of the voting machines become inoperable.[7886]

> It is undisputed that there are a total of 9,329 polling places in the 67 counties of Pennsylvania. . . . [O]ver 90% of Philadelphia's divisions or precincts are equipped with two machines or less and over 99% have three machines or less.
>
> . . .
>
> Based on the record before us, we find that there is a real danger that a significant number of machines will malfunction throughout the Commonwealth, and this occurrence is likely to cause unacceptably long lines on November 4 . . . .[7887]

Judge Bartle made the injunction permanent on January 28, 2009.[7888]

Bilingual Ballots in Puerto Rico

Diffenderfer v. Gómez-Colón (José Antonio Fusté, D.P.R. 3:08-cv-1918)

> Three weeks before ballots needed to be printed for a 2008 election, a federal complaint objected to Puerto Rico's ballots and their instructions being provided only in Spanish. The court certified the case as a class action and ordered that ballots be printed in both Spanish and English. While an appeal was pending, Puer-

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Supp. 2d at 758–59.

7882. Docket Sheet, *NAACP State Conference of Pa.*, No. 2:08-cv-5048 (E.D. Pa. Oct. 23, 2008) (D.E. 15, 16).

7883. Order, *id.* (Oct. 28, 2008, filed Oct. 30, 2008), D.E. 22; Letter, *id.* (Oct. 28, 2008, filed Oct. 30, 2008), D.E. 20.

7884. Transcript, *id.* (Oct. 28, 2008, filed Dec. 4, 2008), D.E. 27.

Because of their election duties, two witnesses were allowed to testify out of order. *Id.*

7885. *See* Cynthia Henry, *U.S. Judge Hears Pa. Ballot Lawsuit*, Phila. Inquirer, Oct. 29, 2008, at B1.

7886. *NAACP State Conference of Pa.*, 591 F. Supp. 2d at 767; *see* Cynthia Henry, *Judge Says Pa. Must Provide Paper Ballots*, Phila. Inquirer, Oct. 30, 2008, at B1; Bob Warner, *Paper's Ready If Machines Fail Voters*, Phila. Daily News, Oct. 30, 2008, at 11.

7887. *NAACP State Conference of Pa.*, 591 F. Supp. 2d at 760, 765; *see* Justin Levitt, *Long Lines at the Courthouse: Pre-Election Litigation of Election Day Burdens*, 9 Election L.J. 19, 22 (2010).

7888. Order, *NAACP State Conference of Pa.*, No. 2:08-cv-5048 (E.D. Pa. Jan. 29, 2009), D.E. 34.

> to Rico enacted legislation requiring bilingual ballots in future elections.
>
> *Topics:* Ballot language; class action; attorney fees; case assignment.

Two voters filed a federal complaint against members of Puerto Rico's election commission on August 19, 2008, objecting to Puerto Rico's ballots and their instructions being provided only in Spanish.[7889]

The court assigned the case to Judge Daniel R. Domínguez, who reassigned the case on August 20 to Judge José Antonio Fusté because only three weeks remained before ballots needed to be printed and Judge Domínguez was already presiding over injunctive hearings in other cases.[7890] That same day, Judge Fusté ordered the defendants to show cause at a hearing on August 27 why the plaintiffs should not be granted the relief that they sought.[7891]

Following the hearing, Judge Fusté ordered that the ballots be printed in both Spanish and English because "the Spanish-only ballots violate the Voting Rights Act, the Equal Protection Clause, and the First Amendment."[7892] Six days later, Judge Fusté issued a published opinion supporting his ruling.[7893]

He also certified the case as a class action on behalf of monolingual English speakers eligible to vote in Puerto Rico.[7894]

> In its pre-hearing brief and initially during the show-cause hearing, Defendants sought to establish that it would be impossible to print bilingual ballots in time for the November 2008 election. However, . . . the manager of the printing company that has been contracted to print the

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7889. Complaint, Diffenderfer v. Gómez-Colón, No. 3:08-cv-1918 (D.P.R. Aug. 19, 2008), D.E. 1; Diffenderfer v. Gómez-Colón, 587 F.3d 445, 449 (1st Cir. 2009); Diffenderfer v. Gómez-Colón, 587 F. Supp. 2d 338, 340–42 (D.P.R. 2008).

7890. Transfer Order, *Diffenderfer*, No. 3:08-cv-1918 (D.P.R. Aug. 20, 2008), D.E. 4.

Judge Fusté retired on June 1, 2016. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

7891. Order, *Diffenderfer*, No. 3:08-cv-1918 (D.P.R. Aug. 20, 2008), D.E. 5; *see Diffenderfer*, 587 F. Supp. 2d at 342.

7892. *Diffenderfer*, 587 F. Supp. 2d at 343; *see* Minutes, *Diffenderfer*, No. 3:08-cv-1918 (D.P.R. Aug. 27, 2008), D.E. 33; *Diffenderfer*, 587 F.3d at 449; *see also* Jeannette Rivera-Lyles, *Puerto Rico Battles Order to Print English Ballots, Too*, Orlando Sentinel, Sept. 10, 2008, at A1.

7893. *Diffenderfer*, 587 F. Supp. 2d 338; *Diffenderfer*, 587 F.3d at 449.

7894. *Diffenderfer*, 587 F. Supp. 2d at 343.

> 2008 ballots . . . testified that he could print bilingual ballots in time, at an additional cost.[7895]

In 2009, Judge Fusté awarded the plaintiffs $67,550.34 in attorney fees.[7896]

While an appeal was pending, Puerto Rico enacted legislation requiring bilingual ballots in future elections.[7897] The court of appeals affirmed the fee award.[7898]

Preclearance of Nominating Procedures

LULAC of Texas v. Texas (Fred Biery, W.D. Tex. 5:08-cv-389)

> Five days after the 2008 presidential primary elections in Texas, and at the beginning of further delegate selection through caucuses, Latino voters and organizations filed a federal complaint attacking how the Democratic Party picked delegates for national and local nominating conventions. The district court dismissed the action and determined that a claim that the nominating procedures had not received section 5 preclearance did not require resolution by a three-judge district court, but the court of appeals disagreed. In time, the case was mooted by the Justice Department's granting of preclearance. The court of appeals vacated an award of attorney fees.
>
> *Topics:* Section 5 preclearance; three-judge court; laches; party procedures; attorney fees.

Two months after the 2008 presidential primary elections in Texas, and at the beginning of further delegate selection through caucuses, Latino voters and organizations filed a federal complaint in the Western District of Texas's San Antonio courthouse, alleging violations of sections 2 and 5 of the Voting Rights Act in how the Democratic Party picked delegates for national and local nominating conventions.[7899] Five days after filing their complaint, the plaintiffs moved for a preliminary injunction on the grounds that procedures had not been precleared as required by section

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7895. *Id.* at 342.

7896. Diffenderfer v. Gómez-Colón, 606 F. Supp. 2d 222 (D.P.R. 2009); *Diffenderfer*, 587 F.3d at 449–50 & n.2.

7897. *Diffenderfer*, 587 F.3d at 449–50.

7898. *Id.* at 452–56.

7899. Complaint, LULAC of Tex. v. Texas, No. 5:08-cv-389 (W.D. Tex. May 9, 2008), D.E. 1; LULAC of Tex. v. Tex. Democratic Party, 651 F. Supp. 2d 700, 701 (W.D. Tex. 2009); *see* Voting Rights Act of 1965 (VRA), Pub. L. No. 89-110, §§ 2, 5, 79 Stat. 437, 437, 439, *as amended*, 52 U.S.C. §§ 10301, 10304.

5.[7900] The Texas Democratic Party moved for dismissal of the action on the next day.[7901]

On the next day, May 16, Judge Fred Biery noted that the case file contained "voluminous documents, presently totaling approximately 300 pages, with more likely to come," and he informed the parties that he expected to provide his first ruling without an oral proceeding.[7902] Judge Biery, who adjusted his work day to avoid San Antonio's rush-hour traffic, was cognizant of his district's 90,000 square miles in size.[7903]

> While the Court realizes time is of the essence in this case, the Court wants to perform its task thoroughly, correctly, and in an orderly fashion. At this time the Court sees no reason for a hearing with testimony. Moreover, numerous gallons of $4.00 a gallon gasoline would be expended for a significant number of persons to appear with the result being an oral presentation of the already written arguments.[7904]

On May 22, Judge Biery granted the motion to dismiss the action.[7905] He denied an injunction on the section 5 claim because of the lateness with which the plaintiffs brought the claim and because they did not show an abridgement of voting rights.[7906]

He did not think a three-judge district court was needed for the section 5 claim, and the circuit's chief judge agreed.[7907] On February 17, 2009, the court of appeals reversed the dismissal and determined that a three-judge court was required for the section 5 claim.[7908] A three-judge district court

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7900. Preliminary-Injunction Motion, *LULAC of Tex.*, No. 5:08-cv-389 (W.D. Tex. May 14, 2008), D.E. 3; *LULAC of Tex.*, 651 F. Supp. 2d at 701; *see* VRA, § 5, 79 Stat. at 439, *as amended*, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination and requiring that preclearance disputes be heard by a three-judge district court).

On June 25, 2013, the Supreme Court declined to hold section 5 unconstitutional, but the Court did hold unconstitutional the criteria for which jurisdictions require section 5 preclearance. Shelby County v. Holder, 570 U.S. 529 (2013).

7901. Motion to Dismiss, *LULAC of Tex.*, No. 5:08-cv-389 (W.D. Tex. May 15, 2008), D.E. 4.

7902. Order, *id.* (May 16, 2008), D.E. 8 [hereinafter May 16, 2008, *LULAC of Tex.* Order].

Tim Reagan interviewed Judge Biery for this report by telephone on August 30, 2012.

7903. Interview with Judge Fred Biery, Aug. 30, 2012.

7904. May 16, 2008, *LULAC of Tex.* Order, *supra* note 7902.

7905. Opinion, *LULAC of Tex.*, No. 5:08-cv-389 (W.D. Tex. May 22, 2008), D.E. 15.

7906. *Id.* at 13–21.

7907. Interview with Judge Fred Biery, Aug. 30, 2012.

7908. LULAC of Tex. v. Texas, 318 F. App'x 261 (5th Cir. 2009).

denied section 5 summary judgment on August 24.[7909] Upon the Justice Department's granting of preclearance, the case was dismissed as moot on December 16.[7910] On June 16, 2011, the court of appeals vacated the district court's award of $67,392.06 in attorney fees and costs, because the district court never granted the plaintiffs relief.[7911]

Voting Without Notice of Errors

ACLU v. Brunner (Kathleen M. O'Malley, N.D. Ohio 1:08-cv-145)

> A January 2008 complaint challenged the selection by a county of new voting machines because the machines would not give voters notice of errors and opportunities to cure them. The district judge determined that by the time the complaint had been filed there was not time for a remedy that would not excessively disrupt the March presidential primary election.
>
> *Topics:* Voting technology; laches.

The ACLU and two voters filed a federal complaint on January 17, 2008, in the Northern District of Ohio, challenging the legality of Cuyahoga County's plan to use for the March 4 presidential primary election a central-count optical-scan system that lacked error notification while other counties would use voting systems that would prevent spoiled ballots by providing voters with notice of errors and an opportunity to correct the errors.[7912] One of the plaintiffs was African American; the defendants included Ohio's secretary of state, Cuyahoga County's board of elections and its four members, and Cuyahoga County's board of commissioners and its three members.[7913]

Among the complaint's prayer for relief was a prayer for a preliminary injunction,[7914] but the plaintiffs did not file a motion for such an injunction with their complaint.[7915] The court assigned the case to Judge Kathleen M.

7909. LULAC of Tex. v. Tex. Democratic Party, 651 F. Supp. 2d 700 (W.D. Tex. 2009) (holding that section 5 applied to party-delegate allocation formulas); *see* Elaine Ayala, *LULAC Suit Against Dems to Proceed*, Hous. Chron., Aug. 26, 2009, at B2.

7910. Order, *LULAC of Tex.*, No. 5:08-cv-389 (W.D. Tex. Dec. 16, 2009), D.E. 57.

7911. LULAC of Tex. v. Tex. Democratic Party, 428 F. App'x 460 (5th Cir. 2011); *see* Order, *LULAC of Tex.*, No. 5:08-cv-389 (W.D. Tex. Apr. 7, 2010), D.E. 64.

7912. Complaint, ACLU v. Brunner, No. 1:08-cv-145 (N.D. Ohio Jan. 17, 2008), D.E. 1 [hereinafter *ACLU* Complaint]; *see* Joe Guillen, *ACLU Files a Lawsuit to Block Vote Switch*, Cleveland Plain Dealer, Jan. 18, 2008, at B1.

7913. *ACLU* Complaint, *supra* note 7912.

7914. *Id.* at 18.

7915. Docket Sheet, *ACLU*, No. 1:08-cv-145 (N.D. Ohio Jan. 17, 2008) [hereinafter *ACLU* Docket Sheet].

O'Malley.[7916] Not wanting to do the plaintiffs' work for them but also wanting to make sure the case progressed efficiently, Judge O'Malley contacted the plaintiffs about the discrepancy between their complaint and the lack of an injunction motion.[7917] On January 23, after contacting the plaintiffs, Judge O'Malley set a telephone conference for January 24.[7918] At the conference, she set a preliminary-injunction hearing for February 5,[7919] and the plaintiffs filed their motion for a preliminary injunction on January 28.[7920]

The plaintiffs subpoenaed testimony at the February 5 hearing from the director of the board of elections for Franklin County, the county that includes Columbus.[7921] On February 2, the director moved to quash the subpoena, complaining that it was unreasonable to ask that he be away from Franklin County, which is in the Southern District of Ohio, three days before voting would start.[7922] On February 4, Judge O'Malley ordered him to appear by telephone.[7923] Because Judge O'Malley had one of the first high-tech courtrooms, the director testified by videoconference.[7924]

On February 4, the NAACP's Cleveland branch filed an amicus curiae brief in opposition to the ACLU's preliminary-injunction motion.[7925] On instructions from the national head office, the branch withdrew the brief on February 7; the local branch had filed a brief on a matter of national concern without approval from the national head office.[7926]

7916. *Id.*

Tim Reagan interviewed Judge O'Malley for this report by telephone on July 19, 2012. Judge O'Malley was elevated to a seat on the Court of Appeals for the Federal Circuit on December 27, 2010, and she retired on March 11, 2022. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

7917. Interview with Judge Kathleen M. O'Malley, July 19, 2012 (describing this as a teaching moment for her law clerks).

7918. Notice, *ACLU*, No. 1:08-cv-145 (N.D. Ohio Jan. 23, 2008), D.E. 5; *ACLU* Docket Sheet, *supra* note 7915.

7919. Minutes, *ACLU*, No. 1:08-cv-145 (N.D. Ohio Jan. 24, 2008), D.E. 6.

7920. Preliminary-Injunction Motion, *id.* (Jan. 28, 2008), D.E. 8.

7921. Subpoena, *attached to* Motion to Quash, *id.* (Jan. 28, 2008), D.E. 21 [hereinafter *ACLU* Motion to Quash].

7922. *ACLU* Motion to Quash, *supra* note 7921.

7923. Order, *ACLU*, No. 1:08-cv-145 (N.D. Ohio Feb. 4, 2008), D.E. 28.

7924. Interview with Judge Kathleen M. O'Malley, July 19, 2012.

7925. Amicus Curiae Brief, *ACLU*, No. 1:08-cv-145 (N.D. Ohio Feb. 4, 2008), D.E. 27.

7926. Motion to Withdraw Document, *id.* (Feb. 7, 2008), D.E. 33; *see ACLU* Docket Sheet, *supra* note 7915 (noting February 19, 2008, permission from the court to withdraw the brief).

The February 5 hearing lasted seven hours.[7927] Judge O'Malley denied the injunction.[7928] A significant factor working against the plaintiffs was how late they had filed their complaint.[7929] There was considerable evidence from the board of elections supporting the difficulties of implementing any relief.[7930]

On a stipulation by the county that it would use notice-based voting equipment for the November 4 general election, the plaintiffs voluntarily dismissed the case on April 2.[7931]

At-Large Caucus Precincts

Chesnut v. Democratic Party of Nevada (James C. Mahan, D. Nev. 2:08-cv-46)

> In 2008, voters challenged the Nevada Democratic Party's plans for nominating caucuses in which some voters would be able to participate in at-large caucuses at times other than the scheduled time for regional caucuses. The court determined that the party had not exceeded its authority in determining its nominating procedures.
>
> *Topics:* Party procedures; intervention; recusal.

Eight days before Nevada's 2008 Democratic presidential nominating precinct caucuses, the Nevada State Education Association and six voters filed a federal action challenging, on equal protection and statutory grounds, the planned administration of the upcoming Saturday, January 19, caucuses.[7932] Nevada law provides that major political parties hold precinct caucuses to select delegates to county conventions, which then would select delegates to a state convention, which then would select delegates to the

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7927. Minutes, *ACLU*, No. 1:08-cv-145 (N.D. Ohio Feb. 6, 2008), D.E. 30.

7928. *Id.*; *see* Mark Niquette & Holly Zacharia, *Tally in Fight with Brunner: 1 New Lawsuit, 1 Challenge Lost*, Columbus Dispatch, Feb. 6, 2008, at 1B.

7929. Interview with Judge Kathleen M. O'Malley, July 19, 2012.

7930. *Id.*

7931. Voluntary Dismissal, *ACLU*, No. 1:08-cv-145 (N.D. Ohio Apr. 2, 2008), D.E. 50; *see* Order, *id.* (Apr. 4, 2008), D.E. 51 (granting dismissal).

7932. Complaint, Chesnut v. Democratic Party of Nev., No. 2:08-cv-46 (D. Nev. Jan. 11, 2008), D.E. 1 [hereinafter *Chesnut* Complaint].

News media described the lawsuit as an action by supporters of Hillary Rodham Clinton against supporters of Barack Obama. Steve Friess, *Lawsuit Over Precincts in Nevada*, N.Y. Times, Jan. 13, 2008, at 120; David McGrath Schwartz, *Voting on the Strip a No-No, Suit Says*, L.V. Sun, Jan. 12, 2008, at A1; *see also* Lisa Mascaro, *Reid Caught in Middle of Strip-Voting Suit*, L.V. Sun, Jan. 15, 2008, at A3 ("Although the Strip caucus sites were established last year, the lawsuit challenging them was filed just three days after the Culinary Union endorsed Obama.").

national convention.[7933] The plaintiffs objected to how the party addressed the difficulty of using a procedure to select delegates that disadvantaged persons who had to work during caucus times.[7934] The solution created at-large precincts, which allowed shift workers in large Las Vegas hotels to meet at times different from regular caucus times; representation at the conventions would be based on participation rather than voter registration, and only shift workers in Las Vegas would be able to benefit from the change.[7935] Three days after filing the complaint, the plaintiffs filed a motion for a temporary restraining order or preliminary injunction.[7936]

The court assigned the case to Judge Kent J. Dawson, but he recused himself, and so the court reassigned the case to Judge James C. Mahan.[7937]

On January 15, the plaintiffs made unsuccessful out-of-court overtures to the defendant to settle the case.[7938] On the same day, the Democratic National Committee moved to intervene.[7939]

Spectators filled the courtroom for a two-hour January 17 hearing.[7940] At the hearing, Judge Mahan granted the motion to intervene and denied immediate injunctive relief.[7941]

Judge Mahan determined that the controlling case was *Ripon Society v. National Republican Party*.[7942] *Ripon Society* concerned allocation of delegates for the 1976 Republican national convention.[7943] The allocation for-

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7933. Nev. Rev. Stat. § 293.130 to .163.

7934. *Chesnut* Complaint, *supra* note 7932.

7935. *Id.*

7936. Motion, *Chesnut*, No. 2:08-cv-46 (D. Nev. Jan. 14, 2008), D.E. 6; *see* Adrienne Packer & Molly Ball, *Hearing Seeks to Stop At-Large Caucus Sites*, L.V. Rev.-J., Jan. 16, 2008, at 6A.

7937. Docket Sheet, *Chesnut*, No. 2:08-cv-46 (D. Nev. Jan. 11, 2008) [hereinafter *Chesnut* Docket Sheet].

Tim Reagan interviewed Judge Mahan for this report by telephone on May 18, 2012.

7938. *See* Adrienne Packer, *Teachers Union, Democrats Fail to Settle Lawsuit Over Caucus Sites*, L.V. Rev.-J., Jan. 16, 2008, at 1A.

7939. Motion to Intervene, *Chesnut*, No. 2:08-cv-46 (D. Nev. Jan. 15, 2008), D.E. 10.

7940. Interview with Judge James C. Mahan, May 18, 2012; *Chesnut* Docket Sheet, *supra* note 7937; *see* Adrienne Packer, *Judge OKs At-Large Caucuses on Strip*, L.V. Rev.-J., Jan. 18, 2008, at 1A.

7941. Order, *Chesnut*, No. 2:08-cv-46 (D. Nev. Jan. 30, 2008), D.E. 20; *see* Packer, *supra* note 7940.

7942. 525 F.2d 567 (D.C. Cir. 1975); Interview with Judge James C. Mahan, May 18, 2012; *see* Packer, *supra* note 7940 (reporting that Judge Mahan "said political parties have the freedom to set up their own guidelines for caucuses if they do not discriminate against voters based on race, gender or religion").

7943. *Ripon Soc'y*, 525 F.2d at 570.

mula, among other things, gave extra seats to states who had been more successful in electing Republicans.[7944] The Court of Appeals for the District of Columbia Circuit determined en banc that the equal-protection principle of one person one vote did not apply to political conventions.[7945] Political parties have First Amendment rights respecting self-governance.[7946] "[A] party might well wish to impose conditions on delegate selection which are inconsistent with an unconstrained, mathematically equal system of representation."[7947] The *Ripon Society* court concluded that equal protection "is satisfied if the representational scheme and each of its elements rationally advance some legitimate interest of the party in winning elections or otherwise achieving its political goals."[7948] In *Ripon Society*, "the [allocation] formula rationally advance[d] legitimate party interests in political effectiveness."[7949]

On March 19, Judge Mahan approved a stipulated dismissal.[7950]

Application of Election Law to a Straw Poll

Schulz v. Iowa (James E. Gritzner, S.D. Iowa 4:07-cv-350)

> An eight-plaintiff pro se federal complaint challenged the participation fee for Iowa State University's Republican straw poll for the 2008 presidential election, which was to be held two days after the complaint was filed. On the afternoon before the poll, the district judge denied the plaintiffs immediate relief from the bench after a hearing. The court of appeals affirmed the decision, on the day of the poll.
>
> *Topics:* Pro se party; equal protection; interlocutory appeal.

Eight plaintiffs filed a pro se federal complaint in the Southern District of Iowa on August 9, 2007, two days before the Republican Party's straw poll at Iowa State University in Ames for the 2008 presidential election.[7951] The plaintiffs alleged that the $35 participation fee was an unconstitutional poll tax, and they alleged improprieties in the voting equipment.[7952] The com-

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7944. *Id.* at 570–71.

7945. *Id.* at 578–87.

7946. *Id.* at 585–86.

7947. *Id.* at 583.

7948. *Id.* at 586–87.

7949. *Id.* at 588.

7950. Order, Chesnut v. Democratic Party of Nev., No. 2:08-cv-46 (D. Nev. Mar. 19, 2008), D.E. 25.

7951. Complaint, Schulz v. Iowa, No. 4:07-cv-350 (S.D. Iowa Aug. 9, 2007), D.E. 1.

7952. *Id.*

plaint included requests for a temporary restraining order, a preliminary injunction, and a permanent injunction.[7953]

Judge James E. Gritzner set the case for hearing on August 10.[7954] At the hearing, he informed the lead plaintiff how he would accommodate the plaintiff's pro se status:

> THE COURT: Our small amount of research that we've been able to do in the short time since we learned that you were on the premises has told us that while you are not a lawyer you appear to be a frequent litigator, so you have some experience in court, and so we'll cut kind of a middle ground as to how forgiving we are for a pro se litigant in terms of what we expect from you, Mr. Schulz.[7955]

At 3:15 on the day before the straw poll, Judge Gritzner ruled from the bench and denied the plaintiffs immediate relief.[7956] An order and opinion followed on the following day.[7957]

> The Court is aware of no constitutional right to participate in the details of a non-binding poll hosted by a private political party . . . .
>
> . . . The plaintiffs have failed to demonstrate that the purchase price to attend an event hosted by a private political party, in which individuals in attendance can participate in a vote that has no binding effect on a public affair (such as an election) constitutes a "poll tax."[7958]

With respect to equipment defects, "If the Plaintiffs entered into this alleged contract knowing the terms of the contract, they cannot now claim the contract has been breached merely because they find some terms of the contract distasteful."[7959]

The plaintiffs filed a notice of interlocutory appeal after the hearing,[7960] and on the following day, the day of the straw poll, the court of appeals affirmed Judge Gritzner's decision.[7961] The parties stipulated dismissal of the action on September 27.[7962]

7953. *Id.* at 21–23.

7954. Docket Sheet, *id.* (Aug. 9, 2007).

7955. Transcript at 4, *id.* (Aug. 10, 2007, filed Aug. 13, 2007), D.E. 14.

7956. *Id.* at 61–65.

7957. Opinion, *id.* (Aug. 10, 2007), D.E. 10; Minutes, *id.* (Aug. 10, 2007), D.E. 9 [hereinafter *Schulz* Opinion]; *see* Jennifer Jacobs, *Judge Keeps Straw Poll's Computerized Voting Machines*, Des Moines Register, Aug. 11, 2007, at A6.

7958. *Schulz* Opinion, *supra* note 7957, at 8–9.

7959. *Id.* at 9.

7960. Notice of Interlocutory Appeal, *Schulz*, No. 4:07-cv-350 (S.D. Iowa Aug. 10, 2007), D.E. 11.

7961. Judgment, Schulz v. Iowa, No. 07-2889 (8th Cir. Aug. 11, 2007).

Having concluded that the judgment of the district court is based on findings of fact

Spanish-Language Ballots in Philadelphia

United States v. City of Philadelphia (Petrese B. Tucker, E.D. Pa. 2:06-cv-4592)

> Twenty-five days before the November 2006 general election, the Justice Department filed a civil complaint against Philadelphia for failure to provide Spanish-language election resources in violation of sections 203 and 208 of the Voting Rights Act. Twelve days later, the Justice Department moved for a temporary restraining order or a preliminary injunction enforcing the Voting Rights Act and appointing federal election observers. The court declined to order federal observers because of the government's weak case dilatorily brought.
>
> *Topics:* Ballot language; laches; three-judge court.

Twenty-five days before the November 2006 general election, the Justice Department filed a civil complaint against Philadelphia for failure to provide Spanish-language election resources in violation of sections 203 and 208 of the Voting Rights Act.[7963]

Pursuant to section 203(b), the Director of the Census made the unreviewable determination that Philadelphia County was among the political subdivisions in the U.S. whose citizens were more than 5% Spanish speakers.[7964] Section 203, therefore, required the county to provide election materials in Spanish.[7965] Section 208 entitled a voter who could not read or write to assistance from a person of the voter's choice.[7966] The circuit's chief judge appointed a three-judge district court to hear the section 203 claims, as required by section 204.[7967]

On October 20, one week after the complaint was filed, Judge Petrese B. Tucker set a status conference for October 24.[7968] On October 25, the

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> that are not clearly erroneous, that no error of law appears and that the district court did not abuse its discretion, the order of the district court denying plaintiffs' motion for a preliminary injunction is affirmed.

Id.

7962. Joint Motion, *Schulz*, No. 4:07-cv-350 (S.D. Iowa Sept. 27, 2007), D.E. 21.

7963. Complaint, United States v. City of Philadelphia, No. 2:06-cv-4592 (E.D. Pa. Oct. 13, 2006), D.E. 1; *see* Amended Complaint, *id.* (Apr. 26, 2007), D.E. 35.

7964. 67 Fed. Reg. 48,871, 48,875 (July 26, 2002).

7965. Voting Rights Act § 203, Pub. L. No. 94-73, 89 Stat. 400, 402 (1975), *as amended*, 52 U.S.C. § 10503.

7966. *Id.* § 208, Pub. L. No. 97-205, 96 Stat. 131, 134 (1982), 52 U.S.C. § 10508.

7967. Designation, *City of Philadelphia*, No. 2:06-cv-4592 (E.D. Pa. Oct. 20, 2006), D.E. 5; *see* Voting Rights Act § 203, *as amended*, 52 U.S.C. § 10504.

7968. Order, *City of Philadelphia*, No. 2:06-cv-4592 (E.D. Pa. Oct. 20, 2006), D.E. 7.

Justice Department moved for a temporary restraining order or a preliminary injunction enforcing the Voting Rights Act and appointing federal election observers.[7969] Circuit Judge D. Brooks Smith and District Judges Tucker and Harvey Bartle III heard the motion on Friday, November 3.[7970] That day, they denied the motion,[7971] and they issued an opinion supporting their decision on election day.[7972]

The court declined to order federal observers because of the government's weak case dilatorily brought.[7973] On June 1, 2007, Judge Tucker approved a stipulated dismissal of the case.[7974]

Idiosyncratic Preferences for Name on Ballot

NaPier v. Baldacci (D. Brock Hornby, D. Me. 2:06-cv-151)

> A minor gubernatorial candidate filed a pro se complaint two months before the 2006 general election because the state was not acceding to his orthographic preferences for his name, including the printing of "Phillip" with the letters "i" represented as just dots with eyebrows and the double "l" represented with a smile under it. The federal judge determined that the case was a matter for the state court.
>
> *Topics:* Pro se party; matters for state courts.

On September 11, 2006, approximately two months before Maine's gubernatorial election, a candidate for governor filed a federal pro se complaint against state officials in the District of Maine.[7975] The plaintiff wanted his name on the ballot to be "Phillip Morris NaPier—Thu PeoPles Hero," and he wanted "Phillip" written so that the letters "i" were just dots with eyebrows and the double "l" had a smile under it.[7976] He also wanted his party identified as the "Pissed Off Patriots."[7977] With his complaint, he filed a hand-written motion for an emergency hearing.[7978]

7969. Motion, *id.* (Oct. 25, 2006), D.E. 9; *see* Marcia Gelbart, *Phila. Opposes U.S. Observers at Polls*, Phila. Inquirer, Oct. 27, 2006, at B1.

7970. *See* Notice, *City of Philadelphia*, No. 2:06-cv-4592 (E.D. Pa. Nov. 2, 2006), D.E. 19.

7971. Order, *id.* (Nov. 3, 2006), D.E. 25.

7972. Opinion, *id.* (Nov. 8, 2006), D.E. 27, 2006 WL 3922115.

7973. *Id.*

7974. Order, *City of Philadelphia*, No. 2:06-cv-4592 (E.D. Pa. June 1, 2007), D.E. 37.

7975. Complaint, NaPier v. Baldacci, No. 2:06-cv-151 (D. Me. Sept. 11, 2006), D.E. 1; NaPier v. Baldacci, 453 F. Supp. 2d 185, 186 (D. Me. 2006).

7976. *NaPier*, 453 F. Supp. 2d at 186, 190.

7977. *Id.* at 186.

7978. Motion, *NaPier*, No. 2:06-cv-151 (D. Me. Sept. 11, 2006), D.E. 2.

Judge D. Brock Hornby held a hearing two days later, at which the plaintiff appeared pro se with a well-behaved guide dog.[7979] Regarding the plaintiff's pleadings as seeking a temporary restraining order, Judge Hornby, on the case's fourth day, denied the plaintiff immediate relief.[7980]

> If the plaintiff is entitled to any relief, he should proceed quickly to state court. The three-day delay caused by this federal filing should not affect any rights he has there. (If he has delayed too long, that delay occurred before the federal suit was filed, not in the last three days; if the Secretary of State has already taken actions that would prevent relief, they were taken before notice of the federal lawsuit, not during the past three days.)[7981]

On September 19, a state court denied the plaintiff injunctive relief.[7982] Because the plaintiff did not respond to the state's October 2 motion to dismiss the federal action, Judge Hornby dismissed it on October 24.[7983]

Spanish-Language Ballots in Springfield, Massachusetts

United States v. City of Springfield (Michael A. Ponsor, D. Mass. 3:06-cv-30123)

> The Justice Department filed a civil complaint against Springfield, Massachusetts, on August 2, 2006, alleging violations of sections 203 and 208 of the Voting Rights Act for failure to provide Spanish-language election resources for Spanish-language voters. By four days before a September 19 primary election, the court and the parties came to agreement on a consent decree, which operated successfully until its expiration early in 2010.
>
> *Topics:* Ballot language; three-judge court; primary election.

The Justice Department filed a civil complaint against Springfield, Massachusetts, on August 2, 2006, alleging violations of sections 203 and 208 of the Voting Rights Act for failure to provide Spanish-language election re-

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7979. Docket Sheet, *id.* (Sept. 11, 2006) [hereinafter D. Me. *NaPier* Docket Sheet]; *NaPier*, 453 F. Supp. 2d at 186; Interview with Judge D. Brock Hornby, Aug. 6, 2012 (noting that especially with pro se cases it is important to make sure as early as possible that defendants are served promptly in emergency cases).

Tim Reagan interviewed Judge Hornby for this report by telephone.

7980. NaPier v. Baldacci, 451 F. Supp. 2d 256 (D. Me. 2006), *amended*, 453 F. Supp. 2d 185.

7981. *NaPier*, 453 F. Supp. 2d at 189.

7982. Opinion, NaPier—Thu Peoples Hero v. Baldacci, No. CV-06-521 (Me. Sup. Ct. Sept. 19, 2006), *attached as* Ex. 1, Motion to Dismiss, *NaPier*, No. 2:06-cv-151 (D. Me. Oct. 2, 2006), D.E. 13.

7983. D. Me. *NaPier* Docket Sheet, *supra* note 7979.

sources for Spanish-language voters.[7984] With its complaint, the department filed a motion for a three-judge district court to hear its section 203 claim.[7985] On August 21, the department moved for a temporary restraining order or a preliminary injunction in light of an imminent September 19 primary election.[7986]

Section 203 requires jurisdictions with a threshold quantity of language-minority voters to provide election materials in the minority language.[7987] Section 208 entitles a voter who cannot read or write to assistance from a person of the voter's choice.[7988]

On August 28, Judge Michael A. Ponsor granted the department's motion to file a reply brief and the city's motion to file a sur-reply brief.[7989] Two days later, the parties filed a proposed consent decree.[7990] That day, Judge Ponsor signed the agreement with respect to section 208[7991] and ordered the settlement as to section 203 to operate as a temporary restraining order until a three-judge court could consider it.[7992] The circuit's chief judge appointed a three-judge court to preside over the section 203 claim,[7993] and Judge Ponsor informed the parties on September 12 that the court's approval of the section 203 agreement was contingent on the parties' resolving one ambiguous passage.[7994] The court approved the revised consent decree on September 15.[7995] The decree operated successfully until its expiration on January 31, 2010.[7996]

7984. Complaint, United States v. City of Springfield, No. 3:06-cv-30123 (D. Mass. Aug. 2, 2006), D.E. 1; *see* Jo-Ann Moriarty, *Springfield Sued Over Voting*, Springfield Republican, Aug. 3, 2006, at A1; Katie Zezima, *City Is Sued Over Voting*, N.Y. Times, Aug. 4, 2006, at A13.

7985. Motion, *City of Springfield*, No. 3:06-cv-30123 (D. Mass. Aug. 2, 2006), D.E. 2.

7986. Motion, *id.* (Aug. 21, 2006), D.E. 5.

7987. Voting Rights Act § 203, Pub. L. No. 94-73, 89 Stat. 400, 402 (1975), *as amended*, 52 U.S.C. § 10503.

7988. *Id.* § 208, Pub. L. No. 97-205, 96 Stat. 131, 134 (1982), 52 U.S.C. § 10508.

7989. Docket Sheet, *City of Springfield*, No. 3:06-cv-30123 (D. Mass. Aug. 2, 2006).

7990. Settlement Motion, *id.* (Aug. 30, 2006), D.E. 18.

7991. Order, *id.* (Aug. 30, 2006), D.E. 21.

7992. Order, *id.* (Aug. 30, 2006), D.E. 20.

7993. Order, *id.* (Aug. 30, 2006), D.E. 19.

7994. Order, *id.* (Sept. 12, 2006), D.E. 22.

7995. Order, *id.* (Sept. 15, 2006), D.E. 24.

7996. Order, *id.* (Feb. 19, 2010), D.E. 35.

Replacing Mechanical Voting Machines with Electronic Voting Machines

Taylor v. Onorato (Gary L. Lancaster, W.D. Pa. 2:06-cv-481)

> Approximately five weeks before a primary election, voters and a public-interest group filed a federal suit to enjoin replacement of mechanical voting machines with electronic voting machines, relying on the Help America Vote Act (HAVA). On the case's second day, the plaintiffs moved for a preliminary injunction. At the end of the case's first week, the district judge held an informal in-chambers status conference, from which news media were excluded. After a three-day evidentiary hearing beginning a week later, the district judge determined that HAVA did not afford the plaintiffs a private right of action.
>
> *Topics:* Voting technology; Help America Vote Act (HAVA); news media.

On April 12, 2006, People for the American Way and seven voters filed a federal complaint in the Western District of Pennsylvania to enjoin Allegheny County's planned replacement of mechanical voting machines with electronic voting machines in the May 16 primary election.[7997] The plaintiffs' allegations included a charge that the new machines were not in compliance with the Help America Vote Act (HAVA).[7998] Defendants included county, state, and federal officials.[7999] On the following day, the plaintiffs filed a motion for a preliminary injunction.[8000]

The court assigned the case to Judge Gary L. Lancaster, who set a status conference for April 18.[8001] He denied a request by news media to at-

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7997. Complaint, Taylor v. Onorato, No. 2:06-cv-481 (W.D. Pa. Apr. 12, 2006), D.E. 1 [hereinafter *Taylor* Complaint]; Taylor v. Onorato, 428 F. Supp. 2d 384, 385 (W.D. Pa. 2006); *see* Ryan Haggerty, *Voters Try to Bar New Machines*, Pittsburgh Post-Gazette, Apr. 13, 2006, at A1; Glenn May, *Suit Would Ban New Voting Machines*, Pittsburgh Trib. Rev., Apr. 13, 2006.

7998. *Taylor* Complaint, *supra* note 7997; *Taylor*, 428 F. Supp. 2d at 385–86; *see* Pub. L. No. 107-252, 116 Stat. 1666 (2002), *as amended*, 52 U.S.C. §§ 20901–21145. *See generally* Marie Leary & Robert Timothy Reagan, The Help America Vote Act (Federal Judicial Center 2012); Symposium, *HAVA @ 10*, 12 Election L.J. 111 (2013).

7999. *Taylor* Complaint, *supra* note 7997; *Taylor*, 428 F. Supp. 2d at 385; *see* May, *supra* note 7997.

8000. Preliminary-Injunction Motion, *Taylor*, No. 2:06-cv-481 (W.D. Pa. Apr. 13, 2006), D.E. 2.

8001. Order, *id.* (Apr. 13, 2006), D.E. 10.

Tim Reagan interviewed Judge Lancaster for this report by telephone on October 18, 2012. Judge Lancaster died on April 24, 2013. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

tend.[8002] He wanted an informal, open discussion of what the case was about and what the parties wanted from him.[8003] He found this to be an absolutely vital step in presiding over the case.[8004] At the conclusion of the conference, Judge Lancaster invited the parties to use his conference room for what turned out to be unsuccessful settlement discussions.[8005]

Judge Lancaster ordered an evidentiary hearing set for April 25.[8006] The defendants presented unrebutted evidence that switching back to the old machines would not be feasible for the next election.[8007] The issues in the case, however, were primarily legal.[8008] After a three-day hearing, Judge Lancaster denied the injunction.[8009] He determined that HAVA does not afford private rights of action and the plaintiffs had not proved that the new machines would be sufficiently less reliable than the old machines to merit relief.[8010]

The *Pittsburgh Post-Gazette* reported that the new machines were a somewhat flawed success:

> Yes, there were glitches, particularly with getting the new electronic voting machines started. In some cases, machines arrived at polling places with cracked screens. And the vote took much longer to count than in past elections, leaving some outcomes hanging into the wee hours.
>
> But all in all, Allegheny County officials were pleased with Tuesday's debut of electronic touch-screen voting, even as they look for ways to

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8002. *See* Jason Cato, *Hearing to Decide Voting Machines' Fate*, Pittsburgh Trib. Rev., Apr. 19, 2006.

8003. Interview with Judge Gary L. Lancaster, Oct. 18, 2012.

8004. *Id.*

8005. *Id.*

8006. Minutes, *Taylor*, No. 2:06-cv-481 (W.D. Pa. Apr. 13, 2006), D.E. 10.

8007. Interview with Judge Gary L. Lancaster, Oct. 18, 2012.

8008. *Id.*

8009. Taylor v. Onorato, 428 F. Supp. 2d 384 (W.D. Pa. 2006); Order, *Taylor*, No. 2:06-cv-481 (W.D. Pa. Apr. 28, 2006), D.E. 80; *see* Jason Cato, *Judge Denies Injunction in Vote Suit*, Pittsburgh Trib. Rev., Apr. 28, 2006; Paula Reed Ward, *County Voting Machines OK'd*, Pittsburgh Post-Gazette, Apr. 29, 2006, at B1.

8010. *Taylor*, 428 F. Supp. 2d 384; *see* Jason Cato, *Judge Clears Way for Voting Machines*, Pittsburgh Trib. Rev., Apr. 29, 2006; Daniel P. Tokaji, *HAVA in Court: A Summary and Analysis of Litigation*, 12 Election L.J. 203, 206 (2013); *see also* Daniel P. Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws*, 44 Ind. L. Rev. 113, 118, 144 n.246 (2010) (concluding that Judge Lancaster applied the wrong legal test: "plaintiffs are *not* required to demonstrate that Congress intended to create a private *remedy* but rather to show that it created an individual right").

> eliminate glitches and speed vote counting before November's general election.[8011]

A couple of weeks later, the newspaper reported that advocacy groups were still dissatisfied with the new technology.[8012]

The plaintiffs voluntarily dismissed the action on June 5.[8013]

Voting Equipment for the Blind in Volusia County

National Federation of the Blind v. Volusia County (John Antoon II, M.D. Fla. 6:05-cv-997)

> Three months before a municipal election, advocates for the blind and five blind voters filed a federal complaint against a county, charging that the county would not provide voting machines accessible to blind people. The district judge heard a motion for a preliminary injunction ten days later. Eleven days after that, the judge denied the injunction. While an interlocutory appeal was pending, the county bought new voting equipment and the plaintiffs dismissed their case voluntarily.
>
> *Topics:* Voting technology; interlocutory appeal.

Approximately three months before a municipal election, on July 5, 2005, advocates for the blind and five blind voters filed a federal complaint against Volusia County in the Middle District of Florida's Orlando courthouse, charging that the county would not provide voting machines accessible to blind people.[8014] With their complaint, the plaintiffs filed motions for a preliminary injunction[8015] and an emergency status conference.[8016]

Judge John Antoon II set the matter for hearing on July 15.[8017]

Named as defendants in the action were Volusia County and its supervisor of elections.[8018] The county declined to provide the supervisor with

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8011. Mark Belko, *County Gives Good Grade to New Voting Machines*, Pittsburgh Post-Gazette, May 18, 2006, at A1.

8012. Moustafa Ayad, *Groups Cite Flaws in Electronic Voting*, Pittsburgh Post-Gazette, June 2, 2006, at B1.

8013. Dismissal, *Taylor*, No. 2:06-cv-481 (W.D. Pa. June 5, 2006), D.E. 87.

8014. Complaint, Nat'l Fed'n of the Blind v. Volusia County, No. 6:05-cv-997 (M.D. Fla. July 5, 2005), D.E. 1 [hereinafter *Nat'l Fed'n of the Blind* Complaint]; *see* Kevin P. Connolly, *Blind Voters Challenge Volusia*, Orlando Sentinel, July 6, 2005, at A1 ("City elections in Volusia, thought to be the only county in Florida to reject a contract for touch-screens, are set for Oct. 11."); Mike Schneider, *Blind Voters Demand Touch Screens*, Miami Herald, July 6, 2005, at 8B.

8015. Preliminary-Injunction Motion, *Nat'l Fed'n of the Blind*, No. 6:05-cv-997 (M.D. Fla. July 5, 2005), D.E. 7.

8016. Status-Conference Motion, *id.* (July 5, 2005), D.E. 2.

8017. Order, *id.* (July 6, 2005), D.E. 8.

independent counsel.[8019] Two days before the injunction hearing, she sought an order from Judge Antoon that she be provided with her own attorney.[8020] On the following day, Judge Antoon denied her motion because she was being sued in her official capacity.[8021]

On July 21, Judge Antoon denied the plaintiffs injunctive relief.[8022]

The plaintiffs filed a notice of interlocutory appeal that day,[8023] and the court of appeals ordered expedited review.[8024] While the injunction denial was on appeal, Judge Antoon ordered mediation.[8025] On January 3, 2006, the county filed a notice of contract for new voting equipment.[8026] The court of appeals dismissed the case as moot on March 30.[8027] Judge Antoon approved a voluntary dismissal of the case on August 17.[8028]

A Challenge to Paper Ballots for Blind Voters

Ramos v. City of San Antonio (Royal Furgeson, W.D. Tex. 5:05-cv-500)

A federal complaint challenged a switch from touchscreen voting machines to paper optical-scan ballots, because of the impact on the ability of voters with vision impairments to vote in secret. A claim pursuant to section 5 of the Voting Rights Act was mooted

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8018. *Nat'l Fed'n of the Blind* Complaint, *supra* note 8014.

8019. Order at 2, *Nat'l Fed'n of the Blind*, No. 6:05-cv-997 (M.D. Fla. July 14, 2005), D.E. 29 [hereinafter July 14, 2005, *Nat'l Fed'n of the Blind* Order].

8020. Motion, *id.* (July 13, 2005), D.E. 15.

8021. July 14, 2005, *Nat'l Fed'n of the Blind* Order, *supra* note 8019.

8022. Opinion, *Nat'l Fed'n of the Blind*, No. 6:05-cv-997 (M.D. Fla. July 21, 2005), D.E. 38; *see* Kevin P. Connolly, *Judge Sides with County on Voting*, Orlando Sentinel, July 22, 2005, at B1; *see also* Kevin P. Connolly, *Touch-Screen Debate Focuses on Deadline*, Orlando Sentinel, July 16, 2005, at B3 (reporting that the county's attorney argued "that under federal law, the county has until Jan. 1 to purchase devices that will allow the visually disabled to vote independently").

8023. Notice of Appeal, *Nat'l Fed'n of the Blind*, No. 6:05-cv-997 (M.D. Fla. July 21, 2005), D.E. 40; *see* Kevin P. Connolly, *Disabled Advocates Fight Vote Ruling*, Orlando Sentinel, July 23, 2005, at B1.

8024. Order, Nat'l Fed'n of the Blind v. Volusia County, No. 05-13990 (11th Cir. July 25, 2005), *filed as* Order, *Nat'l Fed'n of the Blind*, No. 6:05-cv-997 (M.D. Fla. July 27, 2005), D.E. 43; *see* Kevin P. Connolly, *Disabled Lose Again in Battle Over Voting*, Orlando Sentinel, July 26, 2005, at B1.

8025. Docket Sheet, *Nat'l Fed'n of the Blind*, No. 6:05-cv-997 (M.D. Fla. July 5, 2005).

8026. Notice, *id.* (Jan. 3, 2006), D.E. 81; *see* Kevin P. Connolly, *Dragging Feet, County Buys No-Paper Voting Screens*, Orlando Sentinel, Feb. 24, 2006, at B1; Kevin P. Connolly, *Volusia to Replace Voting Machines*, Orlando Sentinel, Dec. 17, 2005, at A1.

8027. Order, *Nat'l Fed'n of the Blind*, No. 05-13990 (11th Cir. Mar. 30, 2006), *filed as* Order, *Nat'l Fed'n of the Blind*, No. 6:05-cv-997 (M.D. Fla. Apr. 3, 2006), D.E. 94.

8028. Order, *Nat'l Fed'n of the Blind*, No. 6:05-cv-997 (M.D. Fla. Aug. 17, 2006), D.E. 98.

> when the Justice Department precleared the change after the case was filed. The district judge opined that the plaintiffs would prevail on the merits, but a workaround procedure mitigated the impact on vision-impaired voters for the impending election, so the judge denied immediate relief. Three years later, the case settled.
>
> *Topics:* Voting technology; section 5 preclearance; three-judge court; recusal; case assignment.

Three voters filed a federal complaint in the Western District of Texas on May 26, 2005, against San Antonio and Bexar County election officials challenging a switch from touchscreen ballots to paper optical-scan ballots in a June 7 municipal runoff election as violating state and federal law, including section 5 of the Voting Rights Act.[8029] "The Plaintiffs' main objection . . . is that the paper optical scan ballot does not allow a visually-impaired voter to enjoy the right of a secret ballot, a right Texas has long recognized."[8030] With their complaint, the plaintiffs filed an application for a temporary restraining order.[8031]

On the following day, Judge Xavier Rodriguez—who joined the bench on August 1, 2003—recused himself, because he had represented San Antonio as a lawyer within two years; Judge Rodriguez transferred the case to Judge Royal Furgeson.[8032] The circuit's chief judge named Circuit Judge Edward C. Prado and Western District of Texas Judge Earl Leroy Yeakel III to join Judge Furgeson as a three-judge district court to hear the section 5 claim.[8033] On May 31, however, the plaintiffs filed an amended application for a temporary restraining order in light of the Justice Department's preclearance of the touchscreen ballots.[8034]

8029. Complaint, Ramos v. City of San Antonio, No. 5:05-cv-500 (W.D. Tex. May 26, 2005), D.E. 1; *see* Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination and requiring that preclearance disputes be heard by a three-judge district court).

8030. Opinion at 5, *Ramos*, No. 5:05-cv-500 (W.D. Tex. June 7, 2005), D.E. 14 [hereinafter *Ramos* Opinion].

8031. Temporary-Restraining-Order Application, *id.* (May 26, 2005), D.E. 2.

8032. Order, *id.* (May 27, 2005), D.E. 3; *see* Federal Judicial Center Biographical Directory of Article III Federal Judges [hereinafter FJC Biographical Directory], www.fjc.gov/history/judges.

Judge Furgeson retired on May 31, 2013. FJC Biographical Directory, *supra*.

8033. Order, *Ramos*, No. 5:05-cv-500 (W.D. Tex. May 27, 2005), D.E. 4.

Judge Prado retired on April 2, 2018, and Judge Yeakel retired on May 1, 2023. FJC Biographical Directory, *supra* note 8032.

8034. Renewed Temporary-Restraining-Order Application, *Ramos*, No. 5:05-cv-500

Following a June 1 hearing, Judge Furgeson denied the plaintiffs immediate relief on June 7.[8035] "While the Court finds that Plaintiffs have shown a likelihood of success on the merits, this factor is outweighed by the other factors to be examined in a request for injunctive relief."[8036]

> Counsel for both sides described an accommodation that had been worked out previously between these parties in separate litigation that allowed visually-impaired voters to vote using paper optical scan ballots without revealing their vote to a third party.
>
> The accommodation, or "workaround" option as counsel referred to it during oral argument, involves polling place attendants who provide telephones to visually-impaired voters. The visually-impaired voters are assisted in dialing a secure number, which is answered by Bexar County Election Board officials who instruct the visually-impaired voter how to vote confidentially for their preferred candidate. As explained to the Court, [the voter] is instructed that, "to place a vote for Candidate X, tell the attendant assisting you to mark an 'A' on the ballot; to place a vote for Candidate Y, tell the attendant assisting you to mark a 'B' on the ballot . . . ." The attendants at the polling place do not know what the 'A' or 'B' stand for, nor do they know for whom the visually-impaired voter desires to vote. Using this method, visually-impaired voters are able to vote in confidence and maintain the secrecy of their ballot.
>
> . . .
>
> On the basis of the scant facts before it, the Court finds that while the "workaround" accommodation is inferior to the touch-screen [direct recording electronic (DRE)] machine in terms of meeting the needs of all voters and particularly those with visual impairments, it will suffice this one time, in light of the fact that the election is ongoing.[8037]

Judge Furgeson dismissed the case as settled on August 12, 2008.[8038]

Including a Nickname on the Ballot

House v. Alabama Republican Party (R. David Proctor, N.D. Ala. 2:04-cv-703)

> Chris "The Teacher" House filed a pro se federal complaint because a political party would not include his nickname on the primary-election ballot for state board of education. Among the

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(W.D. Tex. May 31, 2005), D.E. 5; *see* Order, *id.* (June 17, 2005), D.E. 15 (denying section 5 claim as moot); *Ramos* Opinion, *supra* note 8030, at 14 (noting preclearance).

8035. *Ramos* Opinion, *supra* note 8030.

8036. *Id.* at 4.

8037. *Id.* at 45–46 (footnotes omitted).

8038. Order, *Ramos*, No. 5:05-cv-500 (W.D. Tex. Aug. 12, 2008), D.E. 70; *see* Amended Complaint, *id.* (June 30, 2005), D.E. 18.

> claims was that the party's refusal to do so amounted to an election change requiring preclearance pursuant to section 5 of the Voting Rights Act because it had listed his nickname before. The Justice Department declared that it had no objection to the exclusion of nicknames, so the section 5 claim was dismissed. The district judge temporarily enjoined printing of the ballots while he considered the case. On consideration, he dismissed the federal claims with prejudice and the state claims without prejudice.
>
> *Topics:* Primary election; pro se party; section 5 preclearance; matters for state courts.

Chris "The Teacher" House filed a pro se federal complaint in the Northern District of Alabama on April 6, 2004, complaining that the Republican Party was not including his nickname on the June 1 primary-election ballot for state board of education.[8039] Among the claims was that because the party had listed his nickname before, its refusal to do so amounted to an election change requiring preclearance pursuant to section 5 of the Voting Rights Act.[8040] With his complaint, which he styled as a petition for a writ of mandamus,[8041] the plaintiff filed a motion for a temporary restraining order.[8042]

At Judge R. David Proctor's request, the circuit's chief judge appointed a three-judge district court to hear the complaint.[8043] On April 13, Judge Proctor ordered a chambers conference for April 16 and an evidentiary hearing for April 21, and he ordered the parties to meet to discuss stipulations.[8044] Judge Proctor wanted to make sure that proceedings would permit the matter to be resolved in time for the printing of the ballots.[8045]

8039. Complaint, House v. Ala. Republican Party, No. 2:04-cv-703 (N.D. Ala. Apr. 6, 2004), D.E. 1 [hereinafter *House* Complaint].

8040. *Id.* at 1, 3–6, 10; *see* Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination and requiring that preclearance disputes be heard by a three-judge district court).

On June 25, 2013, the Supreme Court declined to hold section 5 unconstitutional, but the Court did hold unconstitutional the criteria for which jurisdictions require section 5 preclearance. Shelby County v. Holder, 570 U.S. 529 (2013).

8041. *House* Complaint, *supra* note 8039.

8042. Temporary-Restraining-Order Motion, *House*, No. 2:04-cv-703 (N.D. Ala. Apr. 6, 2004), D.E. 2.

8043. Order, *id.* (Apr. 12, 2004), D.E. 6.

Tim Reagan interviewed Judge Proctor for this report by telephone on May 13, 2013.

8044. Order, *House*, No. 2:04-cv-703 (N.D. Ala. Apr. 13, 2004), D.E. 7.

8045. Interview with Judge R. David Proctor, May 13, 2013.

On April 16, the Justice Department declared that it had no objection to the exclusion of nicknames on the primary-election ballot.[8046] Following telephone conferences on April 19 with Judge Proctor on behalf of the three-judge court, the section 5 claim was dismissed without prejudice.[8047]

On April 21, Judge Proctor enjoined printing of the primary-election ballots until further order.[8048] Following an April 22 hearing, he dismissed the plaintiff's remaining federal due-process claim with prejudice and dismissed the plaintiff's state claims without prejudice.[8049]

Challenging Both Nominating and Voting Procedures

White-Battle v. Democratic Party of Virginia (Henry C. Morgan, Jr., E.D. Va. 2:03-cv-897)

> A plaintiff who had desired to be a party nominee for an election to clerk of court filed a pro se federal complaint alleging improprieties in both nomination and voting procedures. The motion was heard and denied six days later. Six months after that, the court granted summary judgment to the defendants.
>
> *Topics:* Getting on the ballot; pro se party.

A plaintiff who had desired to be a party nominee for an election to clerk of court for Virginia's circuit court in Norfolk filed a pro se federal complaint in the Eastern District of Virginia's Norfolk courthouse on December 24, 2003.[8050] The complaint alleged improprieties in both nomination and voting procedures.[8051] With her complaint, the plaintiff filed a motion for a temporary restraining order.[8052]

8046. Stipulations, *House*, No. 2:04-cv-703 (N.D. Ala. Apr. 19, 2004), D.E. 12.

8047. Order, *id.* (Apr. 19, 2004), D.E. 10.

8048. Order, *id.* (Apr. 21, 2004), D.E. 13; *see* Val Walton, *Judges to Decide if Candidate's Nickname Should Be on Ballot*, Birmingham News, Apr. 22, 2004, at 2.

8049. Order, *House*, No. 2:04-cv-703 (N.D. Ala. Apr. 23, 2004), D.E. 23; *see* Val Walton, *Judge Rules Against "The Teacher" on Ballot*, Birmingham News, Apr. 23, 2004, at 5 (reporting that Judge Proctor "found, among other things, that Chris House did not present sufficient evidence to show that he is commonly known in the community as 'The Teacher.'").

8050. White-Battle v. Democratic Party of Va., 323 F. Supp. 2d 696, 698 (E.D. Va. 2004); *see* Docket Sheet, White-Battle v. Democratic Party of Va., No. 2:03-cv-897 (E.D. Va. Dec. 24, 2003) [hereinafter *White-Battle* Docket Sheet].

8051. *White-Battle*, 323 F. Supp. 2d at 698–700.

Judge Morgan died on May 1, 2022. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

8052. *White-Battle*, 323 F. Supp. 2d at 700; *White-Battle* Docket Sheet, *supra* note 8050.

Judge Henry C. Morgan, Jr., heard and denied the motion on December 30.[8053] The plaintiff filed a motion for a preliminary injunction on January 6, 2004, and Judge Morgan granted summary judgment to the defendants on June 29.[8054]

Continuing the Use of Punch-Card Ballots for a Special Election

Southwest Voter Registration Education Project v. Shelley (Stephen V. Wilson, C.D. Cal. 2:03-cv-5715)

> Two months before a gubernatorial recall election, a federal complaint challenged the use in some jurisdictions of punch-card ballots. The district judge denied immediate relief because the election would be held before a previous consent decree's decertification of punch-card ballots would go into effect. A three-judge panel of the court of appeals reversed the district court's ruling, but an eleven-judge en banc panel subsequently affirmed the district court's decision. The governor was recalled.
>
> *Topics:* Voting technology; intervention; laches.

Two months before California's October 7, 2003, gubernatorial recall election, two interest groups filed a federal complaint in the Central District of California to enjoin the election because some California jurisdictions were going to use punch-card ballots, which the plaintiffs regarded as insufficiently reliable.[8055] With their complaint, the plaintiffs filed a notice that the case was related to a case before Judge Stephen V. Wilson that was filed in 2001 and resolved by a consent decree on May 8, 2002.[8056]

8053. *White-Battle*, 323 F. Supp. 2d at 700.

8054. *Id.* at 700, 702–09.

8055. Sw. Voter Registration Educ. Project v. Shelley, 344 F.3d 914, 916–17 (9th Cir. 2003); Sw. Voter Registration Educ. Project v. Shelley, 278 F. Supp. 2d 1131, 1133–34, 1137 (C.D. Cal. 2003); Docket Sheet, Sw. Voter Registration Educ. Project v. Shelley, No. 2:03-cv-5715 (C.D. Cal. Aug. 12, 2003) [hereinafter *Sw. Voter Registration Educ. Project* Docket Sheet] (complaint filed on August 7, 2003, D.E. 1). *See generally* Daniel P. Tokaji, *Leave It to the Lower Courts: On Judicial Intervention in Election Administration*, 68 Ohio St. L.J. 1065, 1073–78 (2007) [hereinafter *Lower Courts*]; Daniel P. Tokaji, *The Paperless Chase: Electronic Voting and Democratic Values*, 73 Fordham L. Rev. 1711, 1729–30 (2005) [hereinafter *Paperless Chase*].

8056. *Sw. Voter Registration Educ. Project* Docket Sheet, *supra* note 8055 (D.E. 3); Docket Sheet, Common Cause S. Cal. Christian Leadership Conference v. Jones, No. 2:01-cv-3470 (C.D. Cal. Apr. 17, 2001) [hereinafter *Common Cause S. Cal. Christian Leadership Conference* Docket Sheet]; Consent Decree, *id.* (May 9, 2002), D.E. 77 [hereinafter *Common Cause S. Cal. Christian Leadership Conference* Consent Decree].

The two original plaintiffs in the 2003 action were among the thirteen plaintiffs in the 2001 action.[8057] According to the consent decree, punch-card ballots would be decertified for use in California as of March 1, 2004.[8058] Five days after the 2003 complaint was filed, the plaintiffs filed an amended complaint adding an interest group that had not before been a plaintiff in either action.[8059] Judge Wilson also permitted another party to intervene.[8060]

On August 20, 2003, not quite two weeks after the 2003 complaint was filed, Judge Wilson denied the plaintiffs injunctive relief.[8061] He concluded that the plaintiffs had not made a sufficient showing that it would be improper to use punch-card ballots in some jurisdictions before the 2004 consent-decree proscription: "Alternative technologies will not be available in several of the affected counties in time for the October election."[8062]

With respect to consent-decree parties seeking relief in advance of the agreed deadline, "while the Court need not decide the res judicata issue at this juncture, there is ample reason to believe that Plaintiffs will have a difficult time overcoming it."[8063]

Also: "As with the question of res judicata, while the Court need not decide the defense of laches at this point in the litigation, it clearly poses a significant impediment to the prosecution of this suit."[8064]

> Here, Plaintiffs waited almost two years to reassert their claims with full knowledge that, until replacement of the punch-card machines in March of 2004, other elections would take place. . . . Most significantly, the 2002 primary and general elections came and went without Plaintiffs at any time asserting these claims or calling for injunctive relief.[8065]

8057. *Common Cause S. Cal. Christian Leadership Conference* Docket Sheet, *supra* note 8056 (amended complaint filed on April 24, 2001, D.E. 4); *Sw. Voter Registration Educ. Project*, 278 F. Supp. 2d at 1134.

8058. *Common Cause S. Cal. Christian Leadership Conference* Consent Decree, *supra* note 8056; *Sw. Voter Registration Educ. Project*, 278 F. Supp. 2d at 1135.

8059. *Sw. Voter Registration Educ. Project* Docket Sheet, *supra* note 8055 (amended complaint filed on August 12, 2002, D.E. 22); *Sw. Voter Registration Educ. Project*, 278 F. Supp. 2d at 1137.

8060. Minutes, *Sw. Voter Registration Educ. Project*, No. 2:03-cv-5715 (C.D. Cal. Aug. 18, 2003), D.E. 27.

8061. *Sw. Voter Registration Educ. Project*, 278 F. Supp. 2d at 1146; *see* Allison Hoffman, Joel Rubin & Jean Guccione, *Court Ruling Keeps Recall on Track for Oct. 7 Ballot*, L.A. Times, Aug. 21, 2003, at 24.

8062. *Sw. Voter Registration Educ. Project*, 278 F. Supp. 2d at 1141.

8063. *Id.* at 1137.

8064. *Id.* at 1138.

8065. *Id.*

On September 15, however, a panel of the court of appeals disagreed with Judge Wilson's conclusions.[8066]

> [T]he effect of using punchcard voting systems in some, but not all, counties, is to discriminate on the basis of geographic residence.
>
> This is a classic voting rights equal protection claim. . . .
>
> . . .
>
> It is virtually undisputed that pre-scored punchcard voting systems are significantly more prone to errors that result in a voter's ballot not being counted than the other voting systems used in California. . . .
>
> . . .
>
> . . . Plaintiffs have tendered sufficient evidence to demonstrate a likelihood of success in establishing that there is no rational basis for using voting systems that have been decertified as "unacceptable" in some counties and not others.[8067]

Animating the panel's decision was its observation that "forty-four percent of the electorate will be forced to use a voting system so flawed that the Secretary of State has officially deemed it 'unacceptable' and banned its use in all future elections."[8068]

According to the panel, res judicata was not a bar to the plaintiffs' 2003 action because of the new plaintiff in the later case and because the unusual recall election was not foreseen in 2002.[8069] Nor did the panel find laches to be a bar, because the complaint was filed only two weeks after the recall election date was set.[8070]

The court of appeals voted to have the case reheard en banc.[8071] On September 23, the en banc panel affirmed Judge Wilson's decision.[8072] "If the recall election scheduled for October 7, 2003, is enjoined, it is certain that the state of California and its citizens will suffer material hardship by virtue of the enormous resources already invested in reliance on the elec-

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8066. Sw. Voter Registration Educ. Project v. Shelley, 344 F.3d 882 (9th Cir. 2003); *see* Tokaji, *Lower Courts*, *supra* note 8055, at 1074–75; Daniel P. Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws*, 44 Ind. L. Rev. 113, 115–16 & n.16 (2010); Henry Weinstein, *The Recall Campaign*, L.A. Times, Sept. 16, 2003, at 1.

8067. *Sw. Voter Registration Educ. Project*, 344 F.3d at 895, 896, 900.

8068. *Id.* at 888.

8069. *Id.* at 901–05.

8070. *Id.* at 905–07; *see Sw. Voter Registration Educ. Project*, 278 F. Supp. 2d at 1134.

8071. Sw. Voter Registration Educ. Project v. Shelley, 344 F.3d 913 (9th Cir. 2003).

8072. Sw. Voter Registration Educ. Project v. Shelley, 344 F.3d 914 (9th Cir. 2003) (en banc); *see* Michael Finnegan, *The Recall Campaign*, L.A. Times, Sept. 24, 2003, at 1; Tokaji, *Lower Courts*, *supra* note 8055, at 1075; Tokaji, *supra* note 8066, at 116 & n.16; Henry Weinstein, *Court Sees Delay as Too Disruptive*, L.A. Times, Sept. 24, 2003, at 22.

tion's proceeding on the announced date."[8073] The en banc panel determined that the plaintiffs' legitimate concern "that use of the punch-card system will deny the right to vote to some voters who must use that system" was too speculative.[8074]

On October 7, Governor Gray Davis was recalled and Arnold Schwarzenegger won the first of his two gubernatorial elections.[8075]

Changing How Straight-Party Votes Are Marked Without Preclearance

LULAC v. Bexar County (Edward C. Prado, W.D. Tex. 5:02-cv-1015)

> A federal complaint challenged, among other things, a change in ballot construction that required voters to mark their selection for straight-party voting twice instead of once as not precleared pursuant to section 5 of the Voting Rights Act. After four proceedings, the parties and the judge agreed that the change could proceed as if precleared for early voting, but the election-day ballot would use the old method while preclearance was pending.
>
> *Topics:* Early voting; voting technology; section 5 preclearance; intervention; attorney fees.

A federal complaint filed against Bexar County—the county that includes San Antonio—on October 16, 2002, alleged that the county was conducting the November general election without having precleared voting changes pursuant to section 5 of the Voting Rights Act.[8076] With the complaint, the plaintiffs filed a motion for a temporary restraining order.[8077]

8073. *Sw. Voter Registration Educ. Project*, 344 F.3d at 919; *see* Tokaji, *Paperless Chase*, *supra* note 8055, at 1730 ("In effect the court punted, leaving for another day the applicability of the Equal Protection Clause and Voting Rights Act in cases where inaccurate voting equipment is employed.").

8074. *Sw. Voter Registration Educ. Project*, 344 F.3d at 919–20; *see* Tokaji, *Lower Courts*, *supra* note 8055, at 1075 ("If the Ninth Circuit opinion did not clarify the law, it did not muddy it either.").

8075. *See* John M. Broder, *Davis Is Out, Schwarzenegger Is In by Big Margins in California Recall*, N.Y. Times, Oct. 8, 2003, at A1; Michael Finnegan, *Gov. Davis Is Recalled; Schwarzenegger Wins*, L.A. Times, Oct. 8, 2003, at 1; *see also* Peter Nicholas, *A Second Term for Schwarzenegger*, L.A. Times, Nov. 8, 2006, at 1.

8076. Docket Sheet, LULAC v. Bexar County, No. 5:02-cv-1015 (W.D. Tex. Oct. 16, 2002) [hereinafter *LULAC* Docket Sheet] (D.E. 1); Opinion at 1, *id.* (Nov. 1, 2002), D.E. 13 [hereinafter *LULAC* Opinion]; *see* Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination).

8077. *LULAC* Docket Sheet, *supra* note 8076 (D.E. 2).

Judge Edward C. Prado held hearings in the case on October 17, 18, 24, and 31.[8078] Chairs of the Democratic and Republican Parties were permitted to intervene.[8079] On November 1, the Friday before the election, Judge Prado issued an order memorializing the parties' and the court's agreement on how to proceed while preclearance—which was sought on October 18 and 21—was pending.[8080]

Early voting was to be delayed because of a delay in printing ballots, but in the event, early voting could begin on time.[8081] The more difficult issue was a change in how a straight-party vote was to be selected: from the previous procedure of marking the straight-party vote once to a new procedure requiring the voter to mark it twice.[8082] For election day, the old procedure could be used, but early-voting ballots would still require two markings for straight-party voting.[8083] After the election, election authorities would have to figure out how to count ballots cast by early voters that only marked a straight-party preference once.[8084] Because preclearance was pending and the election was imminent, "the Court agrees with the parties that the voting changes should be treated as precleared."[8085]

On January 24, 2003, Judge Prado awarded the plaintiffs $18,202.50 in attorney fees and costs.[8086]

Voters' Right to a Completely Open Primary Election

Snellgrove v. Georgia (Hugh Lawson, M.D. Ga. 5:02-cv-288)

Four days before a primary election, independent voters filed a federal complaint complaining that the primary election pre-

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8078. *Id.* (D.E. 4, 5, 9, 12); *LULAC* Opinion, *supra* note 8076, at 1.

Judge Prado was elevated to the court of appeals on May 5, 2003, and he retired on April 2, 2018. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

8079. Order, *LULAC*, No. 5:02-cv-1015 (W.D. Tex. Oct. 31, 2002, filed Nov. 4, 2002), D.E. 15 (Democratic Party); Order, *id.* (Oct. 31, 2002, filed Nov. 4, 2002), D.E. 14 (Republican Party).

8080. *LULAC* Opinion, *supra* note 8076.

8081. *Id.* at 1; *see* Tom Bower, *Bexar Vows Early Voting Won't Get a Late Start*, San Antonio Express-News, Oct. 17, 2002, at 1A.

8082. *LULAC* Opinion, *supra* note 8076, at 1–2.

8083. *Id.* at 2–3; *see* Tom Bower, *Groups OK New Ballot*, San Antonio Express-News, Oct. 25, 2002, at 3B; Sherry Sylvester, *Bexar Officials Redesign Ballot*, San Antonio Express-News, Oct. 22, 2002, at 1B.

8084. *LULAC* Opinion, *supra* note 8076, at 3.

8085. *Id.*

8086. Order, LULAC v. Bexar County, No. 5:02-cv-1015 (W.D. Tex. Jan. 24, 2003), D.E. 23.

> vented them from voting for a member of one party for one office and a member of a different party for another office. After an evidentiary hearing on the day before the election, the district judge declined to issue an injunction.
>
> *Topic:* Primary election.

Four days before an August 20, 2002, primary election in Georgia, three independent voters filed a federal complaint in the Middle District of Georgia complaining that the primary election prevented them from voting for a member of one party for one office and a member of a different party for another office.[8087] The court recognized the complaint as seeking a preliminary injunction.[8088] With their complaint, the plaintiffs filed a notice that the matter would be heard on Monday, three days later.[8089]

From 10:30 a.m. until noon, Judge Hugh Lawson held an evidentiary hearing.[8090] At 1:45 p.m., he announced his decision declining to issue an injunction.[8091] Judge Lawson's opinion issued on the following day explained,

> There is not now, nor has there ever been a constitutional right to vote for the candidate of choice in the sense that Plaintiffs contend. Rather, there exists only the right to have meaningful access to the electoral process. . . .
>
> . . . Certainly some restrictions employed by the various states have failed to withstand constitutional scrutiny. However, a state regulation, such as the one at issue here, restricting an elector from voting in the primary election of more than one political party, has never been held unconstitutional, and the Court declines to do so now.[8092]

On September 3, Judge Lawson granted a voluntary dismissal.[8093]

8087. Complaint, Snellgrove v. Georgia, No. 5:02-cv-288 (M.D. Ga. Aug. 16, 2002), D.E. 1; *see* Travis Fain, *Lawsuit Seeking to Stop Houston Primary Elections*, Macon Telegraph, Aug. 17, 2002, at B3 ("In Georgia, voters don't have to declare a party when they register to vote and may request either a Republican or Democrat ballot on primary day.").

8088. Docket Sheet, *Snellgrove*, No. 5:02-cv-288 (M.D. Ga. Aug. 16, 2002).

8089. Notice, *id.* (Aug. 16, 2002), D.E. 2.

8090. Minutes, *id.* (Aug. 20, 2002), D.E. 7 [hereinafter *Snellgrove* Minutes].

8091. Opinion, *id.* (Aug. 20, 2002), D.E. 8 [hereinafter *Snellgrove* Opinion]; *Snellgrove* Minutes, *supra* note 8090.

8092. *Snellgrove* Opinion, *supra* note 8091, at 2.

8093. Dismissal, *Snellgrove*, No. 5:02-cv-288 (M.D. Ga. Sept. 3, 2002), D.E. 10; *see* Travis Fain & Debbie Rhyne, *Men Drop Primary System Lawsuit*, Macon Telegraph, Sept. 5, 2002, at B2.

Retroactive Preclearance for Emergency Consolidation of Polling Places

Leyva v. Bexar County Republican Party (Edward C. Prado, W.D. Tex. 5:02-cv-408)

> Nearly seven weeks after an election for which polling places were consolidated because of an unexpected shortage of poll workers, a federal complaint challenged the consolidations for not being precleared pursuant to section 5 of the Voting Rights Act. The district judge denied immediate relief because the county intended to seek preclearance and election records would be preserved. In time, the county received retroactive preclearance, and a three-judge district court declined to void the election.
>
> *Topics:* Poll locations; section 5 preclearance; three-judge court; polling hours; primary election; intervention; news media.

On April 29, 2002, Judge Edward C. Prado denied a temporary restraining order in a federal class action filed five days previously challenging county polling-place locations and hours in a March 12 primary election as, among other things, not precleared pursuant to section 5 of the Voting Rights Act.[8094] Judge Prado found that "a temporary restraining order would serve no purpose at this time" because the county intended to seek preclearance and would preserve election records.[8095]

The circuit's chief judge named Circuit Judge Fortunato P. Benavides and Western District of Texas Judge Orlando L. Garcia to join Judge Prado as a three-judge district court to hear section 5 claims.[8096]

8094. Temporary-Restraining-Order Denial, Leyva v. Bexar Cty. Republican Party, No. 5:02-cv-408 (W.D. Tex. Apr. 29, 2002), D.E. 8 [hereinafter *Leyva* Temporary-Restraining-Order Denial]; *see* Docket Sheet, *id.* (Apr. 24, 2002) (complaint, D.E. 1); *see also* Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination and requiring that preclearance disputes be heard by a three-judge district court); Bob Richter & Sherry Sylvester, *Lawsuit Targets Bexar Voting*, San Antonio Express-News, Apr. 25, 2002, at 1B.

On June 25, 2013, the Supreme Court declined to hold section 5 unconstitutional, but the Court did hold unconstitutional the criteria for which jurisdictions require section 5 preclearance. Shelby County v. Holder, 570 U.S. 529 (2013).

Judge Prado was elevated to the court of appeals on May 5, 2003, and he retired on April 2, 2018. Federal Judicial Center Biographical Directory of Article III Federal Judges [hereinafter FJC Biographical Directory], www.fjc.gov/history/judges.

8095. *Leyva* Temporary-Restraining-Order Denial, *supra* note 8094, at 2.

8096. Order, *Leyva*, No. 5:02-cv-408 (W.D. Tex. June 14, 2002), D.E. 18.

Judge Benavides died on May 5, 2023. FJC Biographical Directory, *supra* note 8094.

On July 5, Judge Prado denied a motion to intervene filed by the League of United Latin American Citizens (LULAC), finding "that LULAC's intervention would add to the cost and delay of this litigation without adding sufficient benefit to the existing Plaintiffs' interests."[8097] On July 16, Judge Prado denied as moot a motion by the *San Antonio Express-News* to intervene in opposition to a motion to prevent the plaintiffs from trying their case in the media, because Judge Prado denied what the newspaper referred to as a motion for a gag order.[8098]

On December 5, the court declined to set aside the results of the March 12 election.[8099] Polling places were consolidated in response to an unexpected shortage of polling-place volunteers.[8100] The county party received retroactive preclearance from the Justice Department.[8101]

Paper Primary Ballots for Minor Parties and Machine Primary Ballots for Major Parties

Green Party of New York v. Weiner (Gerard E. Lynch, S.D.N.Y. 1:00-cv-6639)

> A minor party filed a federal complaint one week before a primary election challenging the use of paper ballots for minor parties and voting machines for major parties. Following a hearing two days later, the federal judge denied immediate relief on a finding that the use of paper ballots for a minor party would be unlikely to unduly delay the counting of votes. Following complete briefing, the judge granted the defendants summary judgment seventeen months later and declined jurisdiction over state law claims.

8097. Order, *Leyva*, No. 5:02-cv-408 (W.D. Tex. July 5, 2002), D.E. 33.

On August 14, 2002, Judge Prado dismissed a separate case filed by LULAC on July 8. Order, League of United Latin Am. Citizens v. Bexar Cty. Republican Party, No. 5:02-cv-654 (W.D. Tex. Aug. 14, 2002), D.E. 7; Docket Sheet, *id.* (July 8, 2002) (complaint, D.E. 1); *see LULAC Sues After Judge Rejects Bid to Join Suit*, Hous. Chron., July 10, 2002, at A20; Sherry Sylvester, *LULAC Hits GOP with New Lawsuit*, San Antonio Express-News, July 9, 2002, at 1B.

8098. Order, *Leyva*, No. 5:02-cv-408 (W.D. Tex. July 16, 2002), D.E. 39; *see* Sherry Sylvester, *No Gag Order in GOP Case*, San Antonio Express-News, July 10, 2002, at 3B; *see also* Order, *Leyva*, No. 5:02-cv-408 (W.D. Tex. July 9, 2002), D.E. 35 ("The Court will not prohibit communication with the media at this time . . . .").

8099. Opinion, *Leyva*, No. 5:02-cv-408 (W.D. Tex. Dec. 5, 2002), D.E. 92, 2002 WL 34729181.

8100. *Id.* at 1–2.

8101. *Id.* at 4; *see* Sherry Sylvester, *Feds Rule Altered GOP Poll Sites OK*, San Antonio Express-News, July 23, 2002, at 5B.

Topics: Voting technology; primary election; matters for state courts; intervention; equal protection.

One week before a September 12, 2000, primary election in New York, the Green Party, three Green Party candidates for the U.S. Senate, and another Green Party voter filed a federal complaint in the Southern District of New York challenging election officials' plans to use paper ballots for the party's primary election in New York City while providing voting machines for major-party voters and using voting machines for the Green Party outside New York City.[8102]

Following a September 7 hearing, Judge Gerard E. Lynch denied the plaintiffs immediate relief on September 8.[8103] The plaintiffs presented evidence of

> troubling irregularities in the conduct of the Green Party presidential primary in March of this year, including failure to deliver paper ballots to polling places or to post copies of such ballots as required by state law, and occasional incidents in which poll workers denigrated Green Party members or provided misinformation about the primary.[8104]

But

> Board of Elections personnel have been properly cautioned to conduct the election according to proper procedure and with due regard for the dignity and constitutional rights of voters in smaller parties. On this record, there is no reason to assume that any irregularities that might have occurred in previous paper-ballot primaries will be repeated.[8105]

Observing that the voting machines would serve over two million registered Democrats in the city, Judge Lynch opined that providing paper ballots for 1,640 Green Party members voting in over five hundred electoral districts would not likely result in delayed results.[8106]

8102. Docket Sheet, Green Party of N.Y. v. Weiner, No. 1:00-cv-6639 (S.D.N.Y. Sept. 5, 2000) [hereinafter *Green Party* Docket Sheet] (D.E. 1); Green Party of N.Y. v. Weiner, No. 1:00-cv-6639, 2000 WL 1280913, at *1, *3 (S.D.N.Y. Sept. 8, 2000); Green Party of N.Y. v. Weiner, 216 F. Supp. 2d 176, 181 (S.D.N.Y. 2002).

8103. *Green Party*, 2000 WL 1280913; *Green Party* Docket Sheet, *supra* note 8102; *Green Party*, 216 F. Supp. 2d at 182; *see* Steve Strunsky, *Paper Ballots for Green Party*, N.Y. Times, Sept. 8, 2000, at B10.

Judge Lynch was elevated to the court of appeals on September 18, 2009. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

8104. *Green Party*, 2000 WL 1280913, at *2.

8105. *Id.* at *3 (citation omitted).

8106. *Id.* at *2–*3.

"Plaintiffs have presented some interesting questions of New York State law," but "it would be rash to consider demands for sweeping provisional relief on the basis of state law claims over which at most ancillary jurisdiction may exist."[8107]

Following the primary and general elections, Judge Lynch held a status conference on January 27, 2001, at which the Independence Party moved to intervene.[8108] On February 11, 2002, Judge Lynch awarded the defendants summary judgment on the federal claims and declined jurisdiction over the state law claims.[8109] Because the Independence Party's proposed complaint alleged claims virtually identical to the Green Party's unsuccessful claims, intervention was denied as moot.[8110]

Preference for Faction Loyalists as Party Poll Workers

Espada v. Rosado (John S. Martin, S.D.N.Y. 1:00-cv-6469)

> A federal complaint alleged that poll-worker appointments by a political party for a primary election were unconstitutionally targeted to one faction within the party. The district judge denied as immediate relief appointment of three of the plaintiffs as poll workers, because they had already been appointed. The judge denied the defendants' motion for sanctions on a finding that the complaint, which had been dismissed voluntarily, included nonfrivolous constitutional claims.
>
> *Topics:* Party procedures; primary election; attorney fees.

On August 29, 2000, five plaintiffs filed a federal complaint in the Southern District of New York alleging that the appointment of Democratic election inspectors and poll workers for the September 12 primary election in Bronx County unconstitutionally favored members of a faction within the party.[8111] "Plaintiffs sought immediate injunctive relief replacing 880 poll-workers who were scheduled to work in the upcoming primary election, and appointing [three of the plaintiffs] as election inspectors."[8112]

On September 7, Judge John S. Martin denied the plaintiffs immediate relief because two of the plaintiffs had been appointed poll workers four days before they filed the complaint, and a third plaintiff's appointment

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8107. *Id.* at *1; *Green Party*, 216 F. Supp. 2d at 182.

8108. *Green Party*, 216 F. Supp. 2d at 182.

8109. *Id.* at 184–97.

8110. *Id.* at 198.

8111. Espada v. Rosado, No. 1:00-cv-6469, 2001 WL 1020549 (S.D.N.Y. Sept. 5, 2001); Docket Sheet, Espada v. Rosado, No. 1:00-cv-6469 (S.D.N.Y. Aug. 29, 2000) [hereinafter *Espada* Docket Sheet] (D.E. 1).

8112. *Espada*, 2001 WL 1020549, at *1.

was delayed pending training and became effective before the case was heard.[8113] Because constitutional questions remained, Judge Martin did not dismiss the action.[8114]

Following the defendants' filing a motion for sanctions, the plaintiffs dismissed the action voluntarily.[8115] Judge Martin, who had earlier denied a motion to dismiss the complaint, agreed with the plaintiffs that the action was not frivolous.[8116]

Preclearance Not Required for How Election Officials Are Selected

Selma Coalition for Equality and Change v. City of Selma (Edward C. Prado, W.D. Tex. 5:00-cv-498)

> Unsuccessful candidates in a city-council election filed a federal complaint alleging that election procedures had not been precleared pursuant to section 5 of the Voting Rights Act. Two years later, a three-judge district court determined that remaining claims for how election officials were appointed were not section 5 violations. The court initially awarded the defendants attorney fees, but it denied fees on reconsideration because of the more rigorous standard for awarding fees to defendants in civil rights cases.
>
> *Topics:* Section 5 preclearance; three-judge court; attorney fees; poll locations.

On May 15, 2000, three unsuccessful candidates in a May 6 city-council election for Selma, Texas, filed a federal complaint in the Western District of Texas alleging that election procedures had not been precleared pursuant to section 5 of the Voting Rights Act.[8117]

8113. *Id.* at *1, *3; *Espada* Docket Sheet, *supra* note 8111 (D.E. 17).

Judge Martin retired on September 30, 2003. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

8114. *Espada*, 2001 WL 1020549, at *1, *3.

8115. *Id.* at *1; *Espada* Docket Sheet, *supra* note 8111 (D.E. 18 to 21).

8116. *Id.* at *3–*4.

8117. Docket Sheet, Selma Coal. for Equality and Change v. City of Selma, No. 5:00-cv-498 (W.D. Tex. May 15, 2000) (D.E. 1); *see* Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination and requiring that preclearance disputes be heard by a three-judge district court); *see also* Chuck McCollough, *Defeated Candidates File Lawsuit*, San Antonio Express-News, May 24, 2000, at 1H.

On June 25, 2013, the Supreme Court declined to hold section 5 unconstitutional, but the Court did hold unconstitutional the criteria for which jurisdictions require section 5

On May 16, Judge Edward C. Prado denied the plaintiffs immediate relief because the plaintiffs' complaint did not show that relief was required before the defendants could be heard or that irreparable injury would result from the election winners' taking office.[8118]

Judge Prado denied the city and its council a dismissal on February 13, 2001, finding that a three-judge court needed to determine whether some changes that had not been precleared—altering the selection of election judges and clerks and changing an elections administrator and a polling place—were in violation of section 5.[8119]

On July 1, 2002, Judge Prado denied the defendants' motion to dismiss the second amended complaint,[8120] and the circuit's chief judge named Circuit Judge Jerry E. Smith and Western District of Texas Judge Orlando L. Garcia to join Judge Prado as a three-judge district court.[8121] On October 10, the court concluded that altering how election judges and clerks are selected was a matter of city operations and not something covered by section 5.[8122]

On January 6, 2003, Judge Prado awarded the defendants $86,168.78 in attorney fees and costs,[8123] but on reconsideration, on February 19, Judge Prado recognized the "more rigorous standard for awarding attorneys' fees to prevailing defendants in civil rights lawsuits" and denied the defendants an award.[8124] Selma withdrew its appeal on April 16.[8125]

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preclearance. Shelby County v. Holder, 570 U.S. 529 (2013).

8118. Order, *Selma Coal. for Equality and Change*, No. 5:00-cv-498 (W.D. Tex. May 16, 2000), D.E. 4.

Judge Prado was elevated to the court of appeals on May 5, 2003, and he retired on April 2, 2018. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

8119. Order, *Selma Coal. for Equality and Change*, No. 5:00-cv-498 (W.D. Tex. Feb. 13, 2001), D.E. 47.

8120. Opinion, *id.* (July 1, 2001), D.E. 68; *see* Fee-Reconsideration Opinion, *id.* (Feb. 19, 2003), D.E. 92 [hereinafter *Selma Coal. for Equality and Change* Fee-Reconsideration Opinion] ("Plaintiffs did not explain why they had failed to actively prosecute the case [for] 10 months.").

8121. Order, *id.* (July 1, 2001), D.E. 69.

8122. Opinion, *id.* (Oct. 10, 2002), D.E. 74; Corrected Opinion, *id.* (Dec. 12, 2002), D.E. 80.

8123. Order, *id.* (Jan. 6, 2003), D.E. 82; *see* Chuck McCollough, *Losers Told to Pay City for Lawsuit*, San Antonio Express-News, Feb. 19, 2003, at 1H.

8124. *Selma Coal. for Equality and Change* Fee-Reconsideration Opinion, *supra* note 8120.

8125. Order, Selma Coal. for Equality and Change v. City of Selma, No. 03-50358 (5th Cir. Apr. 16, 2003), *filed as* Order, *Selma Coal. for Equality and Change*, No. 5:00-cv-498

Permitting Independent Voters to Vote in Party Primary Elections

Hole v. North Carolina Board of Elections (James A. Beaty, Jr., M.D.N.C. 1:00-cv-477)

> An unsuccessful primary-election candidate filed a federal complaint nine days after the election alleging that her First Amendment rights were violated by the state and the party's permitting independents to vote in the election. The district court denied relief as foreclosed by the Supreme Court's 1986 decision in *Tashjian v. Republican Party of Connecticut*.
>
> *Topic:* Primary election.

An unsuccessful candidate for the Republican nomination for Guilford County District Court Judge filed a federal complaint in the Middle District of North Carolina on May 11, 2000, nine days after the primary election, alleging that her First Amendment rights were violated by the state and the party's permitting independents to vote in the election.[8126]

The candidate was outvoted 8,130 to 8,061, a difference of 0.4%.[8127] Of the ballots cast in the Republican primary election, two-thirds were cast in the candidate's race, and the ballots cast that day included 3.7% cast by independents.[8128]

On May 17, Judge James A. Beaty, Jr., heard and denied the candidate's motion for a temporary restraining order.[8129] The election was certified on the following day.[8130] On August 17, Judge Beaty denied the candidate's motion for a preliminary injunction, explaining that the prayer was essentially foreclosed by the Supreme Court's 1986 decision in *Tashjian v. Republican Party of Connecticut* that a state could not forbid a party from accepting votes in a primary election from independent voters.[8131]

(W.D. Tex. Apr. 29, 2003), D.E. 95; *see* Chuck McCollough, *Lawsuit Losers Don't Have to Pay Selma*, San Antonio Express-News, Mar. 5, 2003, at 1H.

8126. Hole v. N.C. Bd. of Elections, 112 F. Supp. 2d 475, 476 (M.D.N.C. Aug. 17, 2000); Docket Sheet, Hole v. N.C. Bd. of Elections, No. 1:00-cv-477 (M.D.N.C. May 11, 2000) [hereinafter *Hole* Docket Sheet]; *see* Paula Christian, *Judicial Candidate Sues Two Election Boards*, Greensboro News & Rec., May 16, 2000, at B1.

8127. *Hole*, 112 F. Supp. 2d at 476; *see* Paula Christian, *Losing Candidate to Ask for Recount*, Greensboro News & Rec., May 6, 2000, at B1.

8128. *Hole*, 112 F. Supp. 2d at 476.

8129. *Id.* at 477; *Hole* Docket Sheet, *supra* note 8126.

Judge Beaty retired on January 31, 2018. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

8130. *Hole*, 112 F. Supp. 2d at 477.

8131. *Id.* at 479–82; *see* Tashjian v. Republican Party of Conn., 479 U.S. 208 (1986); *see*

The candidate voluntarily dismissed her action on September 15, and the case was closed on stipulation on June 11, 2001.[8132]

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also Mike Fuchs, *Judge Upholds Primary Result*, Greensboro News & Rec., Aug. 22, 2000, at B1.

8132. *Hole* Docket Sheet, *supra* note 8126.

15. Polling-Place Activities

In the late 1800s, the secret ballot, known as the Australian ballot, came to the United States.[8133] A voter generally should be able to cast a ballot without coercion, intimidation, or interference.

Sometimes during the few days immediately before an election, a judge is asked to enjoin activity that the plaintiff alleges is planned and that the plaintiff alleges will interfere with peaceful voting. Armed agents, for example, might be enjoined.[8134]

Late in the week before the 2004 general election, plaintiffs in each of Ohio's two federal court districts challenged an Ohio statute that would permit political parties to appoint poll watchers tasked with looking for and preventing improper voting.[8135] One judge held a hearing on Thursday, Friday, and Sunday, issuing an injunction on Sunday.[8136] The judge in the other district also issued an injunction on Sunday,[8137] but the court of appeals stayed the injunctions on Monday, effectively vacating them.[8138]

Even closer to the election—four days before—a 2016 suit in New Jersey claimed that a website was encouraging incognito surveillance of voters.[8139] Denying relief, the judge observed that inconspicuous observation was unlikely to be intimidating.[8140] A lawsuit filed on the night before election day in 2004 was more successful.[8141] The judge enjoined a political

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8133. *See* Alexander Keyssar, The Right to Vote 142–43 (2000); Allan J. Lichtman, The Embattled Vote in America 131 (2018); Michael Waldman, The Fight to Vote 80–82 (2016).

8134. *E.g.*, Council on Am.–Islamic Relations—Minn. v. Atlas Aegis LLC, 497 F. Supp. 3d 371 (D. Minn. 2020), *as reported in* "Injunction Against Armed Monitoring of Polling Places by a Private Entity," *infra* page 1087.

8135. *See* "Vote Challengers," *infra* page 1109.

8136. Order at 1, Spencer v. Blackwell, No. 1:04-cv-738 (S.D. Ohio Nov. 1, 2004), D.E. 19.

8137. Order, Summit Cty. Democratic Cent. & Exec. Comm. v. Blackwell, No. 5:04-cv-2165 (N.D. Ohio Oct. 31, 2004), D.E. 20, 2004 WL 5550698.

8138. Summit Cty. Democratic Cent. & Exec. Comm. v. Blackwell, 388 F.3d 547 (6th Cir. 2004).

8139. *See* "Voter Intimidation by Stealth," *infra* page 1088.

8140. Opinion, N.J. Democratic State Comm. v. N.J. Oath Keepers, No. 2:16-cv-8230 (D.N.J. Nov. 7, 2016), D.E. 4.

8141. *See* "Intimidating Native American Voters," *infra* page 1107.

party from recording the license plate numbers of Native American voters.[8142]

A multiplaintiff pro se case alleging United Nations interference with an approaching election was ultimately unsuccessful.[8143] In another election-eve case, the plaintiffs withdrew their motion for emergency relief as "a tactical maneuver intended to have a judge decide the case on its merits," according to a newspaper,[8144] and the case settled about a year-and-a-half later.[8145]

Journalists have succeeded in persuading courts that their talking to voters is not improper interference.[8146]

In 2018, the Supreme Court decided a case about political dress that began as an emergency case in 2010.[8147] "A rule whose fair enforcement requires an election judge to maintain a mental index of the platforms and positions of every candidate and party on the ballot is not reasonable."[8148] In 2019, a district judge issued an injunction requiring a polling place to let campaign workers use the restrooms if they did not display campaign materials while in the building.[8149]

Litigation from 2014 to 2017 pitted the secret ballot against freedom of expression. Is it forbidden to prohibit voters from disclosing how they are voting by taking a ballot selfie?[8150]

8142. Temporary Restraining Order, Daschle v. Thune, No. 4:04-cv-4177 (D.S.D. Nov. 2, 2004), D.E. 6.

8143. Loeber v. Spargo, 391 F. App'x 55 (2d Cir. 2010), *aff'g* Opinion, *Loeber*, No. 1:04-cv-1193 (N.D.N.Y. July 31, 2008), D.E. 109, *cert. denied*, 563 U.S. 1029 (2011), *as reported in* "Speculative Complaint About Polling-Place Interference," *infra* page 1114.

8144. Joseph Gerth & Sheldon S. Shafer, *Judge Allows Vote Challengers*, Louisville Courier-J., Nov. 4, 2003, at A1.

8145. Order, Curington v. Richardson, No. 3:03-cv-665 (W.D. Ky. May 9, 2005), D.E. 17, *as reported in* "Discriminatory Voter Challengers," *infra* page 1115.

8146. *See, e.g.*, "Exit Polling in Nevada," *infra* page 1103; "News Media Access to Polls in Ohio," *infra* page 1104.

8147. Minn. Voters Alliance v. Mansky, 585 U.S. ___, 138 S. Ct. 1876 (2018), *as reported in* "Wearing Political Messages at the Polls in Minnesota," *infra* page 1098.

8148. *Minn. Voters Alliance*, 585 U.S. at ___, 138 S. Ct. at 1889; *see also* "Wearing Tea Party Shirts at Polling Places," *infra* page 1096; "Wearing Campaign Buttons at the Polls," *infra* page 1102.

8149. Opinion, Robinson v. Shelby Cty. Election Comm'n, No. 2:19-cv-2653 (W.D. Tenn. Sept. 26, 2019), D.E. 20, *as reported in* "Letting Campaign Workers Use the Restroom at Polling Places," *infra* page 1088.

8150. *See, e.g.*, "Proscriptions Against Ballot Selfies," *infra* page 1089.

Injunction Against Armed Monitoring of Polling Places by a Private Entity

Council on American–Islamic Relations—Minnesota v. Atlas Aegis (Nancy E. Brasel, D. Minn. 0:20-cv-2195)

A district judge entered a preliminary injunction against a private organization, forbidding the intimidation of voters by deploying armed agents at polling places.

Topic: Early voting.

Two organizations filed a federal complaint in the District of Minnesota on October 20, 2020, alleging that the defendant organization "and an unnamed 'consortium' of individuals and businesses are deploying armed ex-soldiers to intimidate and threaten eligible voters."[8151] With their complaint, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction.[8152]

Judge Nancy E. Brasel set the case for a videoconference hearing at 3:00 p.m. six days later, posting contact information in the public docket sheet.[8153] On the morning of October 26, Judge Brasel checked for settlement among the parties and found none.[8154]

On October 29, Judge Brasel enjoined the defendants from "deploying armed agents within 2,500 feet of Minnesota polling places or otherwise monitoring Minnesota polling places."[8155] Judge Brasel approved a consent decree on February 16, 2021.[8156]

8151. Complaint, Council on Am.–Islamic Relations—Minn. v. Atlas Aegis LLC, No. 0:20-cv-2195 (D. Minn. Oct. 20, 2020), D.E. 1; Council on Am.–Islamic Relations—Minn. v. Atlas Aegis LLC, 497 F. Supp. 3d 371, 375 (D. Minn. 2020).

8152. Motion, *Council on Am.–Islamic Relations—Minn.*, No. 0:20-cv-2195 (D. Minn. Oct. 20, 2020), D.E. 4; *Council on Am.–Islamic Relations—Minn.*, 497 F. Supp. 3d at 375.

8153. Docket Sheet, *Council on Am.–Islamic Relations—Minn.*, No. 0:20-cv-2195 (D. Minn. Oct. 20, 2020) (D.E. 20); *see* Minutes, *id.* (Oct. 26, 2020), D.E. 38; Notice, *id.* (Oct. 26, 2020), D.E. 18.

8154. Minutes, *id.* (Oct. 26, 2020), D.E. 34.

8155. *Council on Am.–Islamic Relations—Minn.*, 497 F. Supp. 3d at 381.

8156. Order, *Council on Am.–Islamic Relations—Minn.*, No. 0:20-cv-2195 (D. Minn. Feb. 16, 2021), D.E. 61; *see* Proposed Consent Decree, *id.* (Feb. 3, 2021), D.E. 57 (proscribing the defendant's deployment of armed agents near election activities).

Letting Campaign Workers Use the Restroom at Polling Places

Robinson v. Shelby County Election Commission (John T. Fowlkes, Jr., W.D. Tenn. 2:19-cv-2653)

> A federal district judge ruled that it was unconstitutional to prohibit campaign workers—so long as they did not display visible campaign materials while in the building—from using the restroom at polling places.
>
> *Topics:* Poll locations; removal.

On Thursday, September 26, 2019, Shelby County's election commission, its administrator, and its members removed to federal court in the Western District of Tennessee a September 25 complaint filed in Tennessee's chancery court seeking an injunction permitting campaign workers to use restrooms at polling places.[8157] On Friday, the plaintiffs—a candidate, an organization, and two campaign workers—filed in federal court a motion for a preliminary injunction, noting that in past elections campaign workers could use restrooms at polling places so long as they did not display campaign materials in the buildings.[8158]

Judge John T. Fowlkes, Jr., set the case for hearing on Monday.[8159] He granted the plaintiffs relief on Wednesday.[8160] Requiring campaign workers to travel to other locations to find a restroom infringes their rights of speech and association while they are away from the area.[8161]

Judge Fowlkes granted a stipulated dismissal on January 30, 2020.[8162]

Voter Intimidation by Stealth

New Jersey Democratic State Committee v. New Jersey Oath Keepers (Jose L. Linares, D.N.J. 2:16-cv-8230)

> Four days before a general election, a party committee filed a federal complaint to enjoin voter intimidation allegedly encouraged by a website that urged "incognito intelligence gathering" on election day. The district court "fail[ed] to see how Defendant's members could intimidate voters who are not even aware of their presence."

8157. Notice of Removal, Robinson v. Shelby Cty. Election Comm'n, No. 2:19-cv-2653 (W.D. Tenn. Sept. 26, 2019), D.E. 1; *see* Amended Complaint, *id.* (Sept. 30, 2019), D.E. 9.

8158. Preliminary-Injunction Motion, *id.* (Sept. 27, 2019), D.E. 6.

8159. Notice of Setting, *id.* (Sept. 27, 2019), D.E. 7; *see* Docket Sheet, *id.* (Sept. 26, 2019) (minutes, D.E. 10).

8160. Opinion, *id.* (Oct. 2, 2019), D.E. 20.

8161. *Id.* at 12.

8162. Order, *id.* (Jan. 30, 2020), D.E. 34.

Topic: Campaign materials.

On the Friday before the 2016 general election, a party committee filed a federal complaint in the District of New Jersey to enjoin planned voter intimidation, citing as evidence of the plan a website posting:

> Calling all Oath Keepers members! We need you to help prevent criminal vote fraud and attempted criminal voter intimidation on election day, 2016. Therefore, we call on you to form up incognito intelligence gathering and crime spotting teams and go out into the public on election day, dressed to blend in with the public, without any Oath Keepers hat or T shirt on, and with video, still camera, and notepad in hand, to look for and document suspected criminal vote fraud or intimidation activities, by any individuals, groups, or parties, and then report those incidents to your local police.[8163]

With its complaint, the committee filed a motion for temporary restraints and injunctive relief.[8164]

On Monday, Judge Jose L. Linares denied the committee relief.[8165] "Plaintiff has not explained how compliance with the above directive is likely to result in voter intimidation."[8166] "[T]he Court fails to see how Defendant's members could intimidate voters who are not even aware of their presence."[8167]

Proscriptions Against Ballot Selfies

Hill v. Williams (1:16-cv-2627) and Harlos v. Morrissey (1:16-cv-2649) (Christine M. Arguello, D. Colo.), Silberberg v. Board of Elections (P. Kevin Castel, S.D.N.Y. 1:16-cv-8336), and ACLU of Northern California v. Padilla (William Alsup, N.D. Cal. 3:16-cv-6287)

> From eight to fifteen days before the 2016 general election, federal actions in three states sought relief from proscriptions on "ballot selfies"—photographs of ballots taken by voters completing them. These actions and previous actions in three other states

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8163. Complaint, N.J. Democratic State Comm. v. N.J. Oath Keepers, No. 2:16-cv-8230 (D.N.J. Nov. 4, 2016), D.E. 4; *see* Matthew McGrath, *GOP Denies Dems' Voter Intimidation Claim*, Bergen Cty. Record, Nov. 5, 2016, at A3.

8164. Motion, *N.J. Democratic State Comm.*, No. 2:16-cv-8230 (D.N.J. Nov. 4, 2016), D.E. 2.

8165. Opinion, *id.* (Nov. 7, 2016), D.E. 4 [hereinafter *N.J. Democratic State Comm.* Opinion]; *see* Kim Lueddeke, *Judge Won't Bar Oath Keepers from Watching Polls*, Bergen Cty. Record, Nov. 8, 2016, at A6.

Judge Linares retired on May 16, 2019. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

8166. *N.J. Democratic State Comm.* Opinion, *supra* note 8165, at 3.

8167. *Id.* at 4.

> pitted freedom of expression against the secret ballot. Some district and circuit judges favored freedom of expression; others favored the secret ballot.
>
> *Topics:* Laches; case assignment.

A ballot selfie is a photograph, typically taken with a smart phone, of a completed ballot that may or may not include an image of the voter's self.[8168] Is political speech or the secret ballot more important?[8169]

Election-Eve Cases

Colorado

Three voters filed a federal complaint in the District of Colorado on October 24, 2016—about two weeks before the November 8 presidential election—against Colorado's secretary of state and its attorney general and Denver's district attorney, challenging a state statute making it a misdemeanor to show someone a ballot to reveal its contents: "Speech about how one votes in an election rests at the core of political speech protected by the First Amendment."[8170] With their complaint, the voters filed a motion for a preliminary injunction.[8171]

Judge Christine M. Arguello set the case for hearing on November 2.[8172]

On October 25, a second set of three voters filed a similar federal complaint in the District of Colorado against the same three defendants.[8173] With their complaint, the voters filed a motion for a temporary restraining

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8168. Rideout v. Gardner, 838 F.3d 65, 67 (1st Cir. 2016).

8169. Silberberg v. Bd. of Elections, 272 F. Supp. 3d 454, 459 (S.D.N.Y. 2017) ("Posting a photograph of one's marked ballot to social media is indisputably a potent form of political speech, presumptively entitled to protection under the First Amendment. [But the] State of New York has a compelling interest in preventing vote buying and voter coercion."); *see* Alejandro Lazo, *"Ballot Selfie" Bans Disputed*, Wall St. J., Nov. 3, 2016, at A4; *see also* Think Before You Shoot! Ballot Selfies May Be Illegal in Your State, www.courtroomstrategy.com/2016/11/think-before-you-shoot-ballot-selfies-may-be-illegal-in-your-state/, *archived at* web.archive.org/web/20201203073143/www.courtroomstrategy.com/2016/11/think-before-you-shoot-ballot-selfies-may-be-illegal-in-your-state/.

8170. Complaint, Hill v. Williams, No. 1:16-cv-2627 (D. Colo. Oct. 24, 2016), D.E. 1; *see* Second Amended Complaint, *id.* (Dec. 29, 2016), D.E. 47; Amended Complaint, *id.* (Nov. 1, 2016), D.E. 22; *see also* Colo. Rev. Stat. § 1-13-712 (2016).

8171. Preliminary-Injunction Motion, *Hill*, No. 1:16-cv-2627 (D. Colo. Oct. 24, 2016), D.E. 7.

8172. Docket Sheet, *id.* (Oct. 24, 2016) (D.E. 10, 27).

8173. Complaint, Harlos v. Morrissey, No. 1:16-cv-2649 (D. Colo. Oct. 25, 2016), D.E. 1.

order and a preliminary injunction.[8174] Judge John L. Kane set the case for hearing on October 28,[8175] but on October 26 he transferred the case to Judge Arguello as related to her case.[8176] She set the case for hearing on November 2.[8177]

> [I]n light of the fact that the mail-in ballots have gone out to all registered voters in Colorado and the presidential election is on November 8th, this Court had no choice but to expedite the hearing of the motions and to curtail the time that the defendants would normally have to respond to those motions.[8178]

A second day of hearing in both cases was held on November 3.[8179]

New York

Three voters challenged New York's misdemeanor proscription against ballot selfies with a federal complaint filed in the Southern District of New York against state and local election officials and two county district attorneys on October 26, 2016.[8180] Judge P. Kevin Castel set the case for hearing on November 1 with an instruction to explain why the plaintiffs waited until thirteen days before the election to file the complaint.[8181]

California

An October 31 federal complaint filed in the Northern District of California by the ACLU against California's secretary of state challenged a statute that had already been repealed but would remain in effect through the end of 2016.[8182] The ACLU sought a temporary restraining order and a prelim-

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8174. Motion, *id.* (Oct. 25, 2016), D.E. 6.

8175. Docket Sheet, *id.* (Oct. 25, 2016) [hereinafter *Harlos* Docket Sheet] (D.E. 7).

8176. Order, *id.* (Oct. 26, 2016), D.E. 11.

8177. *Harlos* Docket Sheet, *supra* note 8175 (D.E. 13, 27).

8178. Transcript at 6, Hill v. Williams, No. 1:16-cv-2627 (D. Colo. Nov. 2, 2016, filed Dec. 5, 2016), D.E. 36.

8179. Transcript, *id.* (Nov. 3, 2016, filed Dec. 5, 2016), D.E. 37.

8180. Complaint, Silberberg v. Bd. of Elections, No. 1:16-cv-8336 (S.D.N.Y. Oct. 26, 2016), D.E. 1; Silberberg v. Bd. of Elections, 272 F. Supp. 3d 454, 460 (S.D.N.Y. 2017); *see* N.Y. Elec. Law § 17-130(10) (2016); *see also* Docket Sheet, Silberberg v. Bd. of Elections & Comm'rs, No. 1:16-cv-8334 (S.D.N.Y. Oct. 26, 2016) (defective case filing).

8181. Order to Show Cause, *Silberberg*, No. 1:16-cv-8336 (S.D.N.Y. Oct. 26, 2016), D.E. 5.

8182. Complaint, ACLU of N. Cal. v. Padilla, No. 3:16-cv-6287 (N.D. Cal. Oct. 31, 2016), D.E. 1; *see* Cal. Elec. Code § 14276 (2016) ("After his or her ballot is marked, a voter shall not show it to any person in such a way as to reveal its contents."), *repealed by* 2016 Cal. Stat. c. 813 (A.B. 1494), § 1, eff. Jan. 1, 2017; *id.* § 14291, *as amended* (2017) ("A voter may voluntarily disclose how he or she voted if that voluntary act does not violate any other law.").

inary injunction.[8183] Judge William Alsup set the case for "the earliest possible hearing," which was November 2.[8184]

Previous Litigation in Other States

New Hampshire

Applying intermediate scrutiny on September 28, the U.S. Court of Appeals for the First Circuit held New Hampshire's proscription on ballot selfies to be not narrowly tailored to serve a significant government interest, because there was no showing that vote buying or coercion was an actual problem.[8185] The court of appeals affirmed an August 11, 2015, decision by District of New Hampshire Judge Paul Barbadoro[8186] in a case filed on October 31, 2014.[8187]

Indiana

Southern District of Indiana District Judge Sarah Evans Barker issued a preliminary injunction against criminal penalties for ballot selfies in Indiana on October 19, 2015.[8188] Judge Barker made the injunction permanent by summary judgment on January 19, 2017.[8189] She found insufficient justification for the content-based restriction.[8190]

> Since issuing our preliminary injunction, the State has had seven months—a span of time which included the 2015 election cycle and the 2016 primaries—to fully develop a factual record that would establish an ongoing problem of vote buying in Indiana. . . .
>
> . . .

8183. Application, *ACLU of N. Cal.*, No. 3:16-cv-6287 (N.D. Cal. Oct. 31, 2016), D.E. 3.

8184. Order, *id.* (Oct. 31, 2016), D.E. 8; Transcript at 3, *id.* (Nov. 2, 2016, filed Nov. 2, 2016), D.E. 14 [hereinafter *ACLU of N. Cal.* Transcript]; *see id.* at 52 ("the fastest possible hearing").

8185. Rideout v. Gardner, 838 F.3d 65 (1st Cir. 2016), *cert. denied*, 581 U.S. 904 (2017); *see* Joe Palazzolo, *Voided Ban on Ballot Selfies Will Stand*, Wall St. J., Apr. 4, 2017, at A3.

8186. Rideout v. Gardner, 123 F. Supp. 3d 218 (D.N.H. 2015).

8187. Docket Sheet, Rideout v. Gardner, No. 1:14-cv-489 (D.N.H. Oct. 31, 2014).

8188. Opinion, Ind. Civil Liberties Union Found. v. Ind. Sec'y of State, No. 1:15-cv-1356 (S.D. Ind. Oct. 19, 2015), D.E. 32, 2015 WL 12030168; *see* Transcript at 11–12, *id.* (Oct. 13, 2015, filed Mar. 28, 2017), D.E. 61 (Judge Barker's noting that "[t]his statute was enacted after the District Court in New Hampshire in Rideout had made its decision" and that selfie proscriptions are somewhat "impractical in this day and age where pictures are taken of everything"); Complaint, *id.* (Aug. 27, 2015), D.E. 1.

8189. Ind. Civil Liberties Union Found. v. Ind. Sec'y of State, 229 F. Supp. 3d 817 (S.D. Ind. 2017).

8190. *See id.* 824.

> [The proscription] extends far beyond the targeted speech in attempting to prevent vote buying. . . . [W]e fail to see how banning voters from taking photos of unmarked ballots in any way serves the statute's goal of protecting voters from vote buying and voter coercion. More particularly, even the prohibition on taking and sharing pictures of marked ballots draws into its ambit voters who may choose to take photos for entirely legitimate and legally innocuous reasons.[8191]

Indiana's secretary of state decided not to appeal the injunction.[8192]

Michigan

By a vote of two to one, on October 28, 2016, the U.S. Court of Appeals for the Sixth Circuit thought that a "ban on photography at the polls seems to be a content-neutral regulation that reasonably protects voters' privacy—and honors a long tradition of protecting the secret ballot."[8193] But the court did not resolve the merits of the case, because it thought that Western District of Michigan Judge Janet T. Neff's October 24 injunction against the proscription fell too close to the election.[8194] Judge Neff decided on August 30, 2018, that the plaintiffs had standing to pursue an amended complaint.[8195] But she issued a stipulated dismissal on May 8, 2019, as state officials relaxed the photography ban.[8196]

Resolution of the New Cases

California

On November 2, 2016, Judge Alsup denied the plaintiffs an immediate injunction against ballot-selfie proscriptions.[8197]

> THE COURT: All right. I have a decision to make, whether to do this orally from the bench or to take a few days and write an order.

8191. *Id.* at 824–26.

8192. Motion, Ind. Civil Liberties Union Found. v. Ind. Sec'y of State, No. 17-1356 (7th Cir. Apr. 25, 2017), D.E. 12; *see* Dismissal Order, *id.* (Apr. 25, 2017), D.E. 13.

8193. Crookston v. Johnson, 841 F.3d 396, 399–400 (6th Cir. 2016).

8194. *Id.* at 397–99, 401; Crookston v. Johnson, 854 F.3d 852 (6th Cir. 2016) (deferring further review of the merits until final resolution of the district-court case); *see* Opinion, Crookston v. Johnson, No. 1:16-cv-1109 (W.D. Mich. Oct. 24, 2016), D.E. 18, 2016 WL 9281943; Complaint, *id.* (Sept. 9, 2016), D.E. 1.

8195. Crookston v. Johnson, 370 F. Supp. 3d 804 (W.D. Mich. 2018); Amended Complaint, *Crookston*, No. 1:16-cv-1109 (W.D. Mich. Oct. 11, 2017), D.E. 65.

8196. Dismissal, *Crookston*, No. 1:16-cv-1109 (W.D. Mich. May 8, 2019), D.E. 100; *see* Jonathan Oosting, *Benson Eyes Settlement in "Ballot Selfie" Suit*, Detroit News, Feb. 23, 2019, at B2.

8197. Order, ACLU of N. Cal. v. Padilla, No. 3:16-cv-6287 (N.D. Cal. Nov. 2, 2016), D.E. 13; Minutes, *id.* (Nov. 2, 2016), D.E. 15; *ACLU of N. Cal.* Transcript, *supra* note 8184, at 60.

> But in light of the timing of the election coming up, and I want as a courtesy to both sides to give you my ruling so that if either side wishes to take an appeal to the court of appeals it can be at least lodged before the election occurs.
>
> . . .
>
> Now the question has come up: Why didn't the ACLU bring this lawsuit sooner? None of their explanations make any sense to me.[8198]

Judge Alsup expressed concern about two things. First, the challenged statute protected the secret ballot.

> THE COURT: . . . I'm old enough to remember the days when employers would take busloads of people to the polling place in other states. And I—there's a reason for this law. And if you didn't show the employer how you voted for their favorite guy, you got fired or the union boss did the same thing to you.[8199]

Second, the relief sought would create uncertainty about the extent to which disruptive selfies could be prevented: prolonged photographic sessions, the use of cumbersome equipment such as a selfie stick, and whether photos would include persons other than the voter.[8200]

Following the election, the plaintiffs voluntarily dismissed their case.[8201]

Colorado

On November 4, Judge Arguello enjoined criminal prosecutions for ballot selfies.[8202] She did not enjoin the selfie proscription per se, just criminal penalties for its violation:

> This Court has no intention of disrupting the upcoming election in Colorado. Indeed, it is exactly for this reason that the Court has narrowly tailored its injunction to ensure that it does not alter existing election laws or rules. Furthermore, it has not enjoined the Secretary of State in any way and its injunction does not affect procedures or rules at polling places. Specifically, if local rules at polling places prohibit the use of cameras due to privacy concerns, nothing in this Court's Order prohibits the enforcement of those rules.[8203]

8198. *ACLU of N. Cal.* Transcript, *supra* note 8184, at 47, 53; *see id.* at 58 ("no one is at fault more than the ACLU for waiting as long as they did for bringing this lawsuit and trying [to] jam this through at the last minute").

8199. *Id.* at 8.

8200. *Id.* at 51–60.

8201. Notice, *ACLU of N. Cal.*, No. 3:16-cv-6287 (N.D. Cal. Nov. 18, 2016), D.E. 16.

8202. Opinion at 26, Hill v. Williams, No. 1:16-cv-2627 (D. Colo. Nov. 4, 2016), D.E. 33, 2016 WL 8667798.

8203. *Id.* at 17.

The Colorado litigation was mooted on March 16, 2017, with the enactment of legislation permitting ballot selfies in Colorado.[8204]

New York

On November 3, 2016, Judge Castel ruled that the secret ballot trumped political expression and the equities cautioned against a last-minute change.[8205]

> Because of the statute, those who would engage in ballot policing, for the purpose of bribery or to enforce orthodoxy among members of a group, whether members of [a] union, employees of a company, or members of a religious group, have long[] been deprived of an essential tool for success. The absence of recent evidence of this kind of voter bribery or intimidation does not mean that the motivation to engage in such conduct no longer exists. Rather, it is consistent with the continued effectiveness of the New York statute.
>
> This action was commenced 13 days before the presidential election, even though the statute has been on the books longer than anyone has been alive. Selfies and smartphone cameras have been prevalent since 2007. A last-minute, judicially-imposed change in the protocol at 5,300 polling places would be a recipe for delays and a disorderly election, as well-intentioned voters either took the perfectly posed selfie or struggled with their rarely-used smartphone camera. This would not be in the public interest, a hurdle that all preliminary injunctions must cross.[8206]

8204. Election Offenses Committed By A Voter, openstates.org/co/bills/2017A/HB17-1014/; Order, Harlos v. Morrissey, No. 16-1471, and Hill v. Morrissey, No. 16-1470 (10th Cir. Apr. 14, 2017) (accepting a voluntary dismissal of the appeals); *see* Order, Harlos v. Morrissey, No. 1:16-cv-2649 (D. Colo. Feb. 10, 2017), D.E. 55 (administratively closing the case); Order, *Hill*, No. 1:16-cv-2627 (D. Colo. Feb. 10, 2017), D.E. 62 (same); Notice, *Harlos*, No. 1:16-cv-2649 (D. Colo. June 20, 2017), D.E. 67 (noting settlement as to attorney fees); Notice, *Hill*, No. 1:16-cv-2627 (D. Colo. June 12, 2017), D.E. 67 (same); Notice, *Harlos*, No. 1:16-cv-2649 (D. Colo. June 7, 2017), D.E. 63 (same); *see also* Kristen Wyatt, *Ballot Selfie Bill Goes to Governor*, Denver Post, Mar. 3, 2017, at 5A.

8205. Silberberg v. Bd. of Elections, 216 F. Supp. 3d 411 (S.D.N.Y. 2016); Silberberg v. Bd. of Elections, 272 F. Supp. 3d 454, 460 (S.D.N.Y. 2017).

8206. *Silberberg*, 216 F. Supp. 3d at 414–15 (footnote omitted).

> THE COURT: . . . [T]he philosophy was not to permit a secret ballot, but the Australian Ballot Movement of the late 19th Century required the voter to cast a secret ballot even if the voter wanted to cast a public ballot, so that an employer or maybe a church leader or a group leader could not enforce Orthodoxy on the members, could not bribe a voter.

Transcript at 20, Silberberg v. Bd. of Elections, No. 1:16-cv-8336 (S.D.N.Y. Nov. 1, 2016, filed Nov. 15, 2016), D.E. 23.

Following an August 29 to 31, 2017, bench trial on an amended complaint,[8207] Judge Castel concluded that the proscription on ballot selfies survived strict scrutiny, "for a law prohibiting the display [of] a marked ballot only for the purpose of vote buying or coercion would be ineffective."[8208]

Wearing Tea Party Shirts at Polling Places

Reed v. Purcell (James A. Teilborg, D. Ariz. 2:10-cv-2324)

> On the Thursday before the 2010 general-election day, a voter filed a federal complaint in the District of Arizona seeking the right to wear a shirt at his polling place supporting the Tea Party, a party that did not appear on the ballot. On Monday, the judge granted the plaintiff temporary relief. In 2011, Arizona's election statutes were revised, mooting the case.
>
> *Topics:* Campaign materials; intervention; attorney fees.

A voter filed a federal complaint in the District of Arizona on Thursday, October 28, 2010, against Maricopa County election officials, seeking the right to wear at his polling place on election day, November 2, "a t-shirt that states: 'Tea Party: Principles Not Politicians,' with the insignia 'Don't Tread On Me.'"[8209] The complaint cited an October 20 injunction issued by Judge James A. Teilborg against Coconino County concerning Tea Party shirts worn at polling places in the 2010 general election.[8210] With his complaint, the plaintiff filed a motion for a temporary restraining order.[8211]

The Coconino case was filed on September 20,[8212] and a motion for a temporary restraining order was filed on October 13,[8213] the same day that the county recorder filed her answer with a counterclaim.[8214] The counter-

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8207. Transcripts, *Silberberg*, No. 1:16-cv-8336 (S.D.N.Y. Aug. 29 and 31, 2017, filed Sept. 18 and 22, 2017), D.E. 142, 149; Silberberg v. Bd. of Elections, 272 F. Supp. 3d 454, 460 (S.D.N.Y. 2017); *see* Second Amended Complaint, *Silberberg*, No. 1:16-cv-8336 (S.D.N.Y. Apr. 17, 2017), D.E. 90; Amended Complaint, *id.* (Dec. 9, 2016), D.E. 26; *see also* Docket Sheet, *id.* (D.E. 26, 45, 46, 49, 72) (repeated efforts to file the amended complaint).

8208. *Silberberg*, 272 F. Supp. 3d at 459.

8209. Complaint at 4, Reed v. Purcell, No. 2:10-cv-2324 (D. Ariz. Oct. 28, 2010), D.E. 1.

8210. *Id.* at 8; *see* Order, Wickberg v. Owens, No. 3:10-cv-8177 (D. Ariz. Oct. 20, 2010), D.E. 30.

8211. Temporary-Restraining-Order Motion, *Reed*, No. 2:10-cv-2324 (D. Ariz. Oct. 28, 2010), D.E. 4.

8212. Complaint, *Wickberg*, No. 3:10-cv-8177 (D. Ariz. Sept. 20, 2010), D.E. 1.

8213. Temporary-Restraining-Order Motion, *id.* (Oct. 13, 2010), D.E. 11.

8214. Recorder Answer, *id.* (Oct. 13, 2010), D.E. 12 [hereinafter *Wickberg* Recorder

claim sought a declaratory judgment that the recorder acted in compliance with an Arizona statute that proscribed electioneering within seventy-five feet of a polling place.[8215]

On October 14, Judge Teilborg denied ex parte relief and set the case for hearing on October 21.[8216] On October 18, he ordered briefing on whether the state should be invited to participate as a party because the case concerned the constitutionality of a state statute.[8217] On October 20, Judge Teilborg issued a stipulated injunction permitting voters to wear at Coconino County polling places on November 2 the "Flagstaff tea party design."[8218]

As in the Coconino case, Judge Teilborg declined to issue an ex parte temporary restraining order in the Maricopa case and set a hearing for Monday, November 1.[8219] Following testimony, arguments, and a 1:49 p.m. recess, he announced his ruling at 2:51 p.m.[8220]

Judge Teilborg issued a temporary restraining order allowing voters in Maricopa County to wear Tea Party shirts and other message apparel that did not advocate for or against ballot measures, candidates, or political parties.[8221] ("The 'tea party' is not recognized as a political party by the State of Arizona."[8222])

The Coconino case was dismissed as settled on April 12, 2011.[8223] Arizona's election statutes were amended on April 29, narrowing the proscription on polling-place electioneering from the display of "political or electioneering materials" to the display of "electioneering materials."[8224] On May 16, Judge Teilborg ordered briefing on effects of the change in the Maricopa case.[8225] On August 1, he dismissed the case as mooted by the

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Answer]; *see also* County Answer, *id.* (Nov. 10, 2010), D.E. 34.

8215. *Wickberg* Recorder Answer, *supra* note 8214, at 11.

8216. Order, *Wickberg*, No. 3:10-cv-8177 (D. Ariz. Oct. 14, 2010), D.E. 14.

8217. Order, *id.* (Oct. 18, 2010), D.E. 18; *see* 28 U.S.C. § 2403(b); *see also* Certification Order, *Wickberg*, No. 3:10-cv-8177 (D. Ariz. Nov. 19, 2010), D.E. 40.

8218. Order, *Wickberg*, No. 3:10-cv-8177 (D. Ariz. Oct. 20, 2010), D.E. 30.

8219. Order, Reed v. Purcell, No. 2:10-cv-2324 (D. Ariz. Oct. 29, 2010), D.E. 10.

8220. Temporary Restraining Order at 8, *id.* (Nov. 1, 2010), D.E. 15 [hereinafter *Reed* Temporary Restraining Order], 2010 WL 4394289; Transcript at 85–86, *id.* (Nov. 1, 2010, filed Nov. 22, 2010), D.E. 28 [hereinafter *Reed* Transcript].

8221. *Reed* Transcript, *supra* note 8220, at 89.

8222. *Reed* Temporary Restraining Order, *supra* note 8220, at 3.

8223. Order, *Wickberg*, No. 3:10-cv-8177 (D. Ariz. Apr. 12, 2011), D.E. 49.

8224. 2011 Ariz. Legis. Serv. ch. 332 (West).

8225. Order, *Reed*, No. 2:10-cv-2324 (D. Ariz. May 16, 2011), D.E. 37.

statutory change.[8226] He awarded the Maricopa plaintiff $71,224 in fees and costs on October 31.[8227]

Wearing Political Messages at the Polls in Minnesota

Minnesota Majority v. Mansky (Joan N. Ericksen, D. Minn. 0:10-cv-4401)

> On the Thursday before a general election, a federal complaint challenged proscriptions on wearing Tea Party shirts and "Please I.D. Me" buttons at the polls. On the following day, the plaintiffs filed a motion for a temporary restraining order. The district judge heard the case on Monday morning and denied immediate relief. Following nearly five years of additional litigation, including an appeal, the judge granted the defendants summary judgment, finding the proscriptions justified as promoting decorum at the polls. The court of appeals agreed that it was reasonable to ban political apparel to ensure a neutral, influence-free polling place, but the Supreme Court decided that the proscription on speech relating to issues not actually on the ballot was too broad.
>
> *Topics:* Campaign materials; matters for state courts; news media; attorney fees.

At 4:55 p.m., five days before the 2010 general election, four organizations, a county election judge, and five other Minnesota voters filed a federal complaint in the District of Minnesota against Minnesota's secretary of state and election officials for the counties including Minneapolis and St. Paul, challenging a prohibition on wearing Tea Party shirts or "Please I.D. Me" buttons at the polls.[8228] At approximately 3:00 p.m. on Friday, the following day, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction.[8229]

Judge Joan N. Ericksen heard the case in a crowded courtroom on Monday, November 1, and denied immediate relief.[8230] "Plaintiffs have not

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8226. Order, *id.* (Aug. 1, 2011), D.E. 45.

8227. Order, *id.* (Oct. 31, 2011), D.E. 55, 2011 WL 5128142.

8228. Complaint, Minn. Majority v. Mansky, No. 0:10-cv-4401 (D. Minn. Oct. 28, 2010), D.E. 1; Minn. Voters Alliance v. Mansky, 585 U.S. ___, ___, 138 S. Ct. 1876, 1884 (2018); Interview with Judge Joan N. Ericksen, Sept. 15, 2015; *see* Mike Kaszuba & James Walsh, *Voter Fraud Debate Escalates Loudly*, Minneapolis Star Trib., Oct. 29, 2010, at 5B.

Tim Reagan interviewed Judge Ericksen for this report by telephone.

8229. Motion, *Minn. Majority*, No. 0:10-cv-4401 (D. Minn. Oct. 29, 2010), D.E. 2; Interview with Judge Joan N. Ericksen, Sept. 15, 2015.

8230. Opinion at 4, *Minn. Majority*, No. 0:10-cv-4401 (D. Minn. Nov. 1, 2010), D.E. 35 [hereinafter Nov. 1, 2010, *Minn. Majority* Opinion], 2010 WL 4450798; Minutes, *id.* (Nov. 1, 2010), D.E. 34; *Minn. Voters Alliance*, 585 U.S. at ___, 138 S. Ct. at 1884; Minn. Majority v. Mansky, 708 F.3d 1051, 1055 (8th Cir. 2013); Minn. Majority v. Mansky, 789

met their burden of demonstrating that the Court would likely find in their favor on the abstention issue" established by *Railroad Commission v. Pullman Co.* and *Younger v. Harris*.[8231] Moreover, "prohibiting the buttons and apparel is reasonably related to the legitimate state interest of maintaining peace, order, and decorum at the polls."[8232]

On election day,

> At least three [members of a plaintiff organization] were affected by the [policy at issue]. One was asked to cover or remove his t-shirt. Another who refused to cover or remove his button had his name and address recorded. Yet another who was wearing both a t-shirt and a button was delayed several hours before voting.[8233]

Judge Ericksen dismissed an amended complaint on April 29, 2011.[8234] "Minnesota's strong interest in creating a neutral zone where individuals can vote free from external influence is reasonably furthered by restricting the expression of political views within the narrow confines of the polling place."[8235]

On March 6, 2013, the court of appeals substantially affirmed Judge Ericksen's decision, except that the court of appeals determined that Judge Ericksen considered matters outside of the pleadings in ruling on a motion

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F. Supp. 2d 1112, 1117; Interview with Judge Joan N. Ericksen, Sept. 15, 2015 (noting also that the judge ruled from the bench and then filed an opinion at approximately 2:00 p.m.); *see* James Walsh & Mike Kaszuba, *Judge Rejects Appeal for Election Gear*, Minneapolis Star Trib., Nov. 2, 2010, at 3B.

8231. Nov. 1, 2010, *Minn. Majority* Opinion, *supra* note 8230, at 4; *see id.* at 1, 3 (noting that the three-hour hearing began at 8:45 a.m.); *see also* Younger v. Harris, 401 U.S. 37 (1971) (determining that the federal courts should not enjoin a criminal prosecution for violation of a statute that may violate the First Amendment absent a showing of bad faith, because the state courts can adjudicate the constitutional claim); *id.* at 54 ("the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good-faith attempts to enforce it"); R.R. Comm'n v. Pullman Co., 312 U.S. 496 (1941) (holding that if resolution of an uncertain state-law matter might moot a federal constitutional question, "In the absence of any showing that . . . methods for securing a definitive ruling in the state courts cannot be pursued with full protection of the constitutional claim, the district court should exercise its wise discretion by staying its hands.").

8232. Nov. 1, 2010, *Minn. Majority* Opinion, *supra* note 8230, at 6 (quotation alterations omitted).

8233. *Minn. Majority*, 708 F.3d at 1055; *see Minn. Voters Alliance*, 585 U.S. at ___, 138 S. Ct. at 1884.

8234. *Minn. Majority*, 789 F. Supp. 2d 1112; *Minn. Voters Alliance*, 585 U.S. at ___, 138 S. Ct. at 1884; *Minn. Majority*, 708 F.3d at 1055; *see* Amended Complaint, *Minn. Majority*, No. 0:10-cv-4401 (D. Minn. Nov. 18, 2010), D.E. 42.

8235. *Minn. Majority*, 789 F. Supp. 2d at 1133.

to dismiss the complaint and remanded the case for summary-judgment consideration of the plaintiffs' as-applied First Amendment challenge.[8236]

On remand, Judge Ericksen granted Minnesota's secretary of state summary judgment as to the buttons on October 15, 2014:

> The undisputed evidence before the Court . . . is both that Plaintiff Election Integrity Watch intended that their "Please I.D. Me" buttons be used as part of an orchestrated effort to falsely intimate to voters in line at the polls that photo identification is required in order to vote in Minnesota, and that Plaintiff Election Integrity Watch—whose name, website, and phone number are featured prominently on the buttons—is connected to a campaign that aims to change state and local laws such that voters would be required to present photo identification at the polls. The Plaintiffs offer nothing in the way of evidence or argument to counter the obvious conclusion that flows from these facts: that precluding the Plaintiffs from wearing these buttons in the polling place—whether a voter identification measure is on the ballot or not—is rationally related to the state's interests in protecting voters from confusion and undue influence and in preserving the decorum of the polls and the integrity of elections.[8237]

As to the shirts, however, the secretary did not present undisputed facts establishing that banning Tea Party apparel at polls would "maintain[] the decorum of the polls, preserv[e] the integrity of elections, and/or protect[] voters from confusion and undue influence."[8238]

Because of a better factual record presented by the county election officials, Judge Ericksen granted them summary judgment on March 23, 2015, as to the Tea Party apparel proscriptions.[8239] The county defendants established that the Tea Party apparel at issue unquestionably conveyed political messages that the state had a legitimate interest in protecting voters from at the polls.[8240]

Appeals were heard on October 20, 2016, at the University of Minnesota Law School.[8241] On February 28, 2017, the court of appeals affirmed

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8236. *Minn. Majority*, 708 F.3d 1051, *cert. denied*, 571 U.S. 1110 (2013); *Minn. Voters Alliance*, 585 U.S. at ___, 138 S. Ct. at 1884–85.

8237. Minn. Majority v. Mansky, 62 F. Supp. 3d 870, 876–77 (D. Minn. 2014).

8238. *Id.* at 878–79.

8239. Opinion, *Minn. Majority*, No. 0:10-cv-4401 (D. Minn. Mar. 23, 2015), D.E. 167.

8240. *Id.* at 21.

8241. Docket Sheet, Minn. Majority v. Mansky, No. 15-1741 (8th Cir. Apr. 13, 2015) (secretary's appeal); Docket Sheet, Minn. Majority v. Mansky, No. 15-1682 (8th Cir. Apr. 2, 2015) (plaintiffs' appeal); Oral Argument, *id.* (8th Cir. Oct. 20, 2016), media-oa.ca8.uscourts.gov/OAaudio/2016/10/151682.mp3 (audio recording).

the summary judgment, finding it reasonable to ban Tea Party apparel and all other political material to ensure a neutral, influence-free polling place.[8242]

The Supreme Court decided on June 14, 2018, that Minnesota's apparel proscription went too far.[8243]

> A polling place in Minnesota qualifies as a nonpublic forum. It is, at least on Election Day, government-controlled property set aside for the sole purpose of voting. . . .
>
> . . .
>
> [W]e see no basis for rejecting Minnesota's determination that some forms of advocacy should be excluded from the polling place, to set it aside as "an island of calm in which voters can peacefully contemplate their choices." Brief for Respondents 43. Casting a vote is a weighty civic act, akin to a jury's return of a verdict, or a representative's vote on a piece of legislation. It is a time for choosing, not campaigning. The State may reasonably decide that the interior of the polling place should reflect that distinction.
>
> . . . The State may reasonably take steps to ensure that partisan discord not follow the voter up to the voting booth, and distract from a sense of shared civic obligation at the moment it counts the most. That interest may be thwarted by displays that do not raise significant concerns in other situations.
>
> . . .
>
> But the State must draw a reasonable line. . . .
>
> [T]he statute prohibits wearing a "political badge, political button, or other political insignia." It does not define the term "political." And the word can be expansive. . . .
>
> . . .
>
> A rule whose fair enforcement requires an election judge to maintain a mental index of the platforms and positions of every candidate and party on the ballot is not reasonable. . . .
>
> . . .
>
> That is not to say that Minnesota has set upon an impossible task. Other States have laws proscribing displays (including apparel) in more lucid terms.[8244]

8242. Minn. Majority v. Mansky, 849 F.3d 749 (8th Cir. 2017); *see* Minn. Voters Alliance v. Mansky, 585 U.S. ___, ___, 138 S. Ct. 1876, 1885 (2018).

8243. *Minn. Voters Alliance*, 585 U.S. ___, 138 S. Ct. 1876; *see* Minn. Voters Alliance v. Mansky, 898 F.3d 818 (8th Cir. 2018) (reversing the district court's grant of summary judgment for the defendants); *see also* Robert Barnes, *High Court Says Minnesota Ban on Political Apparel at Polls Is Too Broad*, Wash. Post, June 15, 2018, at A3; Adam Liptak, *Justices Say Law Barring Political Attire Is Too Broad*, N.Y. Times, June 15, 2018, at A11.

On January 8, 2019, the court of appeals awarded plaintiffs a total of $982,028.53 in attorney fees and costs.[8245]

Wearing Campaign Buttons at the Polls

American Federation of State, County and Municipal Employees v. Land (Patrick J. Duggan, E.D. Mich. 2:08-cv-14370)

> A federal complaint sought relief from proscriptions on wearing campaign buttons or shirts at the general-election polls in 2008. The district court held the restriction on speech to be reasonable, and an appeal was dismissed voluntarily.
>
> *Topic:* Campaign materials.

On October 15, 2008, a labor union and two of its members filed a federal complaint in the Eastern District of Michigan seeking relief from an interpretation of Michigan's election law that would prohibit the wearing of campaign buttons or shirts while voting in the November 4 general election.[8246] The plaintiffs moved for expedited consideration.[8247]

Judge Patrick J. Duggan heard the case on October 27 and denied the plaintiffs relief on the following day.[8248] Observing that "a regulation affecting protected speech in a nonpublic forum need only be reasonable and viewpoint neutral to pass constitutional muster," Judge Duggan found "the directive reasonable in light of the purpose of the forum and the surrounding circumstances."[8249]

The plaintiffs moved on October 31 for an expedited appeal.[8250] That day, the court of appeals issued a schedule specifying the completion of briefing by November 1.[8251] Later that day, however, the court reconsid-

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8244. *Minn. Voters Alliance*, 585 U.S. at ___, 138 S. Ct. at 1886–89, 1891.

8245. Order, *Minn. Majority*, No. 15-1682 (8th Cir. Jan. 8, 2019).

8246. Complaint, Am. Fed'n of State Cty. & Mun. Emps. v. Land, No. 2:08-cv-14370 (E.D. Mich. Oct. 15, 2008), D.E. 1; Am. Fed'n of State, Cty. & Mun. Emps. v. Land, 583 F. Supp. 2d 840, 843 (E.D. Mich. 2008); *see Union Files Suit Over Campaign Gear*, Detroit Free Press, Oct. 16, 2008, at B3.

8247. Motion, *Am. Fed'n of State, Cty. & Mun. Emps.*, No. 2:08-cv-14370 (E.D. Mich. Oct. 15, 2008), D.E. 3; *Am. Fed'n of State, Cty. & Mun. Emps.*, 583 F. Supp. 2d at 843.

8248. *Am. Fed'n of State, Cty. & Mun. Emps.*, 583 F. Supp. 2d 840; Docket Sheet, *Am. Fed'n of State, Cty. & Mun. Emps.*, No. 2:08-cv-14370 (E.D. Mich. Oct. 15, 2008).

Judge Duggan died on March 18, 2020. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

8249. *Am. Fed'n of State, Cty. & Mun. Emps.*, 583 F. Supp. 2d at 847, 849.

8250. Motion, Am. Fed'n of State, Cty. & Mun. Emps. v. Land, No. 08-2388 (6th Cir. Oct. 31, 2008), D.E. 5.

8251. Briefing Schedule, *id.* (Oct. 31, 2008), D.E. 16.

ered and ordered the appeal heard in the normal course.[8252] The court granted a voluntary dismissal of the appeal on November 18.[8253]

Exit Polling in Nevada

ABC v. Heller (Philip M. Pro, D. Nev. 2:06-cv-1268)

> Four weeks before the 2006 general election, news media sought federal-court enforcement of their constitutional right to conduct exit polls within one hundred feet of polling places. The court granted the media the relief that they sought.
>
> *Topics:* Exit polls; news media; attorney fees.

Four weeks before the 2006 general election, six news media companies filed a federal action challenging the constitutionality of Nevada's inconsistently enforced statute proscribing conversations with voters within 100 feet of a polling place.[8254] The plaintiffs sought a preliminary injunction permitting them to conduct exit polls.[8255] The court assigned the case to Judge Philip M. Pro,[8256] who ordered a hearing on the motion for three weeks later.[8257]

In setting the hearing date, Judge Pro had several factors in mind: (1) the extent to which the plaintiffs created their own emergency by filing their action so close to the election, (2) the value of careful and thorough briefing, (3) an opportunity for the parties to engage in extrajudicial conversations, and (4) the amount of time required for appellate review if necessary.[8258]

At the October 31 hearing, Judge Pro said that he was inclined to grant the preliminary injunction,[8259] and he did so on the following day, six days

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8252. Order, *id.* (Oct. 31, 2008), D.E. 21.

8253. Order, *id.* (Nov. 18, 2008), D.E. 27.

8254. Complaint, ABC, Inc. v. Heller, No. 2:06-cv-1268 (D. Nev. Oct. 10, 2006), D.E. 1; ABC, Inc. v. Miller, 550 F.3d 786, 787 (9th Cir. 2008); *see* Nev. Rev. Stat. § 293.740 (1997); *see also Exit Polling Ban*, L.V. Rev.-J., Oct. 13, 2006, at 8B; Sam Skolnik, *Exit Polling at Center of State, National Debate*, L.V. Sun, Oct. 15, 2006, at A1.

8255. Preliminary-Injunction Motion, *ABC, Inc.*, No. 2:06-cv-1268 (D. Nev. Oct. 11, 2006), D.E. 2.

8256. Docket Sheet, *id.* (Oct. 10, 2006).

Tim Reagan interviewed Judge Pro for this report by telephone on May 17, 2012. Judge Pro retired on January 23, 2015. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

8257. Order, *ABC, Inc.*, No. 2:06-cv-1268 (D. Nev. Oct. 11, 2006), D.E. 4; *see* Abby Goodnough, *Judge Voids Measure to Bar News Exit Polls*, N.Y. Times, Oct. 26, 2006, at A15.

8258. Interview with Judge Philip M. Pro, May 17, 2012.

8259. Transcript at 48–50, *ABC, Inc.*, No. 2:06-cv-1268 (D. Nev. Oct. 31, 2006, filed

before the election.[8260] On November 2, Nevada's deputy secretary of state for elections notified the state's county clerks and registrars of voters that they should ensure compliance with Judge Pro's injunction.[8261]

On November 20, the parties stipulated a permanent injunction against application of the statute to exit polling.[8262] Judge Pro issued a permanent injunction two days later.[8263]

On January 19, 2007, Judge Pro denied the plaintiffs attorney fees,[8264] but the court of appeals reversed the denial.[8265] On remand, the attorney-fee matter settled.[8266]

News Media Access to Polls in Ohio

ABC v. Blackwell (Michael H. Watson, S.D. Ohio 1:04-cv-750) and Beacon Journal Publishing Company v. Blackwell (Paul R. Matia, N.D. Ohio 5:04-cv-2178)

> On the morning before the 2004 general election, news media sought federal-court orders granting them access to polls in Ohio. Separate lawsuits were filed in the Southern District of Ohio and the Northern District of Ohio. The Southern District action challenged a directive by Ohio's secretary of state that exit polling not be conducted within one hundred feet of a polling place. Late at night on the day the case was filed, the judge granted the media injunctive relief against the directive. In the Northern District, news media sought access to the polls for reporters and photographers. The second district court denied the media relief, but the court of appeals vacated that decision and granted the media injunctive relief a few hours before the polls closed.
>
> *Topics:* Exit polls; news media.

On the day before the 2004 general election, federal complaints were filed in both the Southern District of Ohio and the Northern District of Ohio by news media seeking access to polling places for news reporting.

Mar. 12, 2007), D.E. 37.

8260. Preliminary Injunction, *id.* (Nov. 1, 2006), D.E. 20, 2006 WL 3149365; ABC, Inc. v. Miller, 550 F.3d 786, 787 (9th Cir. 2008).

8261. Memorandum, *filed as* Letters at 16, *ABC, Inc.*, No. 2:06-cv-1268 (D. Nev. Nov. 9, 2006), D.E. 21.

8262. Stipulation, *id.* (Nov. 20, 2006), D.E. 23.

8263. Permanent Injunction, *id.* (Nov. 22, 2006), D.E. 25.

8264. Order, *id.* (Jan. 19, 2007), D.E. 31.

8265. *ABC, Inc.*, 550 F.3d 786.

8266. Order, *ABC, Inc.*, No. 2:06-cv-1268 (D. Nev. July 1, 2009), D.E. 56.

In the Southern District's Cincinnati courthouse, a complaint and a motion for a temporary restraining order challenged the constitutionality of an oral directive by Ohio's secretary of state that exit polling not be conducted within one hundred feet of a polling place.[8267]

The court assigned the case to Judge Michael H. Watson,[8268] who had joined the bench in September.[8269] His primary chambers were in Columbus, but most of his cases were Cincinnati cases during his first few years on the bench.[8270] Judge Watson held an informal status conference at 11:00 a.m. on the day of filing.[8271] The motion was heard that evening at 6:40 p.m.[8272] Late at night following the hearing, Judge Watson granted the temporary restraining order, and the news media were able to conduct exit polls the next day within one hundred feet of polling places.[8273] Judge Watson reaffirmed this ruling by summary judgment on September 26, 2006.[8274]

Both sides appealed elements of Judge Watson's opinion, but the appeals were voluntarily dismissed in 2007.[8275]

Also on the day before the 2004 general election, the *Beacon Journal* filed a federal complaint at the Northern District of Ohio's Akron court-

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8267. Temporary-Restraining-Order Motion, ABC, Inc. v. Blackwell, No. 1:04-cv-750 (S.D. Ohio Nov. 1, 2004), D.E. 4; Complaint, *id.* (Nov. 1, 2004), D.E. 1; ABC, Inc. v. Blackwell, 479 F. Supp. 2d 719, 721–26 (S.D. Ohio 2006); Temporary Restraining Order at 1–3, *ABC, Inc.*, No. 1:04-cv-750 (S.D. Ohio Nov. 1, 2004), D.E. 9 [hereinafter *ABC, Inc.* Temporary Restraining Order]; *see Blackwell Sued by News Groups on Exit Polls*, Cincinnati Enquirer, Nov. 2, 2004, at A9; *Media Sue Blackwell Over Exit Poll Limits*, Cincinnati Post, Nov. 2, 2004, at A4; Julie Wallace, *Paper Denied Access at Polls*, Akron Beacon J., Nov. 2, 2004, at B1.

8268. Docket Sheet, *ABC, Inc.*, No. 1:04-cv-750 (S.D. Ohio Nov. 1, 2004).

Tim Reagan interviewed Judge Watson for this report by telephone on June 7, 2012.

8269. Federal Judicial Center Biographical Directory of Article III Federal Judges [hereinafter FJC Biographical Directory], www.fjc.gov/history/judges.

8270. Interview with Judge Michael H. Watson, June 7, 2012.

8271. Civil Minutes, *ABC, Inc.*, No. 1:04-cv-750 (S.D. Ohio Nov. 1, 2004), D.E. 7.

8272. Transcript, *id.* (Nov. 1, 2004, filed Dec. 13, 2004), D.E. 14; Civil Minutes, *id.* (Nov. 1, 2004), D.E. 8; *see* John Caniglia & T.C. Brown, *Judge Upholds Media Ban from Polls*, Cleveland Plain Dealer, Nov. 2, 2004, at A12.

8273. *ABC, Inc.* Temporary Restraining Order, *supra* note 8267; ABC, Inc. v. Blackwell, 479 F. Supp. 2d 719, 725 (S.D. Ohio 2006).

8274. *ABC, Inc.*, 479 F. Supp. 2d 719; *see* Jesse Tinsley, *Court Gives Exit Poll Workers Access*, Cleveland Plain Dealer, Sept. 27, 2006, at B2.

8275. Docket Sheet, ABC, Inc. v. Blackwell, No. 06-4484 (6th Cir. Nov. 15, 2006) (plaintiffs' appeal); Docket Sheet, ABC, Inc. v. Blackwell, No. 06-4410 (6th Cir. Oct. 26, 2006) (defendant's appeal).

house.[8276] The *Beacon Journal* is a local newspaper serving readers in Summit County, of which Akron is the seat, and the neighboring counties of Medina, Portage, Stark, and Wayne.[8277] According to the complaint, the newspaper learned on the previous Friday, while covering early voting, that Ohio's secretary of state had issued directives that only voters, poll workers, and police officers could enter a polling place on election day.[8278] With the complaint, the newspaper filed a motion for a temporary restraining order and a preliminary injunction granting the newspaper's reporters and photographers access to Ohio polling places.[8279]

The court assigned the case to Judge Paul R. Matia,[8280] who ordered a hearing on the case at 4:00 p.m. on the day that the action was filed.[8281] That same day, Judge Matia denied the newspaper immediate relief, finding that the state had "a compelling interest in making sure that voters vote freely and without intimidation" and that "[t]he media can perform their First Amendment function almost as well from outside the polling places."[8282] Also that day, the newspaper filed a notice of appeal.[8283]

Four and one-half hours before polls closed on election day, the court of appeals, by a vote of two to one, vacated the district court's order because denying news media access to polling places was not narrowly drawn to serve the state's interests.[8284] The court ordered "that Defendants imme-

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8276. Complaint, Beacon Journal Publ'g Co. v. Blackwell, No. 5:04-cv-2178 (N.D. Ohio Nov. 1, 2004), D.E. 1 [hereinafter *Beacon Journal* Complaint].

8277. *See id.* at 3.

8278. *Id.* at 3–4; *see Beacon Journal Sues State for Access to Polling Places*, Akron Beacon J., Nov. 1, 2004, at A12; *Paper Denied Access at Polls*, Akron Beacon J., Nov. 2, 2004, at B1 [hereinafter *Paper Denied Access*].

8279. Motion, *Beacon Journal*, No. 5:04-cv-2178 (N.D. Ohio Nov. 1, 2004), D.E. 4.

8280. Tim Reagan interviewed Judge Matia for this report by telephone on May 1, 2012.

Judge Matia sat in Cleveland; when a disproportionate number of cases were filed in one of the division's three courthouses, cases might be assigned to judges in other courthouses. Interview with Paul R. Matia, May 1, 2012. He retired on May 31, 2005. FJC Biographical Directory, *supra* note 8269.

8281. Order, *Beacon Journal*, No. 5:04-cv-2178 (N.D. Ohio Nov. 1, 2004), D.E. 5.

8282. Opinion at 3, *id.* (Nov. 1, 2004), D.E. 8; *see* Minute Order, *id.* (Nov. 1, 2004), D.E. 7; *see also* John Caniglia & T.C. Brown, *Judge Upholds Media Ban from Polls*, Cleveland Plain Dealer, Nov. 2, 2004, at A12.

8283. Notice of Appeal, *Beacon Journal*, No. 5:04-cv-2178 (N.D. Ohio Nov. 1, 2004), D.E. 10; *see Paper Denied Access*, *supra* note 8278.

8284. Beacon Journal Publ'g Co. v. Blackwell, 389 F.3d 683, 685 (6th Cir. 2004); *see Media Given Access to Poll Sites*, Akron Beacon J., Nov. 3, 2004, at B9; *Voting Issues Keep Courts Busy Up to Last Minute*, Cleveland Plain Dealer, Nov. 3, 2004, at S9.

diately and forthwith permit Plaintiffs to have reasonable access to any polling place for the purpose of news-gathering and reporting so long as Plaintiffs do not interfere with poll workers and voters as voters exercise their right to vote."[8285]

On November 22, Ohio answered the complaint.[8286] On December 17, the newspaper moved to dismiss its action, because it had obtained from the court of appeals the relief that it sought.[8287] The court dismissed the case on January 14, 2005.[8288]

On January 31, Ohio sought U.S. Supreme Court review of the court of appeals' decision,[8289] but the Court granted Ohio's motion for voluntary dismissal on March 18.[8290]

Intimidating Native American Voters

Daschle v. Thune (Lawrence L. Piersol, D.S.D. 4:04-cv-4177)

> Late on the day before a general election, a U.S. Senator up for reelection filed a federal complaint against his challenger, claiming that the challenger's supporters were discouraging Native American citizens from voting through a practice of intimidation. After a nighttime evidentiary hearing, the district court granted a temporary restraining order at 1:45 on the morning of the election.
>
> *Topics:* Party procedures; recusal.

At approximately 7:00 p.m. on the day before the 2004 general election, U.S. Senator Thomas Daschle filed a federal complaint in the District of South Dakota's Sioux Falls courthouse against Senate challenger John Thune and the South Dakota Republican Party, claiming that the party was engaging in a program designed to intimidate and discourage Native American voters in violation of consent decrees issued in the 1980s by the federal court in New Jersey governing ballot-security practices of the two major national parties.[8291] Daschle sought a temporary restraining order.[8292]

8285. *Beacon Journal*, 389 F.3d 683 at 685.

8286. Answer, *Beacon Journal*, No. 5:04-cv-2178 (N.D. Ohio Nov. 22, 2004), D.E. 12.

8287. Motion to Dismiss, *id.* (Dec. 17, 2004), D.E. 15.

8288. Order, *id.* (Jan. 14, 2005), D.E. 20.

8289. Docket Sheet, Blackwell v. Beacon Journal Publ'g Co., No. 04-1032 (U.S. Feb. 3, 2005).

8290. Blackwell v. Beacon Journal Publ'g Co., 544 U.S. 915 (2005).

8291. Complaint, Daschle v. Thune, No. 4:04-cv-4177 (D.S.D. Nov. 1, 2004), D.E. 1; *see* Democratic Nat'l Comm. v. Republican Nat'l Comm., 673 F.3d 192, 196–98 (3d Cir. 2012) (discussing the consent decrees); *see also* Carson Walker, *Daschle Takes Thune to*

At the time of this case, Judge Lawrence L. Piersol was the only active district judge in the Southern Division, which had its only chambers in Sioux Falls, and it was his practice to be sure to be on hand at the time of general elections to handle emergency election litigation.[8293] He learned from chambers staff in the afternoon that the case was coming.[8294]

All three of the district's active judges had been appointed by President Clinton on Senator Daschle's recommendation, but there was no suggestion of recusal.[8295] Once he knew who the parties were, Judge Piersol had chambers staff contact their attorneys so that a proceeding could be arranged promptly.[8296] It was Judge Piersol's practice never to communicate ex parte with counsel.[8297]

From 8:05 to 11:30 p.m., Judge Piersol conducted an evidentiary hearing.[8298] At 1:45 a.m., he issued a temporary restraining order enjoining defendants

> from following Native Americans from the polling places and directing that they not copy the license plates of Native Americans driving to the polling places, or being driven to the polling places, and further directing that the license plates of Native Americans driving away from the polling places also not be recorded.[8299]

Although Daschle sought statewide relief, Judge Piersol limited the injunction to Charles Mix County, because Daschle's evidence was limited to Charles Mix County.[8300]

Daschle lost his bid for reelection.[8301] Noting that the election was over, Judge Piersol dissolved the temporary restraining order on the day after

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Court on Night Before Election, Aberdeen Am. News, Nov. 2, 2004, at 8B; "Voter Interference," *supra* page 652.

8292. Docket Sheet, *Daschle*, No. 4:04-cv-4177 (D.S.D. Nov. 1, 2004).

8293. Interview with Judge Lawrence L. Piersol, Sept. 10, 2012; *see* 28 U.S.C. § 122(2). Tim Reagan interviewed Judge Piersol for this report by telephone.

8294. Interview with Judge Lawrence L. Piersol, Sept. 10, 2012.

8295. *Id.*

8296. *Id.*

8297. *Id.*

8298. Minutes, Daschle v. Thune, No. 4:04-cv-4177 (D.S.D. Nov. 2, 2004), D.E. 4 [hereinafter *Daschle* Minutes]; *see* Walker, *supra* note 8291.

8299. Temporary Restraining Order, *Daschle*, No. 4:04-cv-4177 (D.S.D. Nov. 2, 2004), D.E. 6 [hereinafter *Daschle* Temporary Restraining Order]; *Daschle* Minutes, *supra* note 8298; *see* Mike Madden, *Judge Orders GOP to Halt Poll Tactics*, Argus Leader, Nov. 2, 2004, at 1A.

8300. *Daschle* Temporary Restraining Order, *supra* note 8299, at 2; *see* Chet Brokaw, *Lawsuit on Alleged Voter Intimidation Will Be Dropped*, Aberdeen Am. News, Nov. 9, 2004, at 10A.

the election;[8302] nine days later, Daschle voluntarily dismissed the action as moot.[8303]

Vote Challengers

Spencer v. Blackwell (Susan J. Dlott, S.D. Ohio 1:04-cv-738) and Summit County Democratic Central and Executive Committee v. Blackwell (John R. Adams, N.D. Ohio 5:04-cv-2165)

> Federal complaints were filed in both of Ohio's districts late in the week before the 2004 general election challenging an Ohio statute that permitted political parties to appoint poll watchers to challenge persons who might be voting illegitimately. Both judges issued injunctions on Sunday, but the court of appeals stayed the injunctions on Monday.
>
> *Topics:* Registration challenges; intervention.

In complaints filed in each of Ohio's two federal districts late in the week before the 2004 general election, plaintiffs challenged an Ohio statute that permitted political parties to appoint poll watchers to challenge persons who might be voting illegitimately.[8304]

The Southern District complaint was filed on Wednesday, October 27,[8305] with motions for a temporary restraining order and a preliminary injunction.[8306] Defendants were Ohio's secretary of state, Hamilton County election officials, and the chair of the Hamilton County Republican Party.[8307] Judge Susan J. Dlott held a telephone conference with all parties that same day.[8308]

8301. *See* Brokaw, *supra* note 8300.

8302. Order, *Daschle*, No. 4:04-cv-4177 (D.S.D. Nov. 3, 2004), D.E. 9; *see* Brokaw, *supra* note 8300.

8303. Voluntary Dismissal, *Daschle*, No. 4:04-cv-4177 (D.S.D. Nov. 15, 2004), D.E. 11.

8304. Summit Cty. Democratic Cent. & Exec. Comm. v. Blackwell, 388 F.3d 547, 549 (6th Cir. 2004).

8305. Complaint, Spencer v. Blackwell, No. 1:04-cv-738 (S.D. Ohio Oct. 27, 2004), D.E. 1 [hereinafter *Spencer* Complaint]; *Summit Cty. Democratic Cent. & Exec. Comm.*, 388 F.3d at 550.

8306. Motion, *Spencer*, No. 1:04-cv-738 (S.D. Ohio Oct. 27, 2004), D.E. 2.

8307. *Spencer* Complaint, *supra* note 8305.

8308. Transcript at 6, *Spencer*, No. 1:04-cv-738 (S.D. Ohio Oct. 28, 2004, filed Nov. 1, 2004), D.E. 20 [hereinafter Nov. 1, 2004, *Spencer* Transcript] (noting that Judge Dlott was at the courthouse until 12:15 the following morning); Order at 1, *id.* (Nov. 1, 2004), D.E. 19 [hereinafter *Spencer* Injunction].

For this report, Tim Reagan interviewed Judge Dlott and her law clerk Sarah Fairweather by telephone on July 30, 2012.

As luck would have it, this was Judge Dlott's second emergency election case in two days because she was two cases behind the other Cincinnati judge in the temporary-restraining-order draw.[8309] In the other case, Judge Dlott enjoined preelection widespread challenges to voter registration based on returned mail.[8310]

Judge Dlott began a three-day hearing on the motions at 1:46 p.m. on Thursday.[8311] Present were two plaintiffs' attorneys with two plaintiffs, two defense attorneys with three defendants, one of whom elected to represent himself, and five attorneys representing Hamilton County voters who had moved to intervene as defendants.[8312] Judge Dlott granted the unopposed motion to intervene.[8313]

The hearing continued on Friday and Sunday.[8314] On Friday, the secretary issued a press release reversing his previous position and taking a position at odds with the attorney general, whose office was representing him.[8315] The secretary and the attorney general were expected to face each other in the 2006 Republican gubernatorial primary election;[8316] the secretary would defeat the attorney general in that election.[8317] During the hearing on Friday, October 30, 2004, Judge Dlott received a copy of the press release, and an additional attorney joined the proceeding.[8318] The attorney

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8309. Transcript at 24, Miller v. Blackwell, No. 1:04-cv-735 (S.D. Ohio Oct. 26, 2004), D.E. 18; Interview with Judge Susan J. Dlott and her law clerk Sarah Fairweather, July 30, 2012; *see* Kimball Perry, *Judge to Decide Voting Issues*, Cincinnati Post, Oct. 30, 2004, at A4.

8310. Order, *Miller*, No. 1:04-cv-735 (S.D. Ohio Oct. 27, 2004), D.E. 11; *see* "Widespread Voter-Registration Challenges," *supra* page 134.

8311. Nov. 1, 2004, *Spencer* Transcript, *supra* note 8308; *see id.* at 18 (noting that the hearing was conducted in a borrowed courtroom).

8312. *Spencer* Nov. 1, 2004, Transcript, *supra* note 8308, at 1–5, 18; *see* Motion, *Spencer*, No. 1:04-cv-738 (S.D. Ohio Oct. 27, 2004), D.E. 4 (motion by three voters).

8313. *Spencer* Nov. 1, 2004, Transcript, *supra* note 8308, at 5.

8314. Transcripts, *Spencer*, No. 1:04-cv-738 (S.D. Ohio Oct. 29 and 31, 2004, filed Nov. 1, 2004), D.E. 26, 29; *Spencer* Injunction, *supra* note 8308, at 1 (noting that the Sunday proceeding concluded late in the evening); *see* Bill Sloat & Jesse Tinsley, *Judge to Decide If GOP Can Challenge Voters*, Cleveland Plain Dealer, Nov. 1, 2004, at B1.

8315. *See* Barry M. Horstman, *Cincinnati: Ground Zero*, Cincinnati Post, Oct. 30, 2004, at A1; Mark Niquette & Darrel Rowland, *Challenge Dispute Shifts to Poll Sites*, Columbus Dispatch, Oct. 30, 2004, at 1A; Ted Wendling, *New Ohio Election Uproar*, Cleveland Plain Dealer, Oct. 30, 2004, at A1.

8316. *See* Niquette & Rowland, *supra* note 8315; Wendling, *supra* note 8315.

8317. *See Blackwell Wins Primary for Ohio Governor*, Cincinnati Enquirer, May 3, 2006, at A1.

8318. Interview with Judge Susan J. Dlott and her law clerk Sarah Fairweather, July 30, 2012; *see* Wendling, *supra* note 8315.

general refused to represent the secretary's position, which he decided was in conflict with Ohio law.[8319] The attorney general later filed an answer on behalf of Ohio as an intervenor.[8320]

On Sunday, Judge Dlott enjoined "all Defendants from allowing any challengers other than election judges and other electors into the polling places throughout the state of Ohio on Election Day."[8321] On Monday, the intervenors filed a notice of appeal[8322] and sought from both the district court[8323] and the court of appeals[8324] an emergency stay of the injunction. Judge Dlott denied the stay motion.[8325]

The Northern District complaint against Ohio and Summit County election officials was filed late in the afternoon on Thursday, October 28,[8326] also with a motion for a temporary restraining order.[8327] On Friday, individual voter challengers moved to intervene on behalf of all challengers statewide, except for challengers in Hamilton County.[8328] Judge John R. Adams held a telephone conference that day.[8329] Following the conference,

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8319. *See* Horstman, *supra* note 8315; Niquette & Rowland, *supra* note 8315; Wendling, *supra* note 8315.

8320. Ohio Answer, Spencer v. Blackwell, No. 1:04-cv-738 (S.D. Ohio Nov. 1, 2004), D.E. 28.

8321. *Spencer* Injunction, *supra* note 8308, at 18; Summit Cty. Democratic Cent. & Exec. Comm. v. Blackwell, 388 F.3d 547, 550 (6th Cir. 2004) (quoting the district court order); *see* Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 Geo. Wash. L. Rev. 1206, 1236–37, 1245–46 (2005).

8322. Notice of Appeal, *Spencer*, No. 1:04-cv-738 (S.D. Ohio Oct. 27, 2004), D.E. 23.

8323. Motion, *id.* (Nov. 1, 2004), D.E. 21.

8324. Docket Sheet, Spencer v. Blackwell, No. 04-4312 (6th Cir. Nov. 1, 2004); *Summit Cty. Democratic Cent. & Exec. Comm.*, 388 F.3d at 550.

8325. Order, *Spencer*, No. 1:04-cv-738 (S.D. Ohio Nov. 1, 2004), D.E. 25.

8326. Complaint at 4, Summit Cty. Democratic Cent. & Exec. Comm. v. Blackwell, No. 5:04-cv-2165 (N.D. Ohio Oct. 28, 2004), D.E. 1; *Summit Cty. Democratic Cent. & Exec. Comm.*, 388 F.3d at 549; Order, *Summit Cty. Democratic Cent. & Exec. Comm.*, No. 5:04-cv-2165 (N.D. Ohio Oct. 31, 2004), D.E. 20 [hereinafter *Summit Cty. Democratic Cent. & Exec. Comm.* Injunction], 2004 WL 5550698.

8327. Motion, *Summit Cty. Democratic Cent. & Exec. Comm.*, No. 5:04-cv-2165 (N.D. Ohio Oct. 28, 2004), D.E. 3; *Summit Cty. Democratic Cent. & Exec. Comm.*, 388 F.3d at 549.

8328. Motion, *Summit Cty. Democratic Cent. & Exec. Comm.*, No. 5:04-cv-2165 (N.D. Ohio Oct. 29, 2004), D.E. 7; *Summit Cty. Democratic Cent. & Exec. Comm.* Injunction, *supra* note 8326, at 4–5.

8329. *Summit Cty. Democratic Cent. & Exec. Comm.* Injunction, *supra* note 8326, at 4; Order, *Summit Cty. Democratic Cent. & Exec. Comm.*, No. 5:04-cv-2165 (N.D. Ohio Oct. 29, 2004) [hereinafter *Summit Cty. Democratic Cent. & Exec. Comm.* Admonishment

he ordered the parties to refrain from ex parte communications.[8330] Judge Adams had a strict policy against communications with chambers that did not include all parties.[8331]

Judge Adams and his law clerks worked on the case all weekend.[8332] On Sunday, Judge Adams granted the intervention motion[8333] and ordered that "persons appointed as challengers may not be present at the polling place for the sole purpose of challenging the qualifications of other voters."[8334] Judge Adams wished he had a better record on which to rule, and if he had it to do over again he might have tried to take additional evidence, but the time before the election was very short when he got the case.[8335] More recently, Judge Adams's district adopted more specific protocols for how to handle election cases; Judge Adams stresses how important it is for the public to have confidence that parties in cases concerning sensitive matters do not have opportunities for judge shopping.[8336]

After Judge Dlott became aware of Judge Adams's case, she called him so that they could coordinate their efforts with respect to the timing of their rulings for the benefit of efficient appellate review.[8337] Judge Adams found the coordination helpful.[8338]

On Monday, as in the Southern District, the intervenors filed a notice of appeal[8339] and sought from both the district court[8340] and the court of

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Order]; Docket Sheet, *id.* (Oct. 28, 2004).

Tim Reagan interviewed Judge Adams for this report by telephone on August 6, 2012.

8330. *Summit Cty. Democratic Cent. & Exec. Comm.* Admonishment Order, *supra* note 8329.

8331. Interview with Judge John R. Adams, Aug. 6, 2012.

8332. *Id.*

8333. Marginal Order, *Summit Cty. Democratic Cent. & Exec. Comm.*, No. 5:04-cv-2165 (N.D. Ohio Oct. 31, 2004), D.E. 18; *Summit Cty. Democratic Cent. & Exec. Comm.* Injunction, *supra* note 8326, at 5.

8334. *Summit Cty. Democratic Cent. & Exec. Comm.* Injunction, *supra* note 8326, at 15; Summit Cty. Democratic Cent. & Exec. Comm. v. Blackwell, 388 F.3d 547, 549 (6th Cir. 2004) (quoting the district court order); *see* Tokaji, *supra* note 8321, at 1237, 1245.

8335. Interview with Judge John R. Adams, Aug. 6, 2012.

8336. *Id.*

8337. Interview with Judge Susan J. Dlott and her law clerk Sarah Fairweather, July 30, 2012.

8338. Interview with Judge John R. Adams, Aug. 6, 2012.

8339. Notice of Appeal, Summit Cty. Democratic Cent. & Exec. Comm. v. Blackwell, No. 5:04-cv-2165 (N.D. Ohio Oct. 27, 2004), D.E. 32.

8340. Motion, *id.* (Nov. 1, 2004), D.E. 25.

appeals[8341] an emergency stay of the injunction. Judge Adams denied the stay motion.[8342]

On Monday, the court of appeals stayed the district court injunctions.[8343] Judge James L. Ryan determined that the plaintiffs did not have standing to bring their cases.[8344] Judge John M. Rogers was willing to assume standing; he held that the public interest in fraud-free elections pursuant to established rules weighed against the injunctions.[8345] Judge R. Guy Cole, Jr., dissented, concluding that "the citizens of Ohio have the right to vote without the threat of suppression, intimidation, or chaos sown by partisan political operatives."[8346] Sixth Circuit Justice Stevens declined to reinstate the injunctions: "That reasonable judges can disagree about the issues is clear enough."[8347]

Appeals filed by the State of Ohio after the election[8348] were dismissed on March 28, 2005, as moot.[8349] On December 22, Judge Adams granted the plaintiffs in his case a voluntary dismissal.[8350]

8341. Docket Sheet, Summit Cty. Democratic Cent. & Exec. Comm. v. Blackwell, No. 04-4311 (6th Cir. Nov. 1, 2004); Summit Cty. Democratic Cent. & Exec. Comm. v. Blackwell, 388 F.3d 547, 549–50 (6th Cir. 2004).

8342. Order, *Summit Cty. Democratic Cent. & Exec. Comm.*, No. 5:04-cv-2165 (N.D. Ohio Nov. 1, 2004), D.E. 26.

8343. *Summit Cty. Democratic Cent. & Exec. Comm.*, 388 F.3d 547; *see* Edward B. Foley, *The Future of* Bush v. Gore*?*, 68 Ohio St. L.J. 925, 993 (2007).

8344. *Summit Cty. Democratic Cent. & Exec. Comm.*, 388 F.3d at 551–52 (concurring).

8345. *Id.* at 551 (opinion for the court).

8346. *Id.* at 552–55 (dissenting).

8347. Spencer v. Pugh, 543 U.S. 1301, 1302 (2004); *see* Foley, *supra* note 8343, at 993; Tokaji, *supra* note 8321, at 1237, 1245.

> The allegations of abuse made by the plaintiffs are undoubtedly serious—the threat of voter intimidation is not new to our electoral system—but on the record before me it is impossible to determine with any certainty the ultimate validity of the plaintiffs' claims.
>
> . . . I have faith that the elected officials and numerous election volunteers on the ground will carry out their responsibilities in a way that will enable qualified voters to cast their ballots.

Spencer, 543 U.S. at 1302–03.

8348. *See* Notice of Appeal, Summit Cty. Democratic Cent. & Exec. Comm. v. Blackwell, No. 5:04-cv-2165 (N.D. Ohio Nov. 30, 2004), D.E. 32; Notice of Appeal, Spencer v. Blackwell, No. 1:04-cv-738 (S.D. Ohio Nov. 30, 2004), D.E. 35.

8349. Docket Sheet, Spencer v. Blackwell, No. 05-3006 (6th Cir. Jan. 5, 2005); Docket Sheet, Summit Cty. Democratic Cent. & Exec. Comm. v. Blackwell, No. 05-3005 (6th Cir. Jan. 5, 2005).

8350. Order, *Summit Cty. Democratic Cent. & Exec. Comm.*, No. 5:04-cv-2165 (N.D. Ohio Dec. 22, 2005), D.E. 48.

On April 28, Judge Dlott denied[8351] the plaintiffs a preliminary injunction based on a second amended complaint.[8352] On May 25, 2006, Judge Dlott granted[8353] a stipulated dismissal[8354] in light of a 2006 reform of Ohio's election law, which, among other things, included a voter-identification provision.[8355]

Speculative Complaint About Polling-Place Interference

Loeber v. Spargo (Lawrence E. Kahn, N.D.N.Y. 1:04-cv-1193)

> A pro se complaint filed a few weeks before the 2004 general election challenged New York districting, among other things. After a hearing on concerns that a United Nations body would oversee New York elections, the district judge dismissed the complaint as speculative and for not naming as defendants parties against whom an injunction would provide the plaintiffs with their desired relief. In 2010, the court of appeals affirmed dismissal of an amended complaint for failure to state a federal cause of action.
>
> *Topics:* Pro se party; malapportionment; Help America Vote Act (HAVA); interlocutory appeal; three-judge court; case assignment.

A twelve-plaintiff pro se federal complaint filed in the Northern District of New York on October 15, 2004, challenged New York gerrymandering and other features of elections in New York.[8356] Ten days later, the court reassigned the case from Judge Gary L. Sharpe to Judge Lawrence E. Kahn.[8357]

A hearing before Judge Kahn on October 27 focused on the plaintiffs' concern that a United Nations body had been invited to oversee the November 2 election.[8358] On Friday, October 29, Judge Kahn denied the plain-

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8351. Order, *Spencer*, No. 1:04-cv-738 (S.D. Ohio Apr. 28, 2005), D.E. 64.

8352. Second Amended Complaint, *id.* (Apr. 14, 2005), D.E. 53.

8353. Order, *id.* (May 25, 2006), D.E. 75.

8354. Stipulation, *id.* (May 23, 2006), D.E. 74.

8355. Ohio H.B. 3, Jan. 31, 2006; *see* Laura A. Bischoff, *Taft Signs Election Reform Measure*, Dayton Daily News, Feb. 1, 2006, at B1; Reginald Fields, *Voter ID Bill Gets Taft's Signature*, Cleveland Plain Dealer, Feb. 1, 2006, at B3; Carrie Spencer Ghose, *Taft Signs Voting Changes Into Law*, Cincinnati Post, Feb. 1, 2006, at A8; Jim Siegel, *Coming This Fall: Voters Must Show ID at Polls*, Columbus Dispatch, Feb. 1, 2006, at 1A.

8356. Complaint, Loeber v. Spargo, No. 1:04-cv-1193 (N.D.N.Y. Oct. 15, 2004), D.E. 1 [hereinafter *Loeber* Complaint].

8357. Order, *id.* (Oct. 25, 2004), D.E. 2.

8358. Transcript, *id.* (Oct. 27, 2004, filed Dec. 7, 2004), D.E. 16; Minutes, *id.* (Oct. 27, 2004), D.E. 4; *see Loeber* Complaint, *supra* note 8356, at 25.

tiffs an injunction.[8359] First, the plaintiffs did not name as defendants parties whose behavior could be enjoined to achieve the remedy that the plaintiffs desired, such as county election officials.[8360] Second, the plaintiffs' concerns were speculative.[8361]

On August 15, 2005, the court of appeals reversed Judge Kahn's dismissal of the case.[8362] "The complaint here, while prolix and burdensome both for the court and for the appellees, can nonetheless be read and comprehended to plead at least some claims that are not frivolous on their face."[8363]

Reviewing an amended complaint,[8364] Judge Kahn dismissed various claims and defendants on January 8, 2008, including the plaintiffs' "claim that Defendants wrongfully counted the voting age population, rather than using the citizen voting age population, thereby using imprecise numbers in redistricting and determining eligibility for funds under the [Help America Vote Act]."[8365]

In 2010, the court of appeals affirmed Judge Kahn's July 31, 2008, dismissal of the case.[8366]

Discriminatory Voter Challengers

Curington v. Richardson (Charles R. Simpson III, W.D. Ky. 3:03-cv-665)

> On the Friday before a general election, a federal complaint alleged that a political party was going to selectively position voter challengers in predominantly African American precincts. On Monday, a state judge denied immediate relief in a related state-court action, and the federal plaintiffs made a tactical decision to

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8359. Opinion, *Loeber*, No. 1:04-cv-1193 (N.D.N.Y. Oct. 29, 2004), D.E. 5, 2004 WL 2432484.

8360. *Id.* at 2–3.

8361. *Id.* at 3–4.

8362. Loeber v. Spargo, 144 F. App'x 168 (2d Cir. 2005); *see* Judgment, *Loeber*, No. 1:04-cv-1193 (N.D.N.Y. Oct. 29, 2004), D.E. 6.

8363. *Loeber*, 144 F. App'x at 170.

8364. Amended Complaint, *Loeber*, No. 1:04-cv-1193 (N.D.N.Y. Jan. 8, 2008), D.E. 81.

8365. Opinion, *id.* (Jan. 8, 2008), D.E. 81, 2008 WL 111172; *see* Pub. L. No. 107-252, 116 Stat. 1666 (2002), *as amended*, 52 U.S.C. §§ 20901–21145; *see also* Marie Leary & Robert Timothy Reagan, The Help America Vote Act 18 (Federal Judicial Center 2012).

8366. Loeber v. Spargo, 391 F. App'x 55 (2d Cir. 2010) ("An independent review of the amended complaint confirms that it did not present any discernable federal constitutional claim related to reapportionment."), *aff'g* Opinion, *Loeber*, No. 1:04-cv-1193 (N.D.N.Y. July 31, 2008), D.E. 109, *cert. denied*, 563 U.S. 1029 (2011); *see also* Docket Sheets, Nos. 04-5890, 05-6536, 05-6956, and 08-739 (2d Cir. Dec. 9, 2004, to Feb. 13, 2008) (reflecting unsuccessful requests for relief from the court of appeals).

withdraw their request in federal court for immediate relief. A year and a half later, the parties settled the case.

Topics: Registration challenges; equal protection; matters for state courts.

On Friday, October 31, 2003, five voters filed a class-action federal complaint in the Western District of Kentucky's Louisville courthouse, alleging that the Jefferson County Republican Party planned to selectively position voter challengers in fifty-nine predominantly African American precincts on the following Tuesday's general-election day.[8367] The court assigned the case to Judge Charles R. Simpson III.[8368]

On Monday, the plaintiffs filed a motion for a temporary restraining order.[8369] That day, however, the plaintiffs' ACLU attorney informed Judge Simpson that he was not prepared to pursue the motion after all.[8370] The *Louisville Courier-Journal* reported that the attorney said that "passing up the opportunity for a hearing was a tactical maneuver intended to have a judge decide the case on its merits."[8371] Also on that Monday, a state-court judge denied immediate relief in an action filed in state court.[8372]

On November 26, Judge Simpson referred the case to a magistrate judge for pretrial matters.[8373] Following orderly pretrial proceedings,[8374] the parties announced a settlement on April 13, 2005.[8375] Judge Simpson dismissed the action on May 9.[8376]

8367. Complaint, Curington v. Richardson, No. 3:03-cv-665 (W.D. Ky. Oct. 31, 2003), D.E. 1; *see* Gregory A. Hall, *ACLU Files Suit to Block GOP Poll Challengers*, Louisville Courier-J., Nov. 1, 2003, at A1.

8368. Assignment Notice, *Curington*, No. 3:03-cv-665 (W.D. Ky. Oct. 31, 2003), D.E. 2.

8369. Temporary-Restraining-Order Motion, *id.* (Nov. 3, 2003), D.E. 3; *see also* Amendments to Complaint, *id.* (Nov. 3, 2003), D.E. 4.

8370. Order, *id.* (Nov. 3, 2003), D.E. 5.

8371. Joseph Gerth & Sheldon S. Shafer, *Judge Allows Vote Challengers*, Louisville Courier-J., Nov. 4, 2003, at A1.

8372. *See id.*

8373. Order, *Curington*, No. 3:03-cv-665 (W.D. Ky. Nov. 26, 2003), D.E. 9.

8374. *E.g.*, Order, *id.* (Apr. 27, 2004), D.E. 12 (specifying minutes of a telephonic status conference).

8375. Agreed Motion to Dismiss, *id.* (Apr. 13, 2005), D.E. 16.

8376. Order, *id.* (May 9, 2005), D.E. 17.

16. Provisional Ballots

Provisional ballots allow a voter whose voter eligibility is in question—perhaps because of uncertainty about the voter's registration—to submit a completed ballot first and resolve eligibility questions later, so that the right to vote is not abridged by requiring the voter to resolve the eligibility question first. Emergency litigation over the counting of provisional ballots can arise, especially in close elections.[8377]

Litigation has arisen over the counting of provisional ballots cast in the wrong precinct.[8378] Judges have sometimes had to determine to what extent the elective franchise can be imperiled by poll-worker error.[8379] Observing that sometimes a single poll location is assigned to more than one precinct, the U.S. Court of Appeals for the Sixth Circuit decided that casting a provisional ballot in the wrong precinct because of poll-worker error could be excused as long as the voter casts the ballot in the correct location.[8380] In one case, a district judge ruled that even if it was not yet clear whether certain provisional ballots had to be counted, they did have to be provisionally accepted.[8381]

A time-sensitive suit filed in 2010—not quite three weeks after a very close judicial election—over the counting of provisional ballots cast in the

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8377. *See, e.g.*, "No Right to Have Provisional Ballots Counted Without Evidence That Voter-Registration Applications Were Received," *infra* page 1118; "Provisional Ballots for a Judicial Election in Texas," *infra* page 1128; *see also, e.g.*, "Provisional Ballot Procedures in Ohio," *infra* page 1130 (aborted election-day litigation over the handling of provisional ballots).

8378. *See, e.g.*, "Casting Provisional Ballots in the Wrong Precinct in Michigan," *infra* page 1134; "Compliance with the Help America Vote Act for Provisional Ballots," *infra* page 1137; "Casting Provisional Ballots in the Right Place," *infra* page 1141.

8379. *See, e.g.*, "Validity Requirements for Provisional Ballots," *infra* page 1126; "Preclearance of a State Supreme-Court Decision That Provisional Ballots Have to Be Cast in the Correct Precinct," *infra* page 1129.

8380. Service Employees Int'l Union v. Husted, 698 F.3d 341 (6th Cir. 2012), *as reported in* "Ohio's Voter-Identification Law," *supra* page 923.

8381. Democratic Party v. Hood, 342 F. Supp. 2d 1073, 1079–81 (N.D. Fla. 2004), *as reported in* "Casting Provisional Ballots in the Wrong Precinct in Florida," *infra* page 1132.

wrong precinct because of poll-worker error was not resolved until a year and a half later, after a three-week trial.[8382]

Litigation has also arisen over provisional ballot data. In 2012, a federal judge ruled that the Help America Vote Act did not forbid disclosing who cast provisional ballots.[8383]

No Right to Have Provisional Ballots Counted Without Evidence That Voter-Registration Applications Were Received

Jackson v. Madison County Board of Registrars (Madeline Hughes Haikala, N.D. Ala. 5:18-cv-1855)

> Four voters sought an injunction requiring the counting of their provisional ballots, alleging that they registered to vote on time. On evidence that their voter-registration applications were never received, the judge determined that they were not entitled to immediate injunctive relief.
>
> *Topics:* Provisional ballots; registration procedures; student registration; case assignment.

Four voters filed a federal complaint in the Northern District of Alabama on Friday, November 9, 2018, three days after a general election, seeking an injunction requiring election officials to count their provisional ballots, alleging that although they registered to vote on time, their registration applications were not processed before the election.[8384] With their complaint, the plaintiffs filed a motion for a temporary restraining order.[8385]

On the day that the case was filed, the court assigned the case to a magistrate judge[8386] and then reassigned the case to Judge Madeline Hughes Haikala.[8387] Judge Haikala issued a temporary restraining order against the final certification of provisional ballots until she could hear from the parties.[8388] Also on the day that the complaint was filed, she held a telephone

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8382. Hunter v. Hamilton Cty. Bd. of Elections, 850 F. Supp. 2d 795 (S.D. Ohio 2012), *as reported in* "Provisional Ballots Cast in the Wrong Precinct Because of Poll-Worker Error," *infra* page 1121.

8383. Opinion, Mah v. Board of Cty. Comm'rs, No. 5:12-cv-4148 (D. Kan. Nov. 15, 2012), D.E. 14, 2012 WL 5584613, *as reported in* "Releasing Names of Provisional Voters," *infra* page 1119; *see* 52 U.S.C. § 21082(a)(5)(B).

8384. Complaint, Jackson v. Madison Cty. Bd. of Registrars, No. 5:18-cv-1855 (N.D. Ala. Nov. 9, 2018), D.E. 1.

8385. Temporary-Restraining-Order Motion, *id.* (Nov. 9, 2018), D.E. 4.

8386. Assignment Notice, *id.* (Nov. 9, 2018), D.E. 2.

8387. Reassignment Notice, *id.* (Nov. 9, 2018), D.E. 8.

8388. Docket Sheet, *id.* (Nov. 9, 2018) (D.E. 13).

conference with the parties[8389] and set the case for hearing on the following Tuesday.[8390]

At the November 13 hearing, the plaintiffs' attorney informed the court, "Since election day, plaintiffs have checked the status of their provisional ballots and discovered that their ballots have been rejected, meaning they will not be counted."[8391] In closing, defense counsel argued that "while plaintiffs have put forth evidence that they completed the forms, they do not know that those forms got turned in."[8392] Judge Haikala concluded that the case essentially presented a chain-of-custody issue: "So based on all of the evidence that the Court has received, the Court cannot say at this point that there is a substantial likelihood of success on the merits."[8393]

Judge Haikala granted a voluntary dismissal on January 28, 2019.[8394]

Releasing Names of Provisional Voters

Mah v. Board of County Commissioners (J. Thomas Marten, D. Kan. 5:12-cv-4148)

> Three days after the November 2012 general election, an incumbent candidate for a state house of representatives filed a petition in state court seeking an order that a county provide the candidate with the names and addresses of all persons who cast provisional ballots in the county. The defendant board of commissioners removed the action to federal court after a state judge granted the candidate the order she requested. The state's secretary of state sought a federal restraining order against the state-court order. The board, however, complied with the state-court order by its deadline. The federal judge ordered the candidate not to distribute the list or contact the voters pending further ruling. Subsequently, the judge ruled that the Help America Vote Act "protects 'access to information about an individual provisional ballot.' It does not protect information 'about the individual casting the ballot.'"
>
> *Topics:* Provisional ballots; Help America Vote Act (HAVA); removal.

8389. *Id.* (minutes, Nov. 9, 2018).

8390. *Id.* (D.E. 15).

8391. Transcript at 5, *id.* (Nov. 13, 2018, filed Nov. 21, 2018), D.E. 24.

8392. *Id.* at 103.

8393. *Id.* at 109–10; *see* Ivana Hrynkiw, *Four A&M Students' Votes Won't Count*, Huntsville Times, Nov. 14, 2018, at A3.

8394. Order, *Jackson*, No. 5:18-cv-1855 (N.D. Ala. Jan. 28, 2019), D.E. 31.

Three days after the November 6, 2012, general election, an incumbent candidate for Kansas's house of representatives filed a petition in state court seeking an order that Shawnee County—the county that includes Topeka—provide the candidate with the names and addresses of all persons who cast provisional ballots in the county.[8395] After the state judge granted the candidate the order she requested,[8396] the defendant board of commissioners removed the action to federal court.[8397] Kansas's secretary of state filed a motion for a temporary restraining order against the state-court order.[8398] The board complied with the state-court order by the November 9, 6:00 p.m., deadline.[8399]

On November 13, Judge J. Thomas Marten held a teleconference with the parties and scheduled a hearing for the following day.[8400] Judge Marten ordered the candidate not to distribute the list further or contact the voters until after the hearing.[8401]

At the conclusion of the hearing, Judge Marten announced that he was denying the motion for a temporary restraining order and lifting his restrictions on use of provisional-ballot information already disclosed.[8402]

Section 302(a)(5)(B) of the Help America Vote Act provides, "Access to information about an individual provisional ballot shall be restricted to the individual who cast the ballot."[8403] Judge Marten explained on Novem-

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8395. Petition, Mah v. Board of Cty. Comm'rs, No. 12-c-1214 (Kan. Dist. Ct. Shawnee Cty. Nov. 9, 2012), *filed as* Ex. A, Notice of Removal, Mah v. Board of Cty. Comm'rs, No. 5:12-cv-4148 (D. Kan. Nov. 9, 2012), D.E. 1 [hereinafter *Mah* Notice of Removal]; *see Kansas: Judge Allows Candidates to Contact Voters*, N.Y. Times, Nov. 15, 2012, at A24 [hereinafter *Judge Allows*] (reporting that the incumbent "trails by 44 votes. She hoped to pick up votes by helping voters correct potential problems with their provisional ballots before officials certify election results . . . .").

8396. Order, *Mah*, No. 12-c-1214 (Kan. Dist. Ct. Shawnee Cty. Nov. 9, 2012), *filed as* Ex. B, *Mah* Notice of Removal, *supra* note 8395.

8397. *Mah* Notice of Removal, *supra* note 8395.

8398. Motion, *Mah*, No. 5:12-cv-4148 (D. Kan. Nov. 9, 2012), D.E. 2.

8399. Opinion at 2, *id.* (Nov. 15, 2012), D.E. 14 [hereinafter *Mah* Injunction Denial Opinion], 2012 WL 5584613.

8400. Docket Sheet, *id.* (Nov. 9, 2012) (D.E. 7, 8).

Judge Marten retired on May 1, 2021. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/ judges.

8401. *Mah* Injunction Denial Opinion, *supra* note 8399, at 2–3.

8402. Transcript at 39–43, *Mah*, No. 5:12-cv-4148 (D. Kan. Nov. 14, 2012, filed Nov. 20, 2012), D.E. 15; *see Judge Allows*, *supra* note 8395.

8403. Pub. L. No. 107-252, 116 Stat. 1666, 1707 (2002), 52 U.S.C. § 21082(a)(5)(B). *See generally* Marie Leary & Robert Timothy Reagan, The Help America Vote Act (Federal Judicial Center 2012); Symposium, *HAVA @ 10*, 12 Election L.J. 111 (2013).

ber 15, "The plain language of the statute protects 'access to information about an individual provisional ballot.' It does not protect information 'about the individual casting the ballot.'"[8404]

After the provisional ballots were counted, the incumbent emerged defeated by a margin of twenty-one votes out of over ten thousand cast.[8405]

In 2013, Kansas amended its election-crimes statute to expressly prohibit the disclosure of "the contents of any ballot, whether cast in a regular or provisional manner, or the name of any voter who cast such ballot, except as ordered by a court of competent jurisdiction in an election contest."[8406] In addition, the statute came to provide, "The name of any voter who has cast a ballot shall not be disclosed from the time the ballot is cast until the final canvass of the election by the county board of canvassers."[8407] On August 1, 2013, Judge Marten granted a motion by Kansas's secretary of state to dismiss the case as moot in light of the statutory amendment.[8408]

Provisional Ballots Cast in the Wrong Precinct Because of Poll-Worker Error

Hunter v. Hamilton County Board of Elections (Susan J. Dlott, S.D. Ohio 1:10-cv-820)

> In the 2010 election for Hamilton County Juvenile Court judge, twenty-three votes separated the two candidates with the validity of many provisional ballots unresolved. The trailing candidate filed a federal action to expand the number of provisional ballots deemed valid when she learned that some, but not all, cast in the wrong precinct would be counted if they were cast in the wrong precinct because of poll-worker error. The district court ordered an investigation into which ballots were cast in the wrong precinct because of erroneous instructions from poll workers. A cir-

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8404. *Mah* Injunction Denial Opinion, *supra* note 8399, at 6; *see* Daniel P. Tokaji, *HAVA in Court: A Summary and Analysis of Litigation*, 12 Election L.J. 203, 208 (2013).

8405. *See Judge Dismisses Lawsuit from House Race*, Newton Kansan, Aug. 3, 2013, at 6 [hereinafter *Judge Dismisses Lawsuit*]; Tim Hrenchir, *Meet Larry Mah*, Topeka Capital-J., Dec. 24, 2012, at A.

8406. Opinion at 2, *Mah*, No. 5:12-cv-4148 (D. Kan. Aug. 1, 2013), D.E. 37 [hereinafter *Mah* Dismissal Opinion]; *see* Kan. Stat. § 25-2422(a)(1) (2013); 2013 Kan. Sess. Laws ch. 101, p.504 (effective July 1, 2013); *see also* Andy Marso, *Bill Shrouding Provisional Ballots Heads to Governor*, Topeka Capital-J., Apr. 8, 2013, at A.

8407. *Mah* Dismissal Opinion, *supra* note 8406, at 2; *see* Kan. Stat. § 25-2422(b) (2013); 2013 Kan. Sess. Laws ch. 101, p.504 (effective July 1, 2013).

8408. *Mah* Dismissal Opinion, *supra* note 8406; *see Judge Dismisses Lawsuit*, *supra* note 8405.

> cuit judge stayed the order, but a full panel dissolved the stay one week later. Litigation continued for eighteen months, and then the plaintiff joined the juvenile-court bench.
>
> *Topics:* Provisional ballots; election errors; enjoining certification; interlocutory appeal; equal protection; matters for state courts.

After ballots were counted in the 2010 general election, Tracie Hunter was twenty-three votes behind John Williams in the election for Hamilton County Juvenile Court judge.[8409] On Sunday, November 21, Hunter filed a federal action in the Southern District of Ohio's Cincinnati courthouse, which is in Hamilton County, asking that the vote count include all provisional ballots cast in the wrong precinct because of poll-worker error, noting that the county was counting some such ballots.[8410] "The [elections] board accepted for counting twenty-seven provisional ballots cast at the board's offices in downtown Cincinnati before Election Day but for which voters, because of poll-worker errors, received ballots from the 'wrong precinct.'"[8411]

> For financial and other administrative reasons, Hamilton County has decided to have some buildings serve as the polling location for several nearby precincts. In such locations, voters must go to the correct "precinct"—i.e., table—within the location to cast a valid ballot. To assist voters in finding the correct table, the County assigns an extra poll worker as a "precinct guide" at sixteen of its seventeen polling locations with four or more precincts.[8412]

With her complaint, Hunter filed a motion for a temporary restraining order and a preliminary injunction.[8413] Williams sought to intervene,[8414] as

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8409. Hunter v. Hamilton Cty. Bd. of Elections, 635 F.3d 219, 222 (6th Cir. 2011); Hunter v. Hamilton Cty. Bd. of Elections, 850 F. Supp. 2d 795, 799 (S.D. Ohio 2012); *see* Service Employees Int'l Union v. Husted, 887 F. Supp. 2d 761, 774 (S.D. Ohio 2012); *see also Hunter Sues to Block Hamilton County Juvenile Judge Count*, Cincinnati Enquirer, Nov. 23, 2010 (identifying Hunter as a Democrat and Williams as a Republican); Mark Niquette, *Local Case May Set U.S. Voting Precedent*, Columbus Dispatch, Jan. 19, 2011, at 3B (same).

8410. Complaint, Hunter v. Hamilton Cty. Bd. of Elections, No. 1:10-cv-820 (S.D. Ohio Nov. 21, 2010), D.E. 1; *Hunter*, 635 F.3d at 225; *Hunter*, 850 F. Supp. 2d at 799. *See generally* Richard L. Hasen, *What to Expect When You're Electing*, Fed. Law., June 2012, at 35 (summarizing the litigation).

8411. Richard L. Hasen, The Voting Wars 147 (2012).

8412. *Hunter*, 635 F.3d at 223; *see also* Hasen, *supra* note 8411, at 148.

8413. Motion, *Hunter*, No. 1:10-cv-820 (S.D. Ohio Nov. 21, 2010), D.E. 2; *Hunter*, 635 F.3d at 226; *Hunter*, 850 F. Supp. 2d at 799.

8414. Williams Motion to Intervene, *Hunter*, No. 1:10-cv-820 (S.D. Ohio Nov. 22,

did the Ohio Democratic Party[8415] and the Northeast Ohio Coalition for the Homeless.[8416]

The court assigned the case to Judge Susan J. Dlott, who held a hearing from 4:50 to 8:05 p.m. on the following day, after a full day on the bench presiding over another case.[8417] Because the proceeding was not ex parte, she regarded the applicable motion as one for a preliminary injunction.[8418]

That evening, Judge Dlott granted the intervention motions.[8419] She also granted a preliminary injunction, requiring Hamilton County to investigate whether provisional ballots cast in the wrong precincts were so cast because of poll-worker errors, so that the county could apply a uniform policy of whether to count them.[8420] Because the close election was already subject to a mandatory recount, Judge Dlott declined to enjoin certification of the election.[8421]

On the next day, Hamilton County certified Williams the winner by twenty-three votes.[8422] On the day after that, the day before Thanksgiving Day, a judge on the court of appeals stayed Judge Dlott's injunction.[8423]

2010), D.E. 10; *see* Transcript at 4, *id.* (Nov. 22, 2010, filed Nov. 26, 2010), D.E. 18 [hereinafter *Hunter* Transcript].

8415. Ohio Democratic Party Motion to Intervene, *Hunter*, No. 1:10-cv-820 (S.D. Ohio Nov. 22, 2010), D.E. 98; *Hunter* Transcript, *supra* note 8414, at 3.

8416. NEOCH Motion to Intervene, *Hunter*, No. 1:10-cv-820 (S.D. Ohio Nov. 22, 2010), D.E. 8; *Hunter* Transcript, *supra* note 8414, at 3.

8417. Docket Sheet, *Hunter*, No. 1:10-cv-820 (S.D. Ohio Nov. 21, 2010) [hereinafter S.D. Ohio *Hunter* Docket Sheet]; *Hunter* Transcript, *supra* note 8414, at 3, 133; *Hunter*, 850 F. Supp. 2d at 799; *see Judicial Candidate Tracie Hunter Questions Uncounted Votes*, Cincinnati Enquirer, Nov. 23, 2010.

For this report, Tim Reagan interviewed Judge Dlott and her law clerk Sarah Fairweather by telephone on July 30, 2012.

8418. Preliminary Injunction, *Hunter*, No. 1:10-cv-820 (S.D. Ohio Nov. 22, 2010), D.E. 13 [hereinafter *Hunter* Preliminary Injunction], 2010 WL 4878957; *Hunter*, 850 F. Supp. 2d at 799–800 n.2.

8419. *Hunter*, 850 F. Supp. 2d at 799–800; *Hunter* Transcript, *supra* note 8414, at 6–8 (noting no opposition to the motion by Williams); *see* Hunter v. Hamilton Cty. Bd. of Elections, 635 F.3d 219, 226 (6th Cir. 2011).

8420. *Hunter* Preliminary Injunction, *supra* note 8418, at 1, 5–7, 9; *Hunter*, 635 F.3d at 226; *Hunter*, 850 F. Supp. 2d at 799–800; *see Local Election Fight Now in Federal Court*, Cincinnati Enquirer, Nov. 24, 2010 [hereinafter *Local Election Fight*].

8421. *Hunter* Preliminary Injunction, *supra* note 8418, at 1, 7–9; *Hunter*, 635 F.3d at 226.

8422. *Hunter*, 635 F.3d at 226; Ohio *ex rel.* Painter v. Brunner, 128 Ohio St. 3d 17, 19, 941 N.E.2d 782, 788 (2011); *see Local Election Fight*, *supra* note 8420.

8423. Order, Hunter v. Hamilton Cty. Bd. of Elections, No. 10-4481 (6th Cir. Nov. 24, 2010) [hereinafter *Hunter* Stay Order]; *Hunter*, 635 F.3d at 226; *see Cincinnati Appeals*

The circuit judge ruled alone, "[b]ecause of the exigent nature of the request and the approaching Thanksgiving holiday."[8424] One week later, a full appellate panel dissolved the stay.[8425]

On December 13, Ohio began to subpoena 2,200 poll workers to investigate whether poll-worker error caused provisional ballots to be cast in incorrect precincts.[8426] The term of office for the Juvenile Court position began on January 1, 2011.[8427] On Friday, January 7, Ohio's supreme court granted Williams mandamus relief and ordered Ohio to limit its investigation of poll-worker error to the method used to identify the original obvious errors that led to the counting of some incorrectly cast provisional ballots.[8428] That same day, Ohio's secretary of state issued a directive specifying which types of incorrectly cast provisional ballots would be counted.[8429]

On January 10, a new secretary of state for Ohio came to office; he replaced his predecessor's directive with one forbidding the counting of additional provisional ballots.[8430] On January 12, Judge Dlott nullified by injunction the new secretary's directive and ordered certain categories of incorrectly cast provisional ballots counted by January 22, the deadline for amending certification of the election.[8431] On January 14, Judge Dlott enjoined the election results from going into effect until further order of her court.[8432]

On January 27, the court of appeals affirmed Judge Dlott's November 22, 2010, injunction and remanded for further proceedings on which mis-

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Court Blocks Judge Vote Probe, Cincinnati Enquirer, Nov. 25, 2010.

8424. *Hunter* Stay Order, *supra* note 8423, at 1.

8425. Order, *Hunter*, No. 10-4481 (6th Cir. Dec. 1, 2010); *Hunter*, 635 F.3d at 226; *see Rejected Ballots to Be Investigated*, Cincinnati Enquirer, Dec. 2, 2010.

8426. *Painter*, 128 Ohio St. 3d at 22, 941 N.E.2d at 790; *see Hunter*, 635 F.3d at 227.

8427. *Painter*, 128 Ohio St. 3d at 18, 941 N.E.2d at 786.

8428. *Id.* at 33, 941 N.E.2d at 798; *Hunter*, 635 F.3d at 228–29.

8429. *Hunter*, 635 F.3d at 228–29; Hunter v. Hamilton Cty. Bd. of Elections, 850 F. Supp. 2d 795, 800 (S.D. Ohio 2012); Order at 4–5, Hunter v. Hamilton Cty. Bd. of Elections, No. 1:10-cv-820 (S.D. Ohio Jan. 12, 2011), D.E. 39 [hereinafter Jan. 12, 2011, *Hunter* Order].

8430. *Hunter*, 635 F.3d at 229–30; Jan. 12, 2011, *Hunter* Order, *supra* note 8429, at 5; *see New Secretary of State: Don't Count Provisional Ballots in Contested Vote*, Cincinnati Enquirer, Jan. 11, 2011.

8431. Jan. 12, 2011, *Hunter* Order, *supra* note 8429, at 1, 10; *Hunter*, 850 F. Supp. 2d at 800; *Hunter*, 635 F.3d at 230–31; *see Judge Choice Thrown Into Chaos*, Cincinnati Enquirer, Jan. 13, 2011.

8432. Order, *Hunter*, No. 1:10-cv-820 (S.D. Ohio Jan. 14, 2011), D.E. 47; *Hunter*, 635 F.3d at 231; *see Federal Judge Wants Explanation on Lack of Ballot Count*, Cincinnati Enquirer, Jan. 15, 2011.

cast provisional ballots should be counted.[8433] A retired judge filled the elective position at issue while litigation continued.[8434]

The case could not be resolved without a full examination of the facts.[8435] Judge Dlott presided over a three-week injunction trial from July 18 to August 5, 2011.[8436] On September 29, Hamilton County's other juvenile court judge announced her retirement.[8437] The governor appointed Williams to fill her seat.[8438] He would have to run in 2012 for the two years remaining in the unexpired term.[8439]

On February 8, 2012, Judge Dlott ordered the counting of provisional ballots cast in the wrong precinct.[8440] She also observed,

> Ohio's precinct-based voting system that delegates to poll workers the duty to ensure that voters are directed to the correct precinct but which provides that provisional ballots cast in the wrong precinct shall not be counted under any circumstance, even where the ballot is miscast due to poll-worker error, is fundamentally unfair and abrogates the Fourteenth Amendment's guarantee of due process of law. However, because Plaintiffs did not challenge the constitutionality of Ohio's election statutes, this Court is without jurisdiction to order a remedy.[8441]

8433. *Hunter*, 635 F.3d at 247; *Hunter*, 850 F. Supp. 2d at 800, 832–33; *see Appeals Court: Ballots Cast Aside Because of Poll-Worker Error Should Be Counted*, Cincinnati Enquirer, Jan. 28, 2011; Edward B. Foley, *How Fair Can Be Faster: The Lessons of* Coleman v. Franken, 10 Election L.J. 187 (2011) (judging the appellate opinion one of "the most significant implementation[s] of the Equal Protection ruling in *Bush v. Gore*[, 531 U.S. 98 (2000)]"); Daniel P. Tokaji, Election Law in a Nutshell 174–75 (2013).

8434. *See Juvenile Court Election Now in Federal Court*, Cincinnati Enquirer, July 19, 2011 [hereinafter *Now in Federal Court*].

8435. Interview with Judge Susan J. Dlott and her law clerk Sarah Fairweather, July 30, 2012 (observing that the capacity for poll-worker error in directing voters to the correct precinct was distressing).

8436. S.D. Ohio *Hunter* Docket Sheet, *supra* note 8417; *see Now in Federal Court*, *supra* note 8434.

8437. *See Retirement Adds Uncertainty to Juvenile Court Race*, Cincinnati Enquirer, Sept. 29, 2011.

8438. *See Williams Appointed Juvenile Court Judge*, Cincinnati Enquirer, Nov. 11, 2011.

8439. *See id.*

8440. Hunter v. Hamilton Cty. Bd. of Elections, 850 F. Supp. 2d 795, 847 (S.D. Ohio 2012); *see* Robert Barnes, *In Ohio, a Fight Over Votes Not Counted*, Wash. Post, Aug. 6, 2012, at A1.

8441. *Hunter*, 850 F. Supp. 2d at 847; *see* Service Employees Int'l Union v. Husted, 887 F. Supp. 2d 761, 776 (S.D. Ohio 2012) (noting that the jurisdictional defect resulted from the plaintiffs' failure to give proper notice to Ohio's attorney general).

After the provisional ballots were counted, Hunter was declared the winner, and she joined the juvenile court bench eighteen months after election day.[8442] Appeals from Judge Dlott's final ruling were voluntarily dismissed on July 12.[8443]

Judge Dlott had high praise for the lawyering in this case.[8444] Although the case was politically charged, the lawyers presented their arguments with great professionalism, and it was difficult to discern political agendas from a casual listen to the conversations.[8445]

Validity Requirements for Provisional Ballots

Ohio ex rel. Skaggs v. Brunner (Algenon L. Marbley, S.D. Ohio 2:08-cv-1077)

> Ohio's secretary of state removed a mandamus action from Ohio's supreme court concerning validity requirements for provisional ballots. The case was assigned to a judge who was already presiding over related cases. The judge granted summary judgment to the state, but the court of appeals ordered the matter referred to the state court, which held the secretary of state's validity requirements to be too lax. The federal court of appeals affirmed the district judge's denial of attorney fees.
>
> *Topics:* Matters for state courts; provisional ballots; removal; attorney fees.

On Thursday, November 13, 2008, two Ohio voters filed a mandamus action with Ohio's supreme court on behalf of the state alleging that the secretary of state had improperly relaxed, after the election, validity requirements for provisional ballots cast in the 2008 general election.[8446] At issue

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8442. *See Bailiff Hire Prompts Questions*, Cincinnati Enquirer, June 17, 2012, at B1; *Will Ohio Count Your Vote*, Cincinnati Enquirer, July 29, 2012, at A1.

8443. Orders, Hunter v. Hamilton Cty. Bd. of Elections, Nos. 12-3224 and 12-3266 (6th Cir. July 12, 2012).

8444. Interview with Judge Susan J. Dlott and her law clerk Sarah Fairweather, July 30, 2012.

8445. *Id.*

8446. Complaint, Ohio *ex rel.* Skaggs v. Brunner, No. 08-2206 (Ohio Nov. 13, 2008), *attached to* Coglianese Affidavit, Ohio *ex rel.* Skaggs v. Brunner, No. 2:08-cv-1077 (S.D. Ohio Nov. 14, 2008), D.E. 3; Ohio *ex rel.* Skaggs v. Brunner, 588 F. Supp. 2d 828, 832 (S.D. Ohio 2008); Ohio *ex rel.* Skaggs v. Brunner, 588 F. Supp. 2d 819, 822 (S.D. Ohio 2008); State *ex rel.* Skaggs v. Brunner, 120 Ohio St. 3d 506, 510, 900 N.E.2d 982, 986 (Ohio 2008); *see* Barbara Carmen & Mark Niquette, *27,000 County Ballots on Hold*, Columbus Dispatch, Nov. 15, 2008, at 1A.

was whether name-and-signature requirements could be relaxed if mistakes were attributable to poll-worker error.[8447]

The secretary removed the action to the U.S. District Court for the Southern District of Ohio on the following day.[8448] The court originally assigned the case to Judge Gregory L. Frost,[8449] but the secretary moved to consolidate the case with election cases already pending before Judge Algenon L. Marbley,[8450] and both judges signed an order of transfer.[8451]

Because of concerns that Judge Marbley might have excessive control over Ohio elections because of an election case he once drew, the judges in Columbus all agreed that they would carefully consider the transfer of an election case.[8452] It was not enough for an election case to be about elections to be related to Judge Marbley's other cases, but the matter of provisional ballots was central to cases already before him.[8453]

At 9:00 a.m. on Saturday, Judge Marbley heard a motion to remand the case.[8454] It was unusual to hold a proceeding on a Saturday, but time was of the essence and that was when all participants were available.[8455] He denied the motion on Monday.[8456] On Thursday, Judge Marbley granted the secretary a summary judgment.[8457] On the following Tuesday, the court of appeals vacated Judge Marbley's decisions and ordered the case remanded so

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8447. Ohio *ex rel.* Skaggs v. Brunner, 549 F.3d 468, 470–71 (6th Cir. 2008).

8448. Notice of Removal, *Skaggs*, No. 2:08-cv-1077 (S.D. Ohio Nov. 14, 2008), D.E. 2; *Skaggs*, 588 F. Supp. 2d at 832; *Skaggs*, 588 F. Supp. 2d at 822; *see* Carmen & Niquette, *supra* note 8446.

8449. Judge Frost retired on May 2, 2016. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

8450. Motion to Consolidate, *Skaggs*, No. 2:08-cv-1077 (S.D. Ohio Nov. 14, 2008), D.E. 6.

Tim Reagan interviewed Judge Marbley for this report by telephone on July 11, 2012.

8451. Transfer Order, *Skaggs*, No. 2:08-cv-1077 (S.D. Ohio Nov. 14, 2008), D.E. 9; *see Skaggs*, 588 F. Supp. 2d at 832; *Skaggs*, 588 F. Supp. 2d at 822.

8452. Interview with Judge Algenon L. Marbley, July 11, 2012.

8453. *Id.*

8454. *Skaggs*, 588 F. Supp. 2d at 822; *see* Carmen & Niquette, *supra* note 8446; Jeb Phillips, *Provisional-Ballot Suit May Go Back to State Court*, Columbus Dispatch, Nov. 16, 2008, at 3B.

8455. Interview with Judge Algenon L. Marbley, July 11, 2012.

8456. *Skaggs*, 588 F. Supp. 2d 819; *Skaggs*, 588 F. Supp. 2d at 832; *see* Mark Niquette & Jodi Andes, *Ballot Fight Staying in Federal Court*, Columbus Dispatch, Nov. 18, 2008, at 3B.

8457. *Skaggs*, 588 F. Supp. 2d 828; *see* Jodi Andes, *Votes Count, Judge Says*, Nov. 21, 2008, at 1A.

that Ohio's supreme court could determine what validity requirements Ohio law required for provisional ballots.[8458]

On December 5, Ohio's supreme court determined that the secretary's directives were too lax: valid provisional ballots must be properly prepared with both the voter's name and the voter's signature.[8459]

On September 18, 2009, Judge Marbley denied the plaintiffs' request for $59,263 in attorney fees.[8460] Although the court of appeals would have been inclined to grant fees had the choice been its to make in the first instance,[8461] Judge Marbley did not abuse his discretion in declining to award fees.[8462]

Provisional Ballots for a Judicial Election in Texas

Texas Democratic Party v. Bettencourt (Gray H. Miller, S.D. Tex. 4:08-cv-3332)

> Six days after the 2008 general election, the Democratic candidate for a state judgeship was a few hundred votes behind his opponent. The trailing candidate filed a federal complaint seeking prompt resolution of several thousand provisional and absentee ballots. Two days later, the district court denied the plaintiff immediate relief. An amended complaint more generally challenging county procedures for voter registration and provisional ballots resulted in a 2012 settlement.
>
> *Topics:* Provisional ballots; absentee ballots.

Six days after the 2008 general election, the Democratic candidate for a state judgeship was a few hundred votes behind his opponent, and several thousand provisional and absentee ballots remained to be verified.[8463] The trailing candidate and the Democratic Party filed a federal action in the Southern District of Texas against Harris County's tax assessor-collector and voter registrar to compel resolution of the unresolved ballots.[8464] On

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8458. Ohio *ex rel.* Skaggs v. Brunner, 549 F.3d 468 (6th Cir. 2008); *see* Jodi Andes & James Nash, *State Court to Decide Ballot Fight*, Columbus Dispatch, Nov. 26, 2008, at 1B.

8459. State *ex rel.* Skaggs v. Brunner, 120 Ohio St. 3d 506, 900 N.E.2d 982 (Ohio 2008).

8460. Opinion, Ohio *ex rel.* Skaggs v. Brunner, No. 2:08-cv-1077 (S.D. Ohio Nov. 14, 2008), D.E. 48, 2009 WL 3064199.

8461. Ohio *ex rel.* Skaggs v. Brunner, 629 F.3d 527, 532 (6th Cir. 2010).

8462. *Id.* at 532–33.

8463. *See* Alan Bernstein, *Dems Sue Registrar Over Votes for Judges*, Hous. Chron., Nov. 12, 2008, at B1; *County-by-County Results*, Hous. Chron., Nov. 6, 2008, at B6 (547,091 to 547,442).

8464. Complaint, Tex. Democratic Party v. Bettencourt, No. 4:08-cv-3332 (S.D. Tex. Nov. 10, 2008), D.E. 1.

the following day, the plaintiffs filed a motion for immediate and permanent injunctive relief.[8465]

Judge Gray H. Miller heard the plaintiffs' motion on November 12, the case's third day,[8466] and Judge Miller denied the plaintiffs immediate relief.[8467] On November 14, the *Houston Chronicle* reported that the counting of additional votes reduced but did not erase the Republican candidate's lead.[8468]

An amended complaint filed on December 1 added four Harris County voters as plaintiffs and challenged the validity of the county's procedures for voter registration and provisional ballots.[8469] Judge Miller issued a conditional dismissal of the action as settled on November 2, 2009.[8470] On September 2, 2010, the plaintiffs filed a new complaint with a motion to enforce the settlement agreement.[8471] By April 2, 2012, the matter had settled.[8472]

The Democratic candidate's efforts in state court to overturn the election results were unsuccessful.[8473]

Preclearance of a State Supreme-Court Decision That Provisional Ballots Have to Be Cast in the Correct Precinct

Kindley v. Bartlett (Terrence W. Boyle, E.D.N.C. 5:05-cv-177)

> A federal class-action complaint challenged a state policy against counting provisional ballots cast in the wrong precinct, a policy recently allowed by the state's supreme court. The federal district-court judge denied injunctive relief on a finding that the state was not attempting to enforce the policy in advance of preclearance pursuant to section 5 of the Voting Rights Act.

8465. Motion, *id.* (Nov. 11, 2008), D.E. 3.

8466. Docket Sheet, *id.* (Nov. 10, 2008) [hereinafter *Tex. Democratic Party* Docket Sheet] (D.E. 4).

8467. *Id.*

8468. Alan Bernstein, *Special Ballots Change Nothing*, Hous. Chron., Nov. 14, 2008, at B1.

8469. Amended Complaint, *Tex. Democratic Party*, No. 4:08-cv-3332 (S.D. Tex. Dec. 1, 2008), D.E. 10.

8470. Order, *id.* (Nov. 2, 2009), D.E. 57.

8471. Petition, *id.* (Sept. 2, 2010), D.E. 59.

8472. *Tex. Democratic Party* Docket Sheet, *supra* note 8466.

8473. *See* Alan Bernstein, *Defeated Candidate Eyes Ballot Glitches*, Hous. Chron., Jan. 9, 2009, at B1; Alan Bernstein, *Democrat Contests 230-Vote Loss for Judge Seat*, Hous. Chron., Dec. 12, 2008, at B4; Brian Rogers, *Candidate Will Not Appeal Ruling to Dismiss Election Suit*, Hous. Chron., July 1, 2009, at B2.

Topics: Provisional ballots; section 5 preclearance; matters for state courts; class action.

On March 15, 2005, a North Carolina voter filed a federal class-action complaint in the Eastern District of North Carolina challenging state policy on the counting of provisional ballots cast in the wrong precinct.[8474] Two days later, the court set the case for hearing on March 22.[8475] On March 18, the plaintiff filed a motion for a temporary restraining order and a preliminary injunction.[8476]

In his March 18 response, North Carolina's attorney general explained that the suit concerned contested elections in state court and the state supreme court's February 5 decision that under state law provisional ballots had to be cast in the correct precinct to count.[8477] On March 21, the court set the case for hearing on March 30 before Judge Terrence W. Boyle.[8478]

Judge Boyle issued an opinion on April 8 denying immediate injunctive relief.[8479] Judge Boyle found that North Carolina was in the process of having its supreme court's ruling precleared pursuant to section 5 of the Voting Rights Act, and the plaintiff had not shown an attempt by North Carolina to enforce the ruling in advance of preclearance.[8480]

On September 26, the plaintiff voluntarily dismissed the action.[8481]

Provisional Ballot Procedures in Ohio

Schering v. Blackwell (Michael H. Watson, S.D. Ohio 1:04-cv-755)

On election day 2004, a voter filed a federal action challenging a directive by Ohio's secretary of state on the handling of provisional ballots. After an informal status conference, the plaintiff decided not to pursue immediate relief.

8474. Complaint, Kindley v. Bartlett, No. 5:05-cv-177 (E.D.N.C. Mar. 15, 2005), D.E. 1; *see* Gary D. Robertson, *Election Battle Back in Court*, Charlotte Observer, Mar. 16, 2005, at 4B.

8475. Docket Sheet, *Kindley*, No. 5:05-cv-177 (E.D.N.C. Mar. 15, 2005) [hereinafter *Kindley* Docket Sheet].

8476. Motion, *id.* (Mar. 18, 2005), D.E. 3.

8477. Response, *id.* (Mar. 18, 2005), D.E. 4.

8478. *Kindley* Docket Sheet, *supra* note 8475.

8479. Opinion, *Kindley*, No. 5:05-cv-177 (E.D.N.C. Apr. 8, 2005), D.E. 16.

8480. *Id.* at 7; *see* Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination).

On June 25, 2013, the Supreme Court declined to hold section 5 unconstitutional, but the Court did hold unconstitutional the criteria for which jurisdictions require section 5 preclearance. Shelby County v. Holder, 570 U.S. 529 (2013).

8481. Notice, *Kindley*, No. 5:05-cv-177 (E.D.N.C. Sept. 28, 2005), D.E. 27.

Topic: Provisional ballots.

At 5:00 p.m. on the day of the November 2, 2004, election, a Hamilton County, Ohio, voter filed a federal action in the Southern District of Ohio's Cincinnati courthouse challenging an October 29, 2004, directive by Ohio's secretary of state on how county boards of elections should handle provisional ballots.[8482] Apparently, 155,337 provisional ballots were cast in Ohio on election day.[8483]

District Judge Michael H. Watson held an informal status conference on the following morning.[8484] At the conference, the plaintiff's attorney said that he would defer adding to the case a request for a temporary restraining order.[8485] A telephonic status conference was set for the following week.[8486] At this conference, the parties agreed that they would inform the court if any further action by the court would be necessary.[8487]

The parties stipulated dismissal on March 15, 2005.[8488]

Two years later, a pro se litigant attempted to intervene in the case to allege President Bush's orchestration of the September 11, 2001, tragedy.[8489] On February 1, 2008, Judge Watson determined that the motion re-

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8482. Complaint, Schering v. Blackwell, No. 1:04-cv-755 (S.D. Ohio Nov. 2, 2004); *see* Edward B. Foley, *The Promise and Problems of Provisional Voting*, 73 Geo. Wash. L. Rev. 1193, 1199–200 (2005) (describing the lawsuit as a placeholder demonstrating readiness to fight over the standards for evaluating provisional ballots); *see also* Lisa A. Abraham, *Provisional Ballots Still to Be Verified*, Akron Beacon J., Nov. 4, 2004, at A1; Adam Liptak, *Justice Lets Ohio Ruling on Monitors at Polls Stand*, N.Y. Times, Nov. 3, 2004, at P6; Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 Geo. Wash. L. Rev. 1206, 1232–33, 1246–49 (2005).

8483. *See* Abraham, *supra* note 8482.

8484. Minute Entry, *Schering*, No. 1:04-cv-755 (S.D. Ohio Nov. 3, 2004) [hereinafter *Schering* Minute Entry].

Tim Reagan interviewed Judge Watson for this report by telephone on June 7, 2012.

Although Judge Watson's primary chambers were in Columbus, as a recently appointed judge most of his cases at the time were Cincinnati cases. Interview with Judge Michael H. Watson, June 7, 2012.

8485. *Schering* Minute Entry, *supra* note 8484; Docket Sheet, *Schering*, No. 1:04-cv-755 (S.D. Ohio Nov. 2, 2004) [hereinafter *Schering* Docket Sheet].

8486. Notice of Hearing, *Schering*, No. 1:04-cv-755 (S.D. Ohio Nov. 9, 2004).

8487. Minute Entry, *id.* (Nov. 10, 2004); *Schering* Docket Sheet, *supra* note 8485.

8488. Stipulation, *Schering*, No. 1:04-cv-755 (S.D. Ohio Mar. 15, 2005); *see* Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 Wm. & Mary Bill Rts. J. 453, 477 (2008) ("After it became clear that Senator Kerry did not intend to challenge the result of Ohio's election the *Schering* case was dropped [footnote omitted]. But had the election been closer, *Schering* could have turned out to be the *Bush v. Gore* of 2004.").

8489. Motion to Intervene, *Schering*, No. 1:04-cv-755 (S.D. Ohio Mar. 13, 2007).

flected "the fantasies of a troubled mind" and denied the motion.[8490] On April 10, Judge Watson ordered the clerk not to accept any more filings from the would-be intervenor.[8491]

Casting Provisional Ballots in the Wrong Precinct in Florida

Florida Democratic Party v. Hood (Robert L. Hinkle, N.D. Fla. 4:04-cv-395)

> Florida's Democratic Party sought to enforce the Help America Vote Act (HAVA) by enjoining Florida from rejecting provisional ballots cast in the wrong precinct in the 2004 general election. The case was filed on September 29, and the court issued a preliminary injunction on October 21. The court ruled that HAVA does not require the counting of provisional ballots cast in the wrong precinct, but HAVA does require that the provisional ballots be provisionally accepted.
>
> *Topics:* Help America Vote Act (HAVA); provisional ballots.

On September 29, 2004, Florida's Democratic Party filed a federal complaint in the Northern District of Florida's Tallahassee courthouse seeking to enforce the Help America Vote Act (HAVA)[8492] by enjoining Florida from rejecting provisional ballots cast in the wrong precinct in the 2004 general election.[8493] With its complaint, the party filed a motion for a preliminary injunction.[8494] Judge Robert L. Hinkle held a telephonic status conference on the next day.[8495] On the third day, Judge Hinkle set an injunction hearing for October 8.[8496]

Judge Hinkle typically began emergency cases with a telephonic conference.[8497] In twenty years of private practice, he sent a lot of bills to a lot of clients, so he was aware of the expenses involved in travel for in-person

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8490. Order, *id.* (Feb. 1, 2008).

8491. Order, *id.* (Apr. 10, 2008).

8492. Pub. L. No. 107-252, 116 Stat. 1666 (2002), *as amended*, 52 U.S.C. §§ 20901–21145. *See generally* Marie Leary & Robert Timothy Reagan, The Help America Vote Act (Federal Judicial Center 2012); Symposium, *HAVA @ 10*, 12 Election L.J. 111 (2013).

8493. Complaint, Fla. Democratic Party v. Hood, No. 4:04-cv-395 (N.D. Fla. Sept. 29, 2004), D.E. 1; Fla. Democratic Party v. Hood, 342 F. Supp. 2d 1073, 1074–75 (N.D. Fla. 2004); *see* Lucy Morganjoni James, *New Suit Expands Pre-Election Battles*, St. Petersburg Times, Oct. 8, 2004, at 5B.

8494. Preliminary-Injunction Motion, *Fla. Democratic Party*, No. 4:04-cv-395 (N.D. Fla. Sept. 29, 2004), D.E. 4.

8495. Docket Sheet, *id.* (Sept. 29, 2004).

Tim Reagan interviewed Judge Hinkle for this report by telephone on October 10, 2012.

8496. Order, *Fla. Democratic Party*, No. 4:04-cv-395 (N.D. Fla. Oct. 1, 2004), D.E. 8.

8497. Interview with Judge Robert L. Hinkle, Oct. 10, 2012.

proceedings.[8498] Election cases often involve out-of-state attorneys.[8499] His goal at the status conference was to find out (1) the extent to which the parties had already communicated with each other, (2) how big an emergency the case presented, and (3) whether a prompt hearing would be necessary and whether it would require live witnesses.[8500]

On October 8, Judge Hinkle permitted a member of Florida's house of representatives and a voter to intervene in opposition to the complaint.[8501] Judge Hinkle decided that HAVA creates federal rights enforceable under 42 U.S.C. § 1983,[8502] but Judge Hinkle denied preliminary injunctive relief on the party's main argument.[8503] Florida's supreme court determined on October 18 that the requirement that provisional ballots be cast in the correct precinct did not violate Florida's constitution.[8504]

After additional telephonic conferences on October 12[8505] and 14[8506] and amicus participation by the U.S. Department of Justice,[8507] Judge Hinkle issued a preliminary injunction on October 21.[8508] He determined that the party had not shown a likely right for provisional ballots cast in the

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8498. *Id.*

8499. *Id.*

8500. *Id.*

8501. Transcript at 3–4, *Fla. Democratic Party*, No. 4:04-cv-395 (N.D. Fla. Oct. 8, 2004, filed Oct. 13, 2004), D.E. 39 [hereinafter Oct. 8, 2004, *Fla. Democratic Party* Transcript]; Minutes, *id.* (Oct. 8, 2004), D.E. 35 [hereinafter Oct. 8, 2004, *Fla. Democratic Party* Minutes]; *see* Intervention Motion, *id.* (Oct. 4, 2004), D.E. 11.

8502. Fla. Democratic Party v. Hood, 342 F. Supp. 2d 1073, 1077–78 (N.D. Fla. 2004); Oct. 8, 2004, *Fla. Democratic Party* Transcript, *supra* note 8501, at 5–8.

8503. *Fla. Democratic Party*, 342 F. Supp. 2d at 1079–81; Oct. 8, 2004, *Fla. Democratic Party* Transcript, *supra* note 8501, at 71–75; Oct. 8, 2004, *Fla. Democratic Party* Minutes, *supra* note 8501; *see* Lucy Morganjoni James, *Judge Upholds Restriction on Provisional Ballots*, St. Petersburg Times, Oct. 9, 2004, at 5B.

8504. AFL-CIO v. Hood, 885 So. 2d 373 (Fla. 2004); *see* Gary Fineout, *Ruling Backs Voting System*, Miami Herald, Oct. 19, 2004, at 1B; Alisa Ulferts, *Court Clarifies Provisional Ballot Use*, St. Petersburg Times, Oct. 19, 2004, at 4B.

8505. Transcript, *Fla. Democratic Party*, No. 4:04-cv-395 (N.D. Fla. Oct. 12, 2004, filed Nov. 9, 2004), D.E. 62; Minutes, *id.* (Oct. 12, 2004), D.E. 37.

8506. Transcript, *id.* (Oct. 14, 2004, filed Nov. 9, 2004), D.E. 61; Minutes, *id.* (Oct. 14, 2004), D.E. 46.

8507. Amicus Brief, *id.* (Oct. 19, 2004), D.E. 52; Amicus Brief, *id.* (Oct. 19, 2004), D.E. 51; Amicus Motion, *id.* (Oct. 19, 2004), D.E. 50; *see* Oct. 8, 2004, *Fla. Democratic Party* Transcript, *supra* note 8501, at 4 (denying a motion to join the U.S. Department of Justice as a party and declining the suggestion that the court be the one to invite the Department's amicus participation); Joinder Motion, *Fla. Democratic Party*, No. 4:04-cv-395 (N.D. Fla. Oct. 7, 2004), D.E. 29.

8508. *Fla. Democratic Party*, 342 F. Supp. 2d 1073.

wrong precinct to be counted, but it had shown a likely right for provisional ballots cast in the wrong precinct to be provisionally accepted by poll workers.[8509] On January 13, 2005, the party voluntarily dismissed its appeal.[8510]

Judge Hinkle converted the preliminary injunction to a permanent injunction on February 4.[8511] On September 1, he awarded the party $33,934.04 in attorney fees, expenses, and costs, reasoning that its partial injunctive success merited a 40% reimbursement.[8512]

Casting Provisional Ballots in the Wrong Precinct in Michigan

Bay County Democratic Party v. Land (1:04-cv-10257) and Michigan State Conference of NAACP Branches v. Land (1:04-cv-10267) (David M. Lawson, E.D. Mich.)

> Local branches of the Democratic Party filed a federal complaint to challenge a state directive that provisional ballots would only be counted if cast in the correct precinct. Three days later, three organizations filed a similar action in the same district, and the court consolidated the two cases. The district court denied a motion by voters to intervene as defendants, but the court permitted their participation as amici curiae. The court denied the Justice Department's motion for a short delay so that it could file an amicus brief. Three weeks after the first case was filed, the court determined that provisional ballots must be counted so long as they are cast in the correct city, village, or township. One week later, the court of appeals reversed that decision in light of a contrary holding in another case issued on the same day.
>
> *Topics:* Provisional ballots; Help America Vote Act (HAVA); 42 U.S.C. § 1983; intervention; case assignment.

Local branches of the Democratic Party filed a federal complaint on September 28, 2004, in the Eastern District of Michigan's Bay City courthouse, alleging that a directive issued by Michigan's director of elections violated

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8509. *Id.* at 1079–81; *see Judge: Provisional Ballots Cast in Wrong Precincts Don't Count*, Miami Herald, Oct. 22, 2004, at 3B; Daniel P. Tokaji, *HAVA in Court: A Summary and Analysis of Litigation*, 12 Election L.J. 203, 207 (2013).

8510. Docket Sheet, Fla. Democratic Party v. Hood, No. 04-15456 (11th Cir. Oct. 22, 2004).

8511. Order, *Fla. Democratic Party*, No. 4:04-cv-395 (N.D. Fla. Feb. 4, 2005), D.E. 74.

8512. Order, *id.* (Sept. 1, 2005), D.E. 90, 2005 WL 2137016; *see* Satisfaction of Judgment, *id.* (Sept. 26, 2005), D.E. 92; Order, *id.* (May 9, 2005), D.E. 82 (determining entitlement to attorney fees).

the Help America Vote Act (HAVA).[8513] The directive stated that provisional ballots would only be counted if they were cast in the correct precinct.[8514] With their complaint, the plaintiffs filed a motion for a preliminary injunction.[8515]

The court assigned the case to Judge David M. Lawson, who was the court's only judge in Bay City.[8516] He set a hearing on the injunction motion for fifteen days later.[8517] Judge Lawson declined to use the plaintiffs' proposed order to show cause—"a relic of the past and unnecessary, except, perhaps, in contempt proceedings"—because it improperly suggested that the defendants had the burden of persuasion.[8518]

On October 1, three organizations filed a similar action in the same district.[8519] Judge Lawson consolidated the two cases on October 5.[8520] That same day, the second set of plaintiffs filed a motion for a preliminary injunction.[8521] On the next day, five voters, four of whom were also county or municipal clerks, moved to intervene as defendants.[8522] On the day before

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8513. Complaint, Bay Cty. Democratic Party v. Land, No. 1:04-cv-10257 (E.D. Mich. Sept. 28, 2004), D.E. 1 [hereinafter *Bay Cty. Democratic Party* Complaint]; Bay Cty. Democratic Party v. Land, 347 F. Supp. 2d 404, 417 (E.D. Mich. 2004); *see* Pub. L. No. 107-252, 116 Stat. 1666 (2002), *as amended*, 52 U.S.C. §§ 20901–21145; *see also* Amy F. Bailey, *Democrats Sue Over Polling Place Issue*, Grand Rapids Press, Sept. 29, 2004, at C6. *See generally* Marie Leary & Robert Timothy Reagan, The Help America Vote Act (Federal Judicial Center 2012); Symposium, *HAVA @ 10*, 12 Election L.J. 111 (2013).

8514. Ex. 2, *Bay Cty. Democratic Party* Complaint, *supra* note 8513.

8515. Preliminary-Injunction Motion, *Bay Cty. Democratic Party*, No. 1:04-cv-10257 (E.D. Mich. Sept. 28, 2004), D.E. 4.

8516. Docket Sheet, *id.* (Sept. 28, 2004).

Tim Reagan interviewed Judge Lawson for this report by telephone on October 3, 2012.

8517. Order, *Bay Cty. Democratic Party*, No. 1:04-cv-10257 (E.D. Mich. Sept. 28, 2004), D.E. 3.

8518. *Id.* at 1–2.

8519. Complaint, Mich. State Conference of NAACP Branches v. Land, No. 1:04-cv-10267 (E.D. Mich. Oct. 1, 2004), D.E. 1; Bay Cty. Democratic Party v. Land, 347 F. Supp. 2d 404, 417 (E.D. Mich. 2004).

8520. Order, *Mich. State Conference of NAACP Branches*, No. 1:04-cv-10267 (E.D. Mich. Oct. 5, 2004), D.E. 2; Order, *Bay Cty. Democratic Party*, No. 1:04-cv-10257 (E.D. Mich. Oct. 5, 2004), D.E. 11; *Bay Cty. Democratic Party*, 347 F. Supp. 2d at 417.

8521. Preliminary-Injunction Motion, *Mich. State Conference of NAACP Branches*, No. 1:04-cv-10267 (E.D. Mich. Oct. 5, 2004), D.E. 9.

8522. Intervention Motion, *Bay Cty. Democratic Party*, No. 1:04-cv-10257 (E.D. Mich. Oct. 6, 2004), D.E. 12; *Bay Cty. Democratic Party*, 347 F. Supp. 2d at 417–18; *see also* Intervention Motion, *Bay Cty. Democratic Party*, No. 1:04-cv-10257 (E.D. Mich. Oct. 8, 2004), D.E. 20.

the hearing, Michigan moved to join the U.S. Department of Justice as either a party or an amicus curiae.[8523]

On the day of the hearing, Judge Lawson denied Michigan's October 5 motion to transfer the case to the Western District, which includes the state's capital.[8524] In cases of this type, Judge Lawson was always prepared for threshold issues: venue, standing, ripeness, mootness, and other jurisdictional issues.[8525]

Judge Lawson determined that an evidentiary hearing was necessary to address factual allegations.[8526] He often found live testimony more efficient than affidavits and counteraffidavits in resolving factual issues.[8527]

Two days after the Wednesday hearing, the Justice Department asked Judge Lawson to delay ruling on the injunction motions until after he could review the department's amicus curiae brief, which the department would file on Monday.[8528]

> The Court is always interested in the position of the United States on matters of national interest, such as is presented in this case. However, if the Court permits the *amicus* filing, in fairness it ought to allow the parties to the case an opportunity to respond. Given the need for a prompt decision, the Court finds that the request of the United States is not timely. Moreover, the Court has reviewed the filing and determines that it adds nothing to the arguments already advanced by the defendants and the other *amici*.[8529]

Judge Lawson resolved the injunction motions on Tuesday, October 19.[8530] First, he denied the five voters intervention, but he permitted their participation as amici curiae.[8531] He found that voters could enforce

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8523. Joinder Motion, *Bay Cty. Democratic Party*, No. 1:04-cv-10257 (E.D. Mich. Oct. 12, 2004), D.E. 31.

8524. Bay Cty. Democratic Party v. Land, 340 F. Supp. 2d 802 (E.D. Mich. 2004); *see Bay Cty. Democratic Party*, 347 F. Supp. 2d at 417; Transfer Motion, *Bay Cty. Democratic Party*, No. 1:04-cv-10257 (E.D. Mich. Oct. 5, 2004), D.E. 8.

8525. Interview with Judge David M. Lawson, Oct. 3, 2012.

8526. *Id.*

8527. *Id.*

8528. Amicus Order, *Bay Cty. Democratic Party*, No. 1:04-cv-10257 (E.D. Mich. Oct. 19, 2004), D.E. 50 [hereinafter *Bay Cty. Democratic Party* Amicus Order]; *see* Amicus Motion, *id.* (Oct. 18, 2004), D.E. 47.

8529. *Bay Cty. Democratic Party* Amicus Order, *supra* note 8528, at 2.

8530. Bay Cty. Democratic Party v. Land, 347 F. Supp. 2d 404 (E.D. Mich. 2004); *see State, Opponents Debate Provisional Ballot Plan*, Grand Rapids Press, Oct. 14, 2004, at B6 (reporting that the hearing lasted five hours and that the state had requested a ruling by Wednesday so it would have time to train election officials if necessary).

8531. *Bay Cty. Democratic Party*, 347 F. Supp. 2d at 438.

HAVA rights through 42 U.S.C. § 1983.[8532] He determined that HAVA guarantees that provisional ballots cast for federal offices be counted so long as they are cast in the correct city, village, or township.[8533]

On October 26, the court of appeals reversed the injunction in light of its holding that same day in an Ohio case that HAVA does not give voters the right to cast ballots in the wrong precinct.[8534]

Compliance with the Help America Vote Act for Provisional Ballots

Sandusky County Democratic Party v. Blackwell (3:04-cv-7582) and League of Women Voters of Ohio v. Blackwell (3:04-cv-7622) (James G. Carr, N.D. Ohio)

> Five weeks before the 2004 general election, Ohio's Democratic Party challenged directives by Ohio's secretary of state on provisional ballots as in violation of the Help America Vote Act (HAVA). The court of appeals agreed with the district court that the state was out of compliance, but the court of appeals agreed with the secretary that provisional ballots should be cast in the correct precincts.
>
> *Topics:* Help America Vote Act (HAVA); provisional ballots; voter identification; 42 U.S.C. § 1983; intervention; enforcing orders; presiding remotely; attorney fees.

On September 27, 2004, five weeks before the 2004 general election, the Democratic Parties of Ohio and Sandusky County filed a federal action in the Northern District of Ohio's Toledo courthouse complaining that a directive on provisional ballots by Ohio's secretary of state failed to adequately implement requirements of the Help America Vote Act (HAVA).[8535] The plaintiffs sought a preliminary injunction.[8536]

8532. *Id.* at 411, 424–27, 438.

8533. *Id.* at 434, 438; *see Provisional Ballots Must Be Counted, Federal Judge Rules*, Grand Rapids Press, Oct. 20, 2004, at C2 (reporting also that the Justice Department had opposed the injunction).

8534. Order, Mich. State Conference of NAACP Branches v. Land, Nos. 04-2307 and 04-2318 (6th Cir. Oct. 26, 2004), *filed as* Order, Bay Cty. Democratic Party v. Land, No. 1:04-cv-10257 (E.D. Mich. Nov. 15, 2004), D.E. 68; *see* Sandusky Cty. Democratic Party v. Blackwell, 387 F.3d 565 (6th Cir. 2004); *see also Court Reverses Ruling on Ballots*, Detroit News, Oct. 27, 2004, at 2; David Eggert, *Appeals Court Reverses Provisional Ballot Ruling*, Grand Rapids Press, Oct. 27, 2004, at C5.

8535. Complaint, Sandusky Cty. Democratic Party v. Blackwell, No. 3:04-cv-7582 (N.D. Ohio Sept. 27, 2004), D.E. 1; Sandusky Cty. Democratic Party v. Blackwell, 387 F.3d 565, 570 (6th Cir. 2004); *see* Pub. L. No. 107-252, 116 Stat. 1666 (2002), *as amended*, 52 U.S.C. §§ 15301–15545; *see also* William Hershey, *Suit Alleges Voter Impediments*, Dayton

Judge James G. Carr drew the case; he was on vacation at the time.[8537] Three days after the case was filed, Judge Carr held a telephone conference from Florida.[8538] Judge Carr regarded this case as a successful demonstration of presiding over a case remotely.[8539] On the day after the teleconference, the plaintiffs filed an amended complaint adding three labor organizations as plaintiffs.[8540]

One week after the case began, three voters sought to intervene as defendants to protect "a fair and orderly election process."[8541] Judge Carr granted the motion.[8542]

On October 5, ten voting-rights organizations filed another federal action in the Toledo courthouse challenging the same directive as was challenged in the first action and also challenging a directive that would require first-time voters who registered by mail to cast provisional ballots if they did not have proper identification at the polls on election day.[8543] On the following day, the plaintiffs filed a motion for a preliminary injunction.[8544] As luck would have it, Judge Carr drew this case as well.[8545] He denied a motion to consolidate the two cases.[8546]

Daily News, Sept. 28, 2004, at B1; Mark Niquette, *Suit Aimed at Ballot Rules*, Columbus Dispatch, Sept. 28, 2004, at 1C. *See generally* Marie Leary & Robert Timothy Reagan, The Help America Vote Act (Federal Judicial Center 2012); Symposium, *HAVA @ 10*, 12 Election L.J. 111 (2013).

8536. Preliminary-Injunction Motion, *Sandusky Cty. Democratic Party*, No. 3:04-cv-7582 (N.D. Ohio Oct. 27, 2004), D.E. 2.

8537. Interview with Judge James G. Carr, June 18, 2012.

Tim Reagan interviewed Judge Carr for this report by telephone.

8538. *Id.*; *see* Order, *Sandusky Cty. Democratic Party*, No. 3:04-cv-7582 (N.D. Ohio Oct. 5, 2004), D.E. 9.

8539. Interview with Judge James G. Carr, June 18, 2012.

8540. Amended Complaint, *Sandusky Cty. Democratic Party*, No. 3:04-cv-7582 (N.D. Ohio Oct. 1, 2004), D.E. 4; *see* Sandusky Cty. Democratic Party v. Blackwell, 339 F. Supp. 2d 975, 977 (N.D. Ohio 2004).

8541. Intervention Motion, *Sandusky Cty. Democratic Party*, No. 3:04-cv-7582 (N.D. Ohio Oct. 4, 2004), D.E. 8.

8542. Order, *id.* (Oct. 7, 2004), D.E. 12.

8543. Complaint, League of Women Voters of Ohio v. Blackwell, No. 3:04-cv-7622 (N.D. Ohio Oct. 5, 2004), D.E. 1; *see* Laura A. Bischoff, *Blackwell Sued Again on Vote Order*, Dayton Daily News, Oct. 6, 2004, at 3B; Scott Hiaasen, *Second Lawsuit Challenges Ohio Provisional Voting Rules*, Cleveland Plain Dealer, Oct. 6, 2004, at B3.

8544. Preliminary-Injunction Motion, *League of Women Voters of Ohio*, No. 3:04-cv-7622 (N.D. Ohio Oct. 6, 2004), D.E. 8.

8545. Docket Sheet, *id.* (Oct. 5, 2004); Interview with Judge James G. Carr, June 18, 2012.

8546. Order, *League of Women Voters of Ohio*, No. 3:04-cv-7622 (N.D. Ohio Oct. 7,

Judge Carr granted the Democratic Parties in the first case a preliminary injunction on October 14, a week and three days after the case began.[8547] Judge Carr determined that HAVA creates individual rights enforceable through 42 U.S.C. § 1983, plaintiffs have standing to enforce those rights, and the secretary's directive conflicted with HAVA.[8548] Both the secretary of state[8549] and the intervenors[8550] appealed.

While his injunction was on appeal, Judge Carr required the secretary to prepare a HAVA-compliant directive; Judge Carr determined, on October 20, that the new directive that the secretary prepared did not comply with HAVA.[8551] This was one of five orders Judge Carr issued while his injunction was on appeal;[8552] in addition, he discussed with the secretary's attorney the judge's option to enforce his orders with contempt proceedings with the possible assistance of the U.S. Marshal.[8553]

2004), D.E. 9.

8547. Sandusky Cty. Democratic Party v. Blackwell, 339 F. Supp. 2d 975 (N.D. Ohio 2004); Sandusky Cty. Democratic Party v. Blackwell, 387 F.3d 565, 571 (6th Cir. 2004); *see* William Hershey, *Judge Overturns Blackwell Directive*, Dayton Daily News, Oct. 15, 2004, at 1B; Mark Niquette, *Provisional Balloting Broadened by Judge*, Columbus Dispatch, Oct. 15, 2004, at 1A; Diane Suchetka, *U.S. Judge Rejects State's Ballot Edict*, Cleveland Plain Dealer, Oct. 15, 2004, at A1.

8548. *Sandusky Cty. Democratic Party*, 339 F. Supp. 2d at 981; *see* Sandusky Cty. Democratic Party v. Blackwell, 340 F. Supp. 2d 810 (N.D. Ohio 2004) (denying a motion to stay the injunction).

8549. Docket Sheet, Sandusky Cty. Democratic Party v. Blackwell, No. 04-4265 (6th Cir. Oct. 15, 2004); Notice of Appeal, Sandusky Cty. Democratic Party v. Blackwell, No. 3:04-cv-7582 (N.D. Ohio Oct. 14, 2004), D.E. 27; *see* Joe Hallett & Mark Niquette, *Blackwell Vows to Fight Ruling*, Columbus Dispatch, Oct. 16, 2004, at 3B.

8550. Docket Sheet, Sandusky Cty. Democratic Party v. Blackwell, No. 04-4266 (6th Cir. Oct. 15, 2004); Notice of Appeal, *Sandusky Cty. Democratic Party*, No. 3:04-cv-7582 (N.D. Ohio Oct. 14, 2004), D.E. 28.

8551. Sandusky Cty. Democratic Party v. Blackwell, 340 F. Supp. 2d 815 (N.D. Ohio 2004); *see* Scott Hiaasen & Bill Sloat, *Provisional Ballots OK'd for Now*, Cleveland Plain Dealer, Oct. 21, 2004, at B3; Mark Niquette, *Judge Blasts Blackwell*, Columbus Dispatch, Oct. 21, 2004, at 1A.

8552. *See also Sandusky Cty. Democratic Party*, 340 F. Supp. 2d 810 (2004) (denial of motions to stay the injunction during the appeal); Order, *Sandusky Cty. Democratic Party*, No. 3:04-cv-7582 (N.D. Ohio Oct. 22, 2004), D.E. 44 (ordering, to ensure full compliance with the court's prior orders, forthwith electronic service of directives on county boards of elections); Order, *id.* (Oct. 18, 2004), D.E. 39 (ordering the preparation of a HAVA-compliant directive in response to a representation by counsel during a teleconference that the secretary had not intended to prepare one); Order, *id.* (Oct. 18, 2004), D.E. 38 (providing a four-hour extension of time to comply with the injunction).

8553. Interview with Judge James G. Carr, June 18, 2012.

Also on October 20, Judge Carr approved in the second case the secretary's directive on provisional ballots for first-time voters.[8554] His injunction in the first case already resolved the other matters in the second case.[8555] The plaintiffs appealed, but the court of appeals agreed that these other matters were resolved in the first case.[8556]

On October 23, the court of appeals affirmed Judge Carr's finding in the first case that the secretary's directive violated HAVA but reversed Judge Carr's holding that "HAVA requires that a voter's provisional ballot must be counted as a valid ballot if it is cast anywhere in the county in which the voter resides, even if it is cast outside the precinct in which the voter resides."[8557] Three days later, the appellate court issued a longer opinion explaining its holding that

> ballots cast in a precinct where the voter does not reside and which would be invalid under state law for that reason are not required by HAVA to be considered legal votes.
>
> To hold otherwise would interpret Congress's reasonably clear procedural language to mean that political parties would now be authorized to marshal their supporters at the last minute from shopping centers, office buildings, or factories, and urge them to vote at whatever polling place happened to be handy, all in the effort to turn out every last vote regardless of state law and historical practice. We do not believe that Congress quietly worked such a revolution in America's voting procedures, and we will not order it.[8558]

8554. League of Women Voters v. Blackwell, 340 F. Supp. 2d 823 (N.D. Ohio 2004); *see* Daniel P. Tokaji, *HAVA in Court: A Summary and Analysis of Litigation*, 12 Election L.J. 203, 207 (2013).

8555. *League of Women Voters*, 340 F. Supp. 2d at 824–25, 831.

8556. Order, League of Women Voters v. Blackwell, No. 04-4293 (6th Cir. Oct. 27, 2004), D.E. 12, *filed as* Information, League of Women Voters of Ohio v. Blackwell, No. 3:04-cv-7622 (N.D. Ohio Nov. 2, 2004), D.E. 31.

8557. Sandusky Cty. Democratic Party v. Blackwell, 386 F.3d 815 (6th Cir. 2004); *see* John F. Hagan & Bill Sloat, *Court Won't Allow Voting in Wrong Precincts*, Cleveland Plain Dealer, Oct. 24, 2004, at A1; Mark Niquette, *Election Officials Happy Now That Provisional-Ballot Issue Is Put to Bed*, Columbus Dispatch, Oct. 25, 2004, at 1A.

8558. Sandusky Cty. Democratic Party v. Blackwell, 387 F.3d 565, 568 (6th Cir. 2004); *see* Edward B. Foley, *The Future of* Bush v. Gore*?*, 68 Ohio St. L.J. 925, 993 (2007); Edward B. Foley, *The Promise and Problems of Provisional Voting*, 73 Geo. Wash. L. Rev. 1193, 1197–98 (2005); Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 Geo. Wash. L. Rev. 1206, 1229–30, 1243–44 (2005); Daniel P. Tokaji, Election Law in a Nutshell 185–86 (2013); Tokaji, *supra* note 8554, at 207; *see also* Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 Wm. & Mary Bill Rts. J. 453, 494 (2008) (arguing that it is "especially important that

On the day of the court of appeals' second ruling, Judge Carr ordered the secretary to issue by 3:00 p.m. a directive to county election officials that complied with HAVA and the court of appeals' rulings.[8559] The order included a requirement that a notice be posted at polling places: "Your vote, including a vote cast by provisional ballot, will count ONLY if you are voting in the precinct in which you reside. If you do not know whether your correct precinct is located at this polling place, please ask a poll worker now for assistance."[8560] Judge Carr saw no such notice at his polling placed when he voted.[8561]

On December 29, Judge Carr and the parties agreed to make the injunction permanent.[8562] On March 3, 2005, Judge Carr awarded the plaintiffs $64,613.14 in attorney fees and costs.[8563] The court of appeals affirmed the award.[8564] Settlement of fees and costs in the appeal brought the case to a close on January 2, 2007.[8565]

Casting Provisional Ballots in the Right Place

Hawkins v. Blunt (Scott O. Wright and Richard E. Dorr, W.D. Mo. 2:04-cv-4177)

> The case concerned whether voters could cast provisional ballots at polling places to which they were not assigned. Claims were mooted by the state's agreeing to alter its procedures for counting provisional ballots.
>
> *Topics:* Help America Vote Act (HAVA); provisional ballots; intervention; case assignment; primary election.

Six days after Missouri's August 3, 2004, primary elections, the state's Democratic Party and three Missouri voters filed an action in the Western District of Missouri claiming that Missouri and the Kansas City Board of

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courts be generous in finding a private right of action and standing in cases alleging that rights protected by HAVA and other federal election laws have been violated"). *See generally* Daniel P. Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws*, 44 Ind. L. Rev. 113, 118, 149–50 (2010).

8559. Order, Sandusky Cty. Democratic Party v. Blackwell, No. 3:04-cv-7582 (N.D. Ohio Oct. 26, 2004), D.E. 46.

8560. *Id.* at 3.

8561. Interview with Judge James G. Carr, June 18, 2012.

8562. Stipulated Order, *Sandusky Cty. Democratic Party*, No. 3:04-cv-7582 (N.D. Ohio Dec. 29, 2004), D.E. 53.

8563. Sandusky Cty. Democratic Party v. Blackwell, 361 F. Supp. 2d 688 (N.D. Ohio 2005).

8564. Sandusky Cty. Democratic Party v. Blackwell, 191 F. App'x 397 (6th Cir. 2006).

8565. Settlement Notice, *Sandusky Cty. Democratic Party*, No. 3:04-cv-7582 (N.D. Ohio Jan. 2, 2007), D.E. 71.

Election Commissioners had violated the Help America Vote Act (HAVA)[8566] and the U.S. Constitution by not permitting the three voters, who showed up to vote at incorrect polling places, to cast provisional ballots and have them counted as if they were cast at the correct polling places.[8567] The plaintiffs also filed a motion for a temporary restraining order.[8568]

The action was filed in the district's Central Division, where the district holds court at Jefferson City, Missouri's capital.[8569] The court initially assigned the case to Judge Nanette K. Laughrey, whose primary chambers at the time were in Kansas City, where the district's Western and St. Joseph Division cases are heard,[8570] but Judge Laughrey also heard cases filed in Jefferson City.[8571]

Because Judge Laughrey was out of state when the action was filed,[8572] Judge Scott O. Wright, whose primary chambers were also in Kansas City and who also heard cases filed in Jefferson City, handled the temporary-restraining-order motion, which he granted on August 11.[8573] Ordinarily, Judge Wright would have conducted a telephonic conference before issuing such an order, but he was in trial at the time, so he issued the order on the basis of the complaint.[8574]

8566. Pub. L. No. 107-252, 116 Stat. 1666 (2002), *as amended*, 52 U.S.C. §§ 15301–15545. *See generally* Marie Leary & Robert Timothy Reagan, The Help America Vote Act (Federal Judicial Center 2012); Symposium, *HAVA @ 10*, 12 Election L.J. 111 (2013).

8567. Complaint, Hawkins v. Blunt, No. 2:04-cv-4177 (W.D. Mo. Aug. 9, 2004), D.E. 1; *see* James Goodwin, *Democrats File Suit Against Blunt*, Springfield News-Leader, Aug. 11, 2004, at 2B; Jo Mannies, *Judge May Rule Today on Provisional Balloting*, St. Louis Post-Dispatch, Aug. 11, 2004, at B1 ("According to the secretary of state's office, Kansas City accounted for the largest bloc of the 859 provisional ballots reported cast throughout Missouri on Aug. 3.").

8568. Temporary-Restraining-Order Motion, *Hawkins*, No. 2:04-cv-4177 (W.D. Mo. Aug. 9, 2004), D.E. 4.

8569. Docket Sheet, *id.* (Aug. 9, 2004); *see* W.D. Mo. R. 3.2(a).2.

8570. W.D. Mo. R. 3.2(a).1.

8571. Email from Judge Nanette K. Laughrey to Tim Reagan, May 11, 2012 (noting that at the time of this case District Judges Laughrey and Wright shared the Jefferson City docket with Magistrate Judge William A. Knox).

Judge Laughrey's primary chambers now are in Jefferson City.

8572. Email from Judge Nanette K. Laughrey to Tim Reagan, May 11, 2012.

8573. Temporary Restraining Order, *Hawkins*, No. 2:04-cv-4177 (W.D. Mo. Aug. 11, 2004), D.E. 9 [hereinafter *Hawkins* Temporary Restraining Order]; *see* Tim Hoover, *Court Blocks Final Missouri Vote Tally*, Kansas City Star, Aug. 12, 2004, at A1; Jo Mannies, *Judge Rules on Suit Over Provisional Voting*, St. Louis Post-Dispatch, Aug. 12, 2004, at C2.

8574. Email from Judge Scott O. Wright to Tim Reagan, May 2, 2012.

Judge Wright enjoined certification of the primary elections, allowed Missouri to prepare provisional sample ballots for the general election, and set an evidentiary hearing for one week later.[8575]

The evidentiary hearing was canceled[8576] because the court realized that the case had been assigned in the regular civil draw instead of the special draw for certain cases naming Missouri as a defendant:[8577]

> any civil case which names the State of Missouri or any of its agencies as a defendant if the complaint seeks a declaratory judgment that a state law, regulation or rule is unconstitutional on its face or seeks to enjoin the enforcement of a state law, rule or regulation as to all persons because it is unconstitutional on its face.[8578]

Not all judges in the district heard Jefferson City cases.[8579] In order to prevent judge shopping, the district assigned all of its active judges an equal share of some cases, regardless of where the cases were filed.[8580] Chief Judge Dean Whipple ordered the case reassigned,[8581] and it was reassigned to Judge Richard E. Dorr in Springfield.[8582]

On August 17, five voters moved to intervene to defend Missouri's practices,[8583] and Judge Dorr set a telephonic hearing on the motion for 3:00 p.m. three days later, with opposition papers due at noon on the day of the hearing.[8584] On hearing day, Judge Dorr denied intervention but

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Judge Wright died on July 11, 2016. Federal Judicial Center Biographical Directory of Article III Federal Judges [hereinafter FJC Biographical Directory], www.fjc.gov/history/judges.

8575. *Hawkins* Temporary Restraining Order, *supra* note 8573.

8576. Order, *Hawkins*, No. 2:04-cv-4177 (W.D. Mo. Aug. 16, 2004), D.E. 14.

8577. Reassignment Order, *id.* (Aug. 13, 2004), D.E. 11 [hereinafter *Hawkins* Reassignment Order].

8578. W.D. Mo. Admin. Directive 13, *attached to* Minutes, W.D. Mo. Fed. Practice Comm., Jan. 21, 2004, www.mow.uscourts.gov/sites/mow/files/FPC_2004-01-21_Minutes.pdf (noting that the directive was adopted on January 8, 2004).

8579. Interview with Judge Richard E. Dorr, May 4, 2012.

8580. *Id.*

8581. *Hawkins* Reassignment Order, *supra* note 8577.

8582. Letter to Counsel, *Hawkins*, No. 2:04-cv-4177 (W.D. Mo. Aug. 13, 2004), D.E. 12.

Tim Reagan interviewed Judge Dorr for this report by telephone on May 4, 2012. Judge Dorr died on April 24, 2013. FJC Biographical Directory, *supra* note 8574.

8583. Motion to Intervene, *Hawkins*, No. 2:04-cv-4177 (W.D. Mo. Aug. 17, 2004), D.E. 15.

8584. Order, *id.* (Aug. 19, 2004), D.E. 26; *see* Jo Mannies, *Hearing on Suit Over Ballot Law Is Set Today*, St. Louis Post-Dispatch, Aug. 20, 2004, at C2.

permitted the voters to file briefs as amici curiae.[8585] Judge Dorr also established September 8 as the deadline for completing briefing on summary-judgment motions.[8586]

On August 27, Judge Dorr dismissed the Kansas City defendants and vacated the temporary restraining order: the Kansas City Board of Election Commissioners had agreed to count the plaintiffs' votes.[8587]

On October 12, Judge Dorr granted summary judgment to the state defendants, relying in part on representations made by them as to how provisional ballots would be counted in the future.[8588]

8585. Order Denying Intervention, *Hawkins*, No. 2:04-cv-4177 (W.D. Mo. Aug. 20, 2004), D.E. 33 [hereinafter *Hawkins* Order Denying Intervention]; *see* Jo Mannies, *Suits Over Voting Procedures Echo Nation's Concern on Issue*, St. Louis Post-Dispatch, Aug. 22, 2004, at C7.

8586. *Hawkins* Order Denying Intervention, *supra* note 8585.

8587. Order, *Hawkins*, No. 2:04-cv-4177 (W.D. Mo. Aug. 27, 2004), D.E. 44; *see* Jo Mannies, *Disputed Ballots from Aug. 3 Primary Will Be Counted*, St. Louis Post-Dispatch, Aug. 28, 2004, at 15 ("The Kansas City Election Board has agreed to count all provisional ballots cast Aug. 3 by registered voters, regardless of whether the ballots were cast in the right polling place.").

8588. Summary Judgment Order, *Hawkins*, No. 2:04-cv-4177 (W.D. Mo. Oct. 12, 2004), D.E. 65; *see* Jo Mannies, *U.S. Judge Spells Out When They Are Valid*, St. Louis Post-Dispatch, Oct. 13, 2004, at B1.

17. Voting Irregularities

The purpose of civil litigation is to cure wrongs, and election errors sometimes trigger emergency litigation.

Sometimes a candidate or the candidate's supporters file a lawsuit if they are disappointed by an election's outcome.[8589] In 2012, a town-council candidate won a district-court judgment overturning his postelection disqualification for insufficient residency on uncontroverted evidence of sufficient residency.[8590] In 2006, a state senate removed a senator from office following a very close special election amid concerns that some votes were fraudulent.[8591] Amid equal-protection concerns, a district judge enjoined the naming of a replacement senator.[8592]

In a city-council race in 2014, a candidate's name was omitted from the ballot during early voting.[8593] The district judge agreed with the candidate that a special election was required; providing early voters with corrected ballots was not enough.[8594] In 2008, a case arose because a withdrawn candidate mistakenly appeared on some ballots.[8595] No remedy was required, because an analysis showed that the candidate was very unlikely to have earned enough votes on the erroneous ballots to have affected the outcome.[8596]

8589. *See, e.g.*, "Challenging Disqualified Votes in a Close Election," *infra* page 1203; "A Suit by Unsuccessful Candidates to Overturn an Election," *infra* page 1211; "Dismissing a Defective Pro Se Application for a Temporary Restraining Order," *infra* page 1230; "Unsuccessful Challenge to Close Election Defeats in New Rochelle," *infra* page 1231; *see also, e.g.*, "A Change in the Mayor's Power Does Not Require Preclearance," *infra* page 1221; "Customary Right of Appointment," *infra* page 1235.

8590. Opinion, Orgeron v. Quartzsite, No. 2:12-cv-1238 (D. Ariz. July 20, 2012), D.E. 38, *as reported in* "Challenging Post-Election Disqualification of Winning Candidates," *infra* page 1213.

8591. *See* "A Suit to Prevent a Legislature from Voiding a Close Election," *infra* page 1224.

8592. Preliminary Injunction, Ford v. Wilder, No. 2:06-cv-2241 (W.D. Tenn. filed May 30, 2006), D.E. 17.

8593. *See* "Remedy for Leaving a Candidate Off of the Ballot," *infra* page 1204.

8594. Temporary Restraining Order, Krieger v. Peoria, No. 2:14-cv-1762 (D. Ariz. Aug. 22, 2014), D.E. 39, 2014 WL 4187500.

8595. *See* "Remedy for a Ballot Printing Error," *infra* page 1223.

8596. Bennett v. Mollis, 590 F. Supp. 2d 273, 275 (D.R.I. 2008).

A 2020 case involved the issuing of corrected ballots to mail-in voters and the question of how to count the votes of voters who returned only the incorrect ballots: a consent order stated that votes would be counted for any offices for which the voters were eligible to vote.[8597]

A 2010 case removed to federal court in Georgia arose from a ballot's incorrectly referring to offices as posts instead of districts.[8598] The county commission had been changed from an at-large chair in post 1 and two other at-large members in posts 2 and 3 to an at-large chair and four other members elected from districts 1 through 4. Referring to the district 1 candidate as a candidate for post 1 erroneously suggested that the office was for the position of chair. The federal judge decided that the case was a state matter.[8599]

For 2003 elections in New York, one voting machine malfunctioned for one choice on the ballot; each vote overwrote the previous vote instead of adding to it.[8600] Although a candidate presented evidence of more votes lost at that machine than the number that he trailed his challenger overall, the court of appeals determined that rather than relief from the federal courts he should have relied on a state quo warranto action.[8601]

A writ of quo warranto is "used to inquire into the authority by which a public office is held or a franchise is claimed."[8602] A district judge determined that such a state-court writ was the appropriate avenue of relief in another New York case, one in which the claim was that the victor did not live in the state-senate district.[8603]

Which party would control Virginia's house of delegates in 2018 depended in large part on how a single ambiguous ballot would be counted, but federal emergency litigation concerned a few score ballots allegedly

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8597. Consent Order, Parnell v. Allegheny Cty. Bd. of Elections, No. 2:20-cv-1570 (W.D. Pa. Oct. 26, 2020), D.E. 57, 2020 WL 6276845, *as reported in* "Poll Watchers and Substitute Ballots," *infra* page 1171.

8598. *See* "Ballot Errors for Local Election," *infra* page 1220.

8599. Remand Order, Caudell v. Thomas, No. 2:10-cv-217 (N.D. Ga. Oct. 27, 2010), D.E. 4.

8600. *See* "Incorrect Election Results Because of a Malfunctioning Voting Machine," *infra* page 1232.

8601. Shannon v. Jacobowitz, 394 F.3d 90 (2d Cir. 2005).

8602. Black's Law Dictionary 1447 (10th ed. 2014).

8603. Opinion, Harris v. Diaz, No. 1:04-cv-9124 (S.D.N.Y. Dec. 14, 2004), D.E. 13, 2004 WL 2912888, *as reported in* "Challenging a Victor's Residence Qualification," *infra* page 1229.

either delivered late because of a postal error or provided to the wrong voters.[8604] Federal judges did not find a showing of entitlement to relief.[8605]

A factor in 2010's federal senate race in Alaska was litigation over voters' spelling errors.[8606] A federal judge decided that state courts should decide which spellings of Lisa Murkowski should count, but he gave the state courts a deadline.[8607]

Primary elections provide additional opportunities for irregularities and controversies. In a 2002 case, a complaint alleged that members of one political party were improperly permitted to vote in the other party's primary election, but after a hearing the plaintiffs decided to pursue relief in state court.[8608] In a 2014 federal senate election in Mississippi, a lawsuit alleged improper voting in a runoff primary election by voters who participated in the other party's initial primary election.[8609] The complaint sought voter information; but by the time of decision, the judge determined that election officials had disclosed to the plaintiffs all the information that they were required to disclose.[8610]

In 2017, complex emergency litigation arose from a presidential commission that sought extensive voter information from all states—ostensibly to develop anti-fraud policies—but shortly after litigation began, the commission was dissolved.[8611]

The presidential elections of 2000 and 2016 resulted in Electoral College victors who did not receive the most votes from individual voters, and unsuccessful lawsuits sought emergency adjustments to Electoral College rules.[8612] A pro se challenge to winner-take-all Electoral College rules in most states following the 2004 election also was unsuccessful.[8613] A 2012

8604. *See* "Litigating a Close Election," *infra* page 1173.

8605. Lecky v. Va. State Bd. of Elections, 285 F. Supp. 3d 908 (E.D. Va. 2018); Transcript at 4–5, Joshua Cole for Delegate v. Va. State Bd. of Elections, No. 1:17-cv-1295 (E.D. Va. Nov. 17, 2017, filed Dec. 5, 2017), D.E. 26.

8606. *See* "Write-In Spellings," *infra* page 1214.

8607. Order, Miller v. Campbell, No. 3:10-cv-252 (D. Alaska Nov. 19, 2010), D.E. 39, 2010 WL 5071599; *see* Miller v. Treadwell, 736 F. Supp. 2d 1240 (D. Alaska 2010).

8608. *See* "Crossover Votes," *infra* page 1234.

8609. *See* "Seeking Voter Records to Challenge Crossover Voting," *infra* page 1206.

8610. True the Vote v. Hosemann, 43 F. Supp. 3d 693 (S.D. Miss. 2014).

8611. *See* "The Presidential Advisory Commission on Election Integrity," *infra* page 1178.

8612. *See* "Does the Electoral College Dilute Votes?," *infra* page 1191; "Faithless Electors," *infra* page 1195; "Unsuccessful Attempt to Block Electoral College Votes," *infra* page 1238.

8613. Order, Gordon v. Cheney, No. 1:05-cv-6 (D.D.C. Jan. 6, 2005), D.E. 4, *as reported in* "Winner Take All in the Electoral College," *infra* page 1228.

challenge to President Obama's eligibility to be President was unsuccessful as well.[8614]

A 2020 suit that sought an order granting the Vice President discretion in counting electoral votes was unsuccessful for lack of standing, and it resulted in a call for attorney discipline.[8615] Other litigation challenging the apparent winner of the 2020 presidential election also was largely unsuccessful[8616] and sometimes led to attorney discipline.[8617]

Unsuccessful Effort to Decertify Georgia's 2020 Presidential Election Results a Few Days Before Congressional Certification

Trump v. Kemp (Mark H. Cohen, N.D. Ga. 1:20-cv-5310)

> About an hour before New Year's Day, six days before Congress was to certify President Biden's Electoral College victory in the 2020 presidential election, the defeated incumbent filed a federal complaint in the Northern District of Georgia seeking to have Georgia's presidential election results decertified. The district judge denied the plaintiff immediate relief at a January 5, 2021, videoconference hearing.

8614. Opinion, Grinols v. Electoral Coll., No. 2:12-cv-2997 (E.D. Cal. Jan. 16, 2013), D.E. 52, 2013 WL 211135, *as reported in* "The Legitimacy of President Obama's Reelection," *infra* page 1209.

8615. Gohmert v. Pence, 832 F. App'x 349 (5th Cir.), *aff'g* 510 F. Supp. 3d 435 (E.D. Tex. 2021), *as reported in* "No Standing to Compel the Vice President to Exercise Discretion in Confirming Electoral College Results," *infra* page 1150.

Case studies in which the issue of attorney discipline arose have "attorney discipline" among their case-study topics.

8616. *See, e.g.*, "Unsuccessful Effort to Decertify Georgia's 2020 Presidential Election Results a Few Days Before Congressional Certification," *infra* page 1148; "Denied Temporary Restraining Order Prohibiting Destruction of Election Evidence Without a Complaint or Evidence," *infra* page 1154; "Unsuccessful Efforts to Enjoin Certification of the 2020 Presidential Election Results in Wisconsin," *infra* page 1155; "Unsuccessful Suit to Overturn Arizona's 2020 Presidential Election Results," *infra* page 1161; "Abandoned Suit to Exclude Some Counties' Presidential Votes Because of Some Alleged Irregularities," *infra* page 1163; "Withdrawn Efforts to Enjoin Certification of 2020 Presidential Election Results in Michigan," *infra* page 1163; "Mediated Agreement on Ballot-Counting Observers," *infra* page 1170.

8617. *See, e.g.*, "Unsuccessful Suit to Require State Legislatures to Certify Presidential Election Results," *infra* page 1151; "Attorneys Sanctioned for Filing a Suit to Overturn 2020 Presidential Election Results Without a Legal or Factual Foundation," *infra* page 1159; "No Injunction Against Certification of Pennsylvania's 2020 Presidential Election Results," *infra* page 1167.

Topics: Enjoining certification; laches; matters for state courts; Electoral College.

At 11:03 p.m. on Thursday, December 31, 2020, President Trump filed a federal complaint in the Northern District of Georgia against Georgia's governor and its secretary of state seeking a court order decertifying the President's reelection defeat in Georgia.[8618] The secretary of state had certified the results of the presidential election in Georgia on November 20, and the governor had certified Georgia's slate of presidential electors on November 21.[8619]

With his complaint, the President filed a motion for expedited relief.[8620] On Monday, the court assigned the case to Judge Mark H. Cohen,[8621] who ordered a response to the motion filed that evening.[8622] He set the case for a videoconference hearing on Tuesday morning.[8623]

Judge Cohen began the hearing with an announcement that public audio streaming of the proceeding had not been consented to by the plaintiff's attorney.[8624] Judge Cohen ended the hearing by denying the President immediate relief.[8625] Judge Cohen issued a published opinion that day.[8626]

Judge Cohen declined to permit the President's "hijacking a pending state election contest case under any circumstances, and certainly not when [the plaintiff was not pursuing it diligently]."[8627] Nor had the plaintiff's claims probable merit.[8628]

8618. Complaint, Trump v. Kemp, No. 1:20-cv-5310 (N.D. Ga. Dec. 31, 2020), D.E. 1; Scheduling Order at 1, *id.* (Jan. 4, 2021), D.E. 8 [hereinafter *Trump* Scheduling Order].

8619. Trump v. Kemp, 511 F. Supp. 3d 1325, 1329 (N.D. Ga. 2021).

8620. Motion, *Trump*, No. 1:20-cv-5310 (N.D. Ga. Dec. 31, 2020), D.E. 2.

8621. Docket Sheet, *id.* (Dec. 31, 2020) [hereinafter *Trump* Docket Sheet].

8622. *Trump* Scheduling Order, *supra* note 8618.

> Although Plaintiff's counsel could have requested through this Court's ECF filing system an immediate hearing over this past holiday weekend, and obtained a hearing before the duty district judge, counsel did not do so. Consequently, this Court was not informed of these filings until this morning at 9:38 a.m. when the case was assigned to the undersigned.

Id. at 2.

8623. *Id.* at 3.

8624. Transcript at 4, *Trump*, No. 1:20-cv-5310 (N.D. Ga. Jan. 5, 2020, filed Jan. 5, 2021), D.E. 19.

8625. *Id.* at 55–56; Minutes, *id.* (Jan. 5, 2021), D.E. 16; *see* Mark Niesse, *Judge Denies Trump's Effort to Decertify Georgia Results*, Atlanta J.-Const., Jan. 6, 2021, at 12A.

8626. Trump v. Kemp, 511 F. Supp. 3d 1325 (N.D. Ga. 2021).

8627. *Id.* at 1335.

8628. *Id.* at 1336–38.

Two days later, a day after congressional certification of President Biden's victory,[8629] the plaintiff filed a notice of voluntary dismissal "due to an out of court settlement agreement."[8630] The defendants acceded to dismissal, but characterized the reference to a settlement as "demonstrably false."[8631] The court terminated the case on the following day.[8632]

No Standing to Compel the Vice President to Exercise Discretion in Confirming Electoral College Results

Gohmert v. Pence (Jeremy D. Kernodle, E.D. Tex. 6:20-cv-660)

> A district judge and the court of appeals determined that plaintiffs did not have standing to seek a court order that the Vice President exercise discretion in presiding over the confirmation of Electoral College votes.
>
> *Topics:* Electoral College; intervention; attorney discipline.

In a federal action filed in the Eastern District of Texas on December 27, 2020, "Plaintiffs include the United States Representative for Texas' First Congressional District and the entire slate of Republican Presidential Electors for the State of Arizona."[8633] The plaintiffs asked the court to declare that the defendant Vice President Pence "in his capacity as President of Senate and Presiding Officer of the January 6, 2021 Joint Session of Congress, is subject solely to the requirements of the Twelfth Amendment and may exercise the exclusive authority and sole discretion in determining which electoral votes to count for a given State."[8634] On the following day, the plaintiffs filed an emergency motion for an expedited declaratory judgment and emergency injunctive relief.[8635] On the case's third day, the

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8629. *See* Kristina Peterson & Natalie Andrews, *Mob Storms Capitol—Biden Certification Delayed*, Wall St. J., Jan. 7, 2021, at A1.

8630. Notice, *Trump*, No. 1:20-cv-5310 (N.D. Ga. Jan. 7, 2021), D.E. 22.

8631. Notice Response, *id.* (Jan. 7, 2021), D.E. 23.

8632. *Trump* Docket Sheet, *supra* note 8621.

8633. Complaint at 2, Gohmert v. Pence, No. 6:20-cv-660 (E.D. Tex. Dec. 27, 2020), D.E. 1 [hereinafter *Gohmert* Complaint]; Gohmert v. Pence, 510 F. Supp. 3d 435, 438–39 (E.D. Tex. 2021); *see* Erik Larson, *Gohmert Sues Pence Over Electors*, Houston Chron., Dec. 29, 2020, at A9; Elizabeth Thompson, *Gohmert Targets Electors*, Dallas Morning News, Dec. 29, 2020, at B1. *See generally* Rosalind S. Helderman & John Wagner, *Pence Snubs GOP Effort to Let Him Alter Results*, Wash. Post, Jan. 1, 2021, at A1.

8634. *Gohmert* Complaint, *supra* note 8633, at 25–26.

8635. Motion, *Gohmert*, No. 6:20-cv-660 (E.D. Tex. Dec. 28, 2020), D.E. 2; *Gohmert*, 510 F. Supp. 3d at 439.

plaintiffs filed a motion to shorten time for response to their earlier motion.[8636]

Judge Jeremy D. Kernodle ordered briefing on the injunction motion completed by January 1, 2021,[8637] on which day he dismissed the case for lack of standing.[8638] The Vice President's exercise of discretion would not necessarily provide the plaintiffs with relief from their alleged harms.[8639] The court of appeals affirmed Judge Kernodle's dismissal on the following day.[8640]

Unsuccessful Suit to Require State Legislatures to Certify Presidential Election Results

Wisconsin Voters Alliance v. Pence (James E. Boasberg, D.D.C. 1:20-cv-3791)

> A district judge denied relief in a federal suit filed in the district court for the District of Columbia seeking an order requiring state legislatures in five states to certify presidential election results. In addition to finding no merit to the complaint, the judge faulted the plaintiffs for naming as defendants officials in the five states over whom the court could not have personal jurisdiction. The judge also scolded the attorney for making no effort to serve the defendants, and the judge referred the plaintiffs' attorney for discipline.
>
> *Topics:* Electoral College; enjoining certification; attorney discipline; election errors; laches.

A federal complaint filed in the district court for the District of Columbia on December 22, 2020, sought a judicial order requiring state legislatures to certify the 2020 presidential election results for each state.[8641] The plain-

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8636. Motion, *Gohmert*, No. 6:20-cv-660 (E.D. Tex. Dec. 29, 2020), D.E. 7.

8637. Order, *id.* (Dec. 29, 2020), D.E. 12.

8638. *Gohmert*, 510 F. Supp. 3d 435; *see* Devlin Barrett, *Judge Rejects Gohmert's Election Suit Against Pence*, Wash. Post, Jan. 2, 2021, at A1; Catie Edmondson & Maggie Haberman, *Suit That Aimed to Reject Biden Electoral Votes Is Dismissed*, N.Y. Times, Jan. 2, 2021, at A20.

8639. *Gohmert*, 510 F. Supp. 3d at 443.

8640. Gohmert v. Pence, 832 F. App'x 349 (5th Cir. 2021).

> A national lawyers group on Monday called for professional licensing bodies to investigate East Texas congressman Louie Gohmert and his attorneys for what it called a "self-evident breach" of ethics rules for lawyers when they sued unsuccessfully last week to try to force Vice President Mike Pence to overturn the results of the Nov. 3 presidential election.

Robert T. Garrett, *Gohmert Faces Suit Over Ethics*, Dallas Morning News, Jan. 5, 2021, at A6.

8641. Complaint, Wis. Voters Alliance v. Pence, No. 1:20-cv-3791 (D.D.C. Dec. 22,

tiffs were five organizations—one each in Arizona, Georgia, Michigan, Pennsylvania, and Wisconsin—and eighteen individuals, including ten voters in the five states and eight office holders in four of the states.[8642] The defendants were the Vice President, the two houses of Congress, the Electoral College, and the governor and presiding officers for the two legislative houses of each of the five states.[8643]

The complaint recited previous litigation in the Supreme Court:

> **F. In 2020, Texas sued Pennsylvania, Michigan, Wisconsin and Georgia in the U.S. Supreme Court to adjudicate election irregularities and improprieties.**
>
> 83. On December 7, 2020, Texas filed an original action in the U.S. Supreme Court, Case No. 20O155, against Pennsylvania, Michigan, Wisconsin and Georgia for election irregularities and improprieties. On December 9, Missouri and 16 other states filed a motion for leave to file an amicus curiae brief in support of Texas. On December 10, U.S. Representative Mike Johnson and 105 other members submitted a motion for leave to file amicus brief in support of Texas. On December 11, the Supreme Court dismissed the original action in a text order:
>
>> The State of Texas's motion for leave to file a bill of complaint is denied for lack of standing under Article III of the Constitution. Texas has not demonstrated a judicially cognizable interest in the manner in which another State conducts its elections.[8644]

The proposed bill of complaint sought an order nullifying Electoral College appointments based on presidential election results in Georgia, Michigan, Pennsylvania, and Wisconsin.[8645]

With their district-court complaint, the plaintiffs filed a motion for a preliminary injunction.[8646]

2020), D.E. 1 [hereinafter *Wis. Voters Alliance* Complaint]; Wis. Voters Alliance v. Harris, 28 F.4th 1282, 1283 (D.C. Cir. 2022).

8642. *Wis. Voters Alliance* Complaint, *supra* note 8641; Wis. Voters Alliance v. Pence, 514 F. Supp. 3d 117, 119 (D.D.C. 2021).

8643. *Wis. Voters Alliance* Complaint, *supra* note 8641; *Wis. Voters Alliance*, 514 F. Supp. 3d at 119.

8644. *Wis. Voters Alliance* Complaint, *supra* note 8641, at 32 (quoting Texas v. Pennsylvania, 593 U.S. ___, 141 S. Ct. 1230 (2020)).

8645. Proposed Bill of Complaint at 39, No. 20O155 (U.S. Dec. 7, 2020), www.supremecourt.gov/DocketPDF/22/22O155/162953/20201207234611533_TX-v-State-Motion-2020-12-07%20FINAL.pdf.

8646. Preliminary-Injunction Motion, *Wis. Voters Alliance*, No. 1:20-cv-3791 (D.D.C. Dec. 22, 2020), D.E. 2; *Wis. Voters Alliance*, 28 F.4th at 1283.

On January 4, 2021, Judge James E. Boasberg denied immediate relief: "the suit rests on a fundamental and obvious misreading of the Constitution. It would be risible were its target not so grave: the undermining of a democratic election for President of the United States."[8647] The plaintiffs' "central contention is flat-out wrong."[8648]

Judge Boasberg scolded the plaintiffs for procedural improprieties:

> In order to provide an equitable briefing and hearing schedule on a very tight timetable, this Court immediately instructed Plaintiffs to file proofs of service on Defendants so that they could proceed on their preliminary-injunction Motion. Twelve days later, Plaintiffs have still not provided proof of notice to any Defendant, let alone filed a single proof of service or explained their inability to do so.[8649]

And he scolded the plaintiffs for naming as defendants persons over whom the court clearly had no personal jurisdiction: "Plaintiffs cannot simply sue anyone they wish here in the District of Columbia. . . . [T]hey never explain how a court in this city can subject to its jurisdiction, say, the Majority Leader of the Wisconsin State Senate."[8650]

Judge Boasberg found

> it difficult to believe that the suit is meant seriously. Courts are not instruments through which parties engage in such gamesmanship or symbolic political gestures. As a result, at the conclusion of this litigation, the Court will determine whether to issue an order to show cause why this matter should not be referred to its Committee on Grievances for potential discipline of Plaintiffs' counsel.[8651]

On January 7, the day that Congress certified Joe Biden the winner of the presidential election, the plaintiffs voluntarily dismissed their case.[8652] Somewhat more than one month later, Judge Boasberg concluded that disciplinary referral was appropriate.[8653] Because the referral was not a final

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8647. *Wis. Voters Alliance*, 514 F. Supp. 3d at 119.

8648. *Id.* at 120.

8649. *Id.* at 119 (citation omitted); *see* Docket Sheet, *Wis. Voters Alliance*, No. 1:20-cv-3791 (D.D.C. Dec. 22, 2020) (minute order, Dec. 23, 2020).

8650. *Wis. Voters Alliance*, 514 F. Supp. 3d at 120.

8651. *Id.* at 121–22.

8652. Notice, *Wis. Voters Alliance*, No. 1:20-cv-3791 (D.D.C. Jan. 7, 2021), D.E. 16; Wis. Voters Alliance v. Harris, 28 F.4th 1282, 1283 (D.C. Cir. 2022).

8653. Opinion, *Wis. Voters Alliance*, No. 1:20-cv-3791 (D.D.C. Feb. 19, 2021), D.E. 23, 2021 WL 686359; *see* David Wickert, *Attorney in Ga. Election Suit May Face Discipline*, Atlanta J.-Const., Feb. 24, 2021, at 7A.

order, the court of appeals determined that it did not have jurisdiction over counsel's attempted appeal.[8654]

Denied Temporary Restraining Order Prohibiting Destruction of Election Evidence Without a Complaint or Evidence

Leaf v. Whitmer (Robert J. Jonker, W.D. Mich. 1:20-cv-1169)

> A district judge denied an application for a temporary restraining order against Michigan election officials' destruction of election evidence after the 2020 general election. On the one hand, it was not clear that a valid case had been filed, because there was no complaint. On the other hand, the application asked the court to make speculative inferences without foundations.
>
> *Topics:* Election errors; absentee ballots.

In the Western District of Michigan on December 6, 2020, seven Republican-nominated 2020 presidential electors for Michigan and Barry County's sheriff filed an application for a temporary restraining order requiring Michigan's election officials not to "destroy or delete . . . election data, instruments, machines, and materials."[8655] The plaintiffs filed two additional slightly altered copies of their motion on the same and next days.[8656] On December 7, the court filed a notice that the case had been assigned to Judge Robert J. Jonker and the filing fee was still due.[8657]

Judge Jonker denied the plaintiffs relief on the case's second day: "For one thing, it is not clear to the Court whether Plaintiffs have even commenced an action" because the record did not include a complaint.[8658] In addition,

> Plaintiffs' Applications invite the Court to make speculative leaps towards a hazy and nebulous inference that there has been numerous instances of election fraud and that Defendants are destroying the evidence. There is simply nothing of record to infer as much, much less conclude that irreparable injury will occur before the defendants can be heard.[8659]

8654. *Wis. Voters Alliance*, 28 F.4th at 1283.

8655. Temporary-Restraining-Order Motion at 10, Leaf v. Whitmer, No 1:20-cv-1169 (W.D. Mich. Dec. 6, 2020), D.E. 1.

8656. Temporary-Restraining-Order Motions, *id.* (Dec. 6 and 7, 2020), D.E. 2, 3.

8657. Notice, *id.* (Dec. 7, 2020), D.E. 4.

8658. Opinion at 2, *id.* (Dec. 7, 2020), D.E. 5, 2020 WL 12698016.

8659. *Id.* at 2–3; *see* Dave Boucher, Paul Egan & Clara Hendrickson, *Courts Reject Claims of Fraud, Misconduct in Legal Challenges*, Detroit Free Press, Dec. 13, 2020, at A11; Paul Egan, *Federal Judge Rips Court Filing from Sheriff*, Detroit Free Press, Dec. 9,

Judge Jonker issued an order on January 22, 2021, that the plaintiffs show cause why the matter should not be dismissed for failure to prosecute it,[8660] and the plaintiffs filed a notice of voluntary dismissal on February 6.[8661]

Unsuccessful Efforts to Enjoin Certification of the 2020 Presidential Election Results in Wisconsin

Feehan v. Wisconsin Elections Commission (Pamela Pepper, 2:20-cv-1771) and Trump v. Wisconsin Elections Commission (Brett H. Ludwig, 2:20-cv-1785) (E.D. Wis.)

> About four weeks after the 2020 presidential election, two federal complaints in the Eastern District of Wisconsin sought to enjoin certification of Wisconsin's results because of alleged improprieties in the operation of the election. Two district judges dismissed the complaints as outside the federal court's jurisdiction.
>
> *Topics:* Enjoining certification; Electoral College; case assignment; intervention; attorney fees; laches.

Two district judges in the Eastern District of Wisconsin denied suits to decertify the results of the 2020 presidential election in Wisconsin.

First Case

According to a federal complaint filed on Tuesday, December 1, 2020, in the Eastern District of Wisconsin, "This civil action brings to light a massive election fraud . . . ."[8662] A prospective member of the Electoral College and an apparently defeated congressional candidate filed the complaint against Wisconsin election officials.[8663] The complaint alleged ballot stuffing using election software and hardware provided by a company founded by foreign oligarchs and dictators.[8664] The plaintiffs sought decertification of Wisconsin's presidential election.[8665] On the same day, the plaintiffs filed a motion for declaratory, emergency, and permanent injunctive relief.[8666]

2020, at A6; Craig Mauger, *Michigan Sheriff's Conspiracy-Laden Election Suit Stalls*, Detroit News, Dec. 9, 2020, at A5.

8660. Order, *Leaf*, No. 1:20-cv-1169 (W.D. Mich. Jan. 22, 2021), D.E. 6.

8661. Dismissal Notice, *id.* (Feb. 6, 2021), D.E. 8.

8662. Complaint at 1, Feehan v. Wis. Elections Comm'n, No. 2:20-cv-1771 (E.D. Wis. Dec. 1, 2020), D.E. 1 [hereinafter *Feehan* Complaint].

8663. *Id.* at 1–9; Feehan v. Wis. Elections Comm'n, 506 F. Supp. 3d 596, 599–601 (E.D. Wis. 2020).

8664. *Feehan* Complaint, *supra* note 8662, at 1–3.

8665. *Id.* at 47; *Feehan*, 506 F. Supp. 3d at 601–02.

8666. Corrected Motion, *Feehan*, No. 2:20-cv-1771 (E.D. Wis. Dec. 1, 2020), D.E. 6;

In a December 2 order, Judge Pamela Pepper enumerated defects in the plaintiffs' filings, noted that they had neither proposed a briefing schedule nor requested a hearing, and said that she would await the defendants' opposition brief unless the plaintiffs contacted chambers with defendants on the line to request a telephonic hearing.[8667] On December 3, the prospective Electoral College elector filed an amended complaint as the sole plaintiff,[8668] and he filed with it an amended injunction motion.[8669]

On December 3, Judge Pepper denied the governor's motion to reassign a December 2 case seeking similar relief to Judge Pepper, because the local rules "[do] *not* provide a mechanism for any party other than the plaintiff to file a motion asking for reassignment of cases based on the party's view that cases are related."[8670]

On December 4, Judge Pepper ordered briefing on the plaintiff's injunction motion completed by December 8.[8671] On December 7, she set the case for a telephonic status conference on December 8, posting contact information in the docket sheet.[8672] She denied motions by the Democratic National Committee[8673] and a voter[8674] to intervene in the case, but granted them permission to participate as amici curiae.[8675]

Judge Pepper dismissed the action on December 9.[8676] "Does a federal court have the jurisdiction and authority to grant the relief this lawsuit

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Feehan, 506 F. Supp. 3d at 602.

8667. Order, *Feehan*, No. 2:20-cv-1771 (E.D. Wis. Dec. 2, 2020), D.E. 7.

8668. Amended Complaint, *id.* (Dec. 3, 2020), D.E. 9; *Feehan*, 506 F. Supp. 3d at 603; *see* Nuha Dolby, *Where Wisconsin Lawsuits on Behalf of Trump Stand*, Milwaukee J. Sentinel, Dec. 9, 2020, at A4 (reporting that the dropped plaintiff never agreed to be a party in the case).

8669. Amended Motion, *Feehan*, No. 2:20-cv-1771 (E.D. Wis. Dec. 3, 2020), D.E. 10; *Feehan*, 506 F. Supp. 3d at 603.

8670. Order at 3–4, *Feehan*, No. 2:20-cv-1771 (E.D. Wis. Dec. 3, 2020), D.E. 19, 2020 WL 7079256; *see* Motion, *id.* (Dec. 3, 2020), D.E. 16.

8671. Order, *id.* (Dec. 4, 2020), D.E. 29, 2020 WL 7121803; *Feehan*, 506 F. Supp. 3d at 603.

8672. Docket Sheet, *Feehan*, No. 2:20-cv-1771 (E.D. Wis. Dec. 1, 2020); *see* Audio Recording, *id.* (Dec. 8, 2020), D.E. 70; *see also Feehan*, 506 F. Supp. 3d at 603.

8673. Motions, *Feehan*, No. 2:20-cv-1771 (E.D. Wis. Dec. 4 and 5, 2020), D.E. 22, 40.

8674. Motions, *id.* (Dec. 3 and 4, 2020), D.E. 14, 33

8675. Feehan v. Wis. Elections Comm'n, 506 F. Supp. 3d 640 (E.D. Wis. 2020) (voter); Opinion, *Feehan*, No. 2:20-cv-1771 (E.D. Wis. Dec. 6, 2020), D.E. 41, 2020 WL 7182950 (Democratic National Committee); *Feehan*, 506 F. Supp. 3d at 603.

8676. *Feehan*, 506 F. Supp. 3d 596; *see* Patrick Marley, *Judge Says Trump Is Asking for Remarkable Court Ruling*, Milwaukee J. Sentinel, Dec. 11, 2020, at A4; Riley Vetterkind, *Time Running Out on Trump*, Wis. State J., Dec. 11, 2020, at A1.

seeks? The answer is no. Federal judges do not appoint the president in this country. One wonders why the plaintiffs came to federal court and asked a federal judge to do so."[8677]

On February 1, 2021, the court of appeals vacated Judge Pepper's decision and ordered the case dismissed as moot.[8678] On August 24, 2022, Judge Pepper denied the governor's March 31, 2021, motion for attorney fees and other sanctions, because the court no longer had jurisdiction over the case.[8679]

The court of appeals affirmed the denial of a sanction on August 2, 2023:

> Although we conclude that the district court did have jurisdiction to award sanctions under its inherent authority, the district court made clear that it would not have treated this as the sort of rare case where post-judgment sanctions imposed under inherent authority would have been needed to protect the court's institutional integrity.[8680]

Second Case

The case that the governor wanted reassigned to Judge Pepper was filed in the Eastern District on December 2, 2020, by President Trump against state and local election officials.[8681] The complaint alleged,

> A striking characteristic of the November 3, 2020, election in Wisconsin is that it involved a number of *ultra vires* acts by Wisconsin public officials charged with administering the election that were inconsistent with state law and the directions of the Wisconsin Legislature as set forth in the Wisconsin Election Code.[8682]

8677. *Feehan*, 506 F. Supp. 3d at 600 (paragraph break omitted).

8678. Order, Feehan v. Wis. Elections Comm'n, No. 20-3448 (7th Cir. Feb. 1, 2021), D.E. 16.

8679. Opinion, *Feehan*, No. 2:20-cv-1771 (E.D. Wis. Aug. 24, 2022), D.E. 113, 2022 WL 3647882; *see* Motion, *id.* (Mar. 31, 2021), D.E. 97; *see also* Patrick Marley, *Evers Seeks $250,000 from Trump, Official*, Milwaukee J. Sentinel, Apr. 2, 2021, at A3; Riley Vetterkind, *Evers Wants Attorneys Fees*, Wis. State J., Apr. 2, 2021, at A3.

8680. Opinion at 2, Feehan v. Evers, No. 22-2704 (7th Cir. Aug. 2, 2023), D.E. 54, 2023 WL 4928520.

8681. Complaint, Trump v. Wis. Elections Comm'n, No. 2:20-cv-1785 (E.D. Wis. Dec. 2, 2020), D.E. 1 [hereinafter *Trump* Complaint]; Trump v. Wis. Elections Comm'n, 983 F.3d 919, 923 (7th Cir. 2020); *see* Molly Beck, *Trump Sues to Have State Legislature Award Electoral Votes*, Milwaukee J. Sentinel, Dec. 4, 2020, at A11; Dolby, *supra* note 8668.

8682. *Trump* Complaint, *supra* note 8681, at 4.

Among the remedies sought was a remand of the issue to Wisconsin's legislature.[8683] With his complaint, the President filed a motion for expedited declaratory and injunctive relief.[8684]

At a December 4 telephonic status conference, Judge Brett H. Ludwig set the case for a final videoconference hearing on December 10.[8685] Members of the public could listen to live audio of the conference on the court's YouTube channel.[8686] On December 8, he granted intervention motions by the NAACP and the Democratic National Committee.[8687]

Judge Ludwig dismissed the action on December 12.[8688]

> This is an *extraordinary* case. A sitting president who did not prevail in his bid for reelection has asked for federal court help in setting aside the popular vote based on disputed issues of election administration, issues he plainly could have raised before the vote occurred. This Court has allowed plaintiff the chance to make his case and he has lost on the merits.[8689]

The court of appeals affirmed the dismissal on December 24: "Wisconsin lawfully appointed its electors in the manner directed by its Legislature."[8690] The Supreme Court denied expedited consideration of petitions for certiorari on January 11, 2021,[8691] and denied certiorari on March 8.[8692]

As Judge Pepper did, Judge Ludwig denied the defendants an award of attorney fees, because "a district court lacks jurisdiction to grant [fees] if the movant waits to seek relief until after the conclusion of an appeal on the merits."[8693]

8683. *Id.* at 72.

8684. Motion, *Trump*, No. 2:20-cv-1785 (E.D. Wis. Dec. 2, 2020), D.E. 6.

8685. Minutes, *id.* (Dec. 4, 2020), D.E. 45; Transcript, *id.* (Dec. 4, 2020, filed Dec. 7, 2020), D.E. 53; *see* Transcript, *id.* (Dec. 10, 2020, filed Dec. 10, 2020), D.E. 130.

8686. Protocol Order, *id.* (Dec. 9, 2020), D.E. 116.

8687. Opinion, *id.* (Dec. 8, 2020), D.E. 61, 2020 WL 7230960; *see* Motions, *id.* (Dec. 3 and 4, 2020), D.E. 16, 23.

8688. Trump v. Wis. Elections Comm'n, 506 F. Supp. 3d 620 (E.D. Wis. 2020); Trump v. Wis. Elections Comm'n, 983 F.3d 919, 924 (7th Cir. 2020).

8689. *Trump*, 506 F. Supp. 3d at 639.

8690. *Trump*, 983 F.3d at 927; *see* Bill Glauber, *Appeals Court Rejects Trump Bid to Overturn Results*, Milwaukee J. Sentinel, Dec. 27, 2020, at A8.

8691. Trump v. Wis. Elections Comm'n, 592 U.S. ___, 141 S. Ct. 1045 (2021).

8692. Trump v. Wis. Elections Comm'n, 592 U.S. ___, 141 S. Ct. 1516 (2021); *see* Molly Beck, *Court Won't Hear Election Lawsuit*, Milwaukee J. Sentinel, Mar. 9, 2021, at A7.

8693. Opinion, Trump v. Wis. Elections Comm'n, No. 2:20-cv-1785 (E.D. Wis. Dec. 6, 2021), D.E. 178, 2021 WL 5771011; *see* Brent Kendall & Alexa Corse, *Election Suits Prompt Bids to Punish Lawyers*, Wall St. J., May 10, 2021, at A4; Marley, *supra* note 8679; Riley Vetterkind, *Cities Ask Trump to Reimburse Legal Fees*, Wis. State J., Apr. 6, 2021, at

Attorneys Sanctioned for Filing a Suit to Overturn 2020 Presidential Election Results Without a Legal or Factual Foundation

King v. Whitmer (Linda V. Parker, E.D. Mich. 2:20-cv-13134)

Twelve minutes before Thanksgiving Day 2020, a federal complaint sought decertification of Joe Biden's presidential election victory in Michigan. The district judge denied immediate relief on December 7. In 2021, she sanctioned the plaintiffs' attorneys for pursuing a lawsuit without a legal or factual foundation. The court of appeals affirmed the sanctions in part.

Topics: Enjoining certification; election errors; attorney discipline; attorney fees; laches; intervention; matters for state courts; Electoral College.

Six voters, including three prospective members of the Electoral College, filed a federal complaint in the Eastern District of Michigan at 11:48 p.m. on November 25, 2020, the day before Thanksgiving Day, alleging "massive election fraud" "for the purpose of illegally and fraudulently manipulating the vote count to manufacture an election of Joe Biden as President of the United States."[8694] Among the requested relief was an emergency order decertifying Michigan's presidential election or certifying Donald Trump as the winner.[8695]

Detroit moved to intervene as a defendant on Friday.[8696] The plaintiffs filed an amended complaint[8697] and a motion for a temporary restraining order[8698] on Sunday.[8699] The Democratic Party[8700] and a voter[8701] moved to

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A3; Vetterkind, *supra* note 8679.

8694. Complaint at 2, King v. Whitmer, No. 2:20-cv-13134 (E.D. Mich. Nov. 25, 2020), D.E. 1 [hereinafter *King* Complaint]; King v. Wood, 71 F.4th 511, 517–18 (6th Cir. 2023); King v. Whitmer, 556 F. Supp. 3d 680, 690 (E.D. Mich. 2021) ("Even though Michigan law establishes an extensive procedure for challenging elections, . . . Plaintiffs did not avail themselves of these procedures . . . ."); King v. Whitmer, 505 F. Supp. 3d 720, 726 (E.D. Mich. 2020); *see* Dave Boucher, *Trump Allies Seeking to Overturn Mich. Results*, Detroit Free Press, Dec. 1, 2020, at A5; Craig Mauger, *Suit Citing Conspiracy Theories Wants Trump as Mich. Winner*, Detroit News, Nov. 27, 2020, at A6.

8695. *King* Complaint, *supra* note 8694, at 72; *King*, 556 F. Supp. 3d at 691.

8696. Intervention Motion, *King*, No. 2:20-cv-13134 (E.D. Mich. Nov. 27, 2020), D.E. 5.

8697. Amended Complaint, *id.* (Nov. 29, 2020), D.E. 6.

8698. Temporary-Restraining-Order Motion, *id.* (Nov. 29, 2020), D.E. 7.

8699. *King*, 71 F.4th at 518; *King*, 556 F. Supp. 3d at 690; *King*, 505 F. Supp. 3d at 726.

8700. Intervention Motion, *King*, No. 2:20-cv-13134 (E.D. Mich. Nov. 30, 2020), D.E. 14.

intervene as defendants on Monday. Judge Linda V. Parker granted the three intervention motions on December 2.[8702]

On December 1, Judge Parker ordered the defendants' response to the temporary-restraining-order motion filed by 8:00 p.m. on the following day and any reply filed by 8:00 p.m. on the day after that.[8703]

On December 7, Judge Parker denied the plaintiffs immediate relief: "If granted, the relief would disenfranchise the votes of the more than 5.5 million Michigan citizens who, with dignity, hope, and a promise of a voice, participated in the 2020 General Election."[8704] The claims were barred by Eleventh Amendment immunity from suits brought by citizens against their own states.[8705] Among other reasons, they were also barred because of mootness and laches.[8706]

The plaintiffs filed a notice of appeal on the following day[8707] and a petition to the Supreme Court for a writ of certiorari three days after that.[8708] The parties stipulated dismissal of the appeal on January 26, 2021,[8709] and the Supreme Court denied the certiorari petition on February 22.[8710]

Judge Parker imposed sanctions on the plaintiffs' attorneys on August 25, 2021.[8711] "This lawsuit represents a historic and profound abuse of the

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8701. Intervention Motion, *id.* (Nov. 30, 2020), D.E. 12; *see* Motion to Expedite Briefing, *id.* (Dec. 1, 2020), D.E. 17.

8702. Opinion, *id.* (Dec. 2, 2020), D.E. 28, 2020 WL 7053810; *King*, 71 F.4th at 518; *King*, 556 F. Supp. 3d at 691; *King*, 505 F. Supp. 3d at 726.

8703. Order, *King*, No. 2:20-cv-13134 (E.D. Mich. Dec. 1, 2020), D.E. 24; *King*, 556 F. Supp. 3d at 691; *King*, 505 F. Supp. 3d at 726.

8704. *King*, 505 F. Supp. 3d at 725; *see King*, 71 F.4th at 518; *King*, 556 F. Supp. 3d at 691; *see also* Dave Boucher, *Judge Rejects Suit from Ex-Trump Attorney*, Detroit Free Press, Dec. 8, 2020, at A5; Craig Mauger, *Judge: "The People Have Spoken" in Michigan Election*, Detroit News, Dec. 8, 2020, at A5.

8705. *King*, 505 F. Supp. 3d at 727–29.

8706. *Id.* at 729–32.

8707. Notice of Appeal, *King*, No. 2:20-cv-13134 (E.D. Mich. Dec. 8, 2020), D.E. 64; *King*, 556 F. Supp. 3d at 692; *see* Dave Boucher, Paul Egan & Clara Hendrickson, *Courts Reject Claims of Fraud, Misconduct in Legal Challenges*, Detroit Free Press, Dec. 13, 2020, at A11.

8708. Certiorari Petition, King v. Whitmer, No. 20-815 (U.S. Dec. 11, 2020); *King*, 556 F. Supp. 3d at 692.

8709. Order, King v. Whitmer, No. 20-2205 (6th Cir. Jan. 26, 2021), D.E. 12; *King*, 556 F. Supp. 3d at 693.

8710. King v. Whitmer, 592 U.S. ___, 141 S. Ct. 1449 (2021); *see* King v. Whitmer, 592 U.S. ___, 141 S. Ct. 1044 (2021) (denying motions to expedite consideration of the petition).

8711. *King*, 556 F. Supp. 3d 680; King v. Wood, 71 F.4th 511, 519 (6th Cir. 2023); *see* Alexa Corse & Jess Bravin, *Pro-Trump Attorneys Sanctioned Over Vote Claims*, Wall St. J.,

judicial process. . . . *And this case was never about fraud—it was about undermining the People's faith in our democracy and debasing the judicial process to do so.*"[8712] The sanctions included attorney fees and costs, twelve hours of continuing legal education on pleading standards and election law, and referral for possible suspension or disbarment.[8713]

The court of appeals held on June 23, 2023, that much of what was sanctioned was sanctionable, but some was not, and it trimmed the fee awards.[8714]

Unsuccessful Suit to Overturn Arizona's 2020 Presidential Election Results

Bowyer v. Ducey (Diane J. Humetewa, D. Ariz. 2:20-cv-2321)

> Six days after a federal action alleged substantial fraud in Arizona's 2020 presidential election, the district judge dismissed the complaint as without possible merit.
>
> *Topics:* Election errors; intervention; laches; Electoral College; case assignment.

A federal complaint filed in the District of Arizona on December 2, 2020, by fourteen voters—including eleven would-be members of the Electoral College—against state election officials alleged a "scheme and artifice to defraud . . . for the purpose of illegally and fraudulently manipulating the vote count to manufacture an election of Joe Biden as President of the United States, and also of various down ballot democrat candidates in the 2020 election cycle."[8715] Among the relief sought was an injunction against a reflection in the Electoral College of Arizona's presidential election re-

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Aug. 26, 2021, at A4; Alan Feuer, *Judge Orders Sanctions for Pro-Trump Lawyers*, N.Y. Times, Aug. 26, 2021, at A19; Craig Mauger & Beth LeBlanc, *Lawyers Allied with Trump Penalized for Suit*, Detroit News, Aug. 26, 2021, at A2; *see also* Brent Kendall & Alexa Corse, *Election Suits Prompt Bids to Punish Lawyers*, Wall St. J., May 10, 2021, at A4.

8712. *King*, 556 F. Supp. 3d at 688–89.

8713. *Id.* at 735; *see* Clara Hendrickson, *Pro-Trump Lawyers Receive Training*, Detroit Free Press, Feb. 27, 2022, at A4 ("All nine attorneys submitted paperwork attesting that they completed legal training to comply with the sanctions order.").

8714. *King*, 71 F.4th 511, *cert. pending*, Docket Sheet, No. 23-497 (U.S. Nov. 9, 2023), *and* Docket Sheet, No. 23-486 (U.S. Nov. 8, 2023).

8715. Complaint at 2, Bowyer v. Ducey, No. 2:20-cv-2321 (D. Ariz. Dec. 2, 2020), D.E. 1 [hereinafter *Bowyer* Complaint]; *see* Howard Fischer, *Trump Supporters File Federal Suit Seeking to Overturn Results of Arizona's Election*, Ariz. Daily Star, Dec. 3, 2020, at B1.

sults.[8716] With their complaint, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction.[8717]

Senior Judge James A. Teilborg declined assignment of the case because of its needing an expedited schedule, and the court reassigned the case to Judge Diane J. Humetewa.[8718] Judge Humetewa set the case for an afternoon telephonic status conference, and the docket sheet included an email address for members of the public to request contact information for audio access to the conference.[8719] Following the conference, she set the case for a December 8 hearing and posted contact information in the docket sheet.[8720]

Judge Humetewa granted intervention by Maricopa County officials but denied intervention by the Arizona Democratic Party.[8721]

She dismissed the complaint on December 9.[8722]

> Not only have Plaintiffs failed to provide the Court with factual support for their extraordinary claims, but they have wholly failed to establish that they have standing for the Court to consider them. Allegations that find favor in the public sphere of gossip and innuendo cannot be a substitute for earnest pleadings and procedure in federal court. They most certainly cannot be the basis for upending Arizona's 2020 General Election. The Court is left with no alternative but to dismiss this matter in its entirety.[8723]

On April 13, 2021, the court of appeals accepted a voluntary dismissal of an appeal.[8724]

8716. *Bowyer* Complaint, *supra* note 8715, at 51–52.

8717. Motion, *Bowyer*, No. 2:20-cv-2321 (D. Ariz. Dec. 2, 2020), D.E. 2.

8718. Order, *id.* (Dec. 2, 2020), D.E. 7.

8719. Docket Sheet, *id.* (Dec. 2, 2020) [hereinafter *Bowyer* Docket Sheet] (D.E. 11); *see* Transcript, *id.* (Dec. 3, 2020, filed Jan. 20, 2021), D.E. 89.

8720. *Bowyer* Docket Sheet, *supra* note 8719 (D.E. 28, 43, 69, 74); *see* Howard Fischer, *1 of 2 Remaining Ariz. Election Suits to be Heard by Federal Judge Today*, Ariz. Daily Star, Dec. 8, 2020, at B1.

8721. Bowyer v. Ducey, 506 F. Supp. 3d 699, 707 (D. Ariz. 2020); *Bowyer* Docket Sheet, *supra* note 8719 (D.E. 32); *see* Intervention Motion, *Bowyer*, No. 2:20-cv-2321 (D. Ariz. Dec. 3, 2020), D.E. 27 (Maricopa County officials); Intervention Motion, *id.* (Dec. 3, 2020), D.E. 26 (Arizona Democratic Party).

8722. *Bowyer*, 506 F. Supp. 3d 699; *see* Howard Fischer, *Federal Judge Tosses Last Lawsuit Challenging Biden Win in Arizona*, Ariz. Daily Star, Dec. 10, 2020, at B2; Maria Polletta, *Last Pending Arizona Elections Challenge Dismissed*, Ariz. Republic, Dec. 10, 2020, at A14.

8723. *Bowyer*, 506 F. Supp. 3d at 724.

8724. Order, Bowyer v. Ducey, No. 20-17399 (9th Cir. Apr. 13, 2021), D.E. 7.

Abandoned Suit to Exclude Some Counties' Presidential Votes Because of Some Alleged Irregularities

Langenhorst v. Pecore (William C. Griesbach, E.D. Wis. 1:20-cv-1701)

Four days after they filed their complaint, before any judicial review, plaintiffs voluntarily dismissed a lawsuit that sought to exclude presidential votes from three counties on the basis of some alleged irregularities.

Topics: Enjoining certification; intervention.

Three voters filed a federal complaint in the Eastern District of Wisconsin against election officials for Wisconsin and three of its counties on November 12, 2020, alleging the "inclusion of illegal Presidential Elector results in certain counties."[8725] The plaintiffs sought exclusion from the presidential election of all votes from those counties.[8726] On the following day, the plaintiffs moved to expedite discovery and resolution of the case.[8727]

Judge William C. Griesbach set the case for a telephonic status conference on November 16, posting contact information in the docket sheet.[8728] While three motions to intervene were pending,[8729] the plaintiffs filed on November 16 three notices voluntarily dismissing the case.[8730]

Withdrawn Efforts to Enjoin Certification of 2020 Presidential Election Results in Michigan

Donald J. Trump for President v. Benson (1:20-cv-1083), Bally v. Whitmer (1:20-cv-1088), and Johnson v. Benson (1:20-cv-1098) (Janet T. Neff, W.D. Mich.)

Three federal lawsuits filed to enjoin certification of 2020 presidential election results in Michigan were withdrawn soon after they were filed. In one, the district judge ruled on intervention motions and a motion to strike a false statement in the voluntary-dismissal notice.

8725. Complaint at 1, Langenhorst v. Pecore, No 1:20-cv-1701 (E.D. Wis. Nov. 12, 2020), D.E. 1 [hereinafter *Langenhorst* Complaint]; Amended Complaint, *id.* (Nov. 12, 2020), D.E. 5; *see* Emily Bazelon, *The Trump Campaign Has Filed 16 Lawsuits Contesting the Election*, N.Y. Times, Nov. 16, 2020, at A16; Molly Beck, *Suit Aims to Block Votes from Blue Counties*, Milwaukee J. Sentinel, Nov. 13, 2020, at A13; *Lawsuit Wants Votes Excluded*, Wis. State J., Nov. 14, 2020, at A3.

8726. *Langenhorst* Complaint, *supra* note 8725, at 21.

8727. Motion, *Langenhorst*, No. 1:20-cv-1701 (E.D. Wis. Nov. 13, 2020), D.E. 7.

8728. Docket Sheet, *id.* (Nov. 12, 2020).

8729. Motions, *id.* (Nov. 13 to 15, 2020), D.E. 11, 13, 18.

8730. Notices, *id.* (Nov. 16, 2020), D.E. 25 to 27.

Topics: Enjoining certification; intervention; election errors; special master.

Three federal lawsuits challenging the 2020 presidential-election results in Michigan were withdrawn days after they were filed.

Wayne County

President Trump's reelection campaign and seven voters filed a federal complaint in the Western District of Michigan on Wednesday, November 11, 2020, against Michigan and Wayne County election officials alleging various improprieties in the casting of ballots in Wayne County in the 2020 general election.[8731] On the next day, the court assigned the case to Judge Janet T. Neff.[8732]

On Monday, Judge Neff ordered responses filed that afternoon[8733] to intervention motions by Detroit that day,[8734] by the Democratic Party on Saturday,[8735] and by a collection of other proposed litigants on Friday.[8736] The plaintiffs filed a notice that they did not oppose any of the intervention motions,[8737] and Judge Neff granted the motions on Tuesday.[8738] She ordered briefing on the Democratic Party's motion to dismiss the case completed by November 20.[8739]

The plaintiffs dismissed their case voluntarily on November 19, stating, "The Wayne County board of county canvassers met and declined to

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8731. Complaint, Donald J. Trump for President, Inc. v. Benson, No. 1:20-cv-1083 (W.D. Mich. Nov. 11, 2020), D.E. 1; *see* Emily Bazelon, *The Trump Campaign Has Filed 16 Lawsuits Contesting the Election*, N.Y. Times, Nov. 16, 2020, at A16 (reporting that attached affidavits from poll challengers "described isolated grievances and perceived irregularities, not systematic fraud"); Beth LeBlanc, *Trump Campaign Has Yet to Serve Benson with Suit*, Detroit News, Nov. 18, 2020, at A6 (reporting that the "initial filing in federal court last week was filed accidentally in the U.S. Court of Federal Claims instead of Michigan's Western U.S. District Court").

8732. Notice, *Donald J. Trump for President, Inc.*, No. 1:20-cv-1083 (W.D. Mich. Nov. 12, 2020), D.E. 4.

8733. Orders, *id.* (Nov. 16, 2020), D.E. 13, 18.

8734. Intervention Motion, *id.* (Nov. 16, 2020), D.E. 14.

8735. Intervention Motion, *id.* (Nov. 13, 2020), D.E. 6.

8736. Intervention Motion, *id.* (Nov. 14, 2020), D.E. 10; *see* Paul Egan & Clara Hendrickson, *Trump Legal Efforts Failing at Election Challenges*, Detroit Free Press, Nov. 15, 2020, at A18.

8737. Notice, *Donald J. Trump for President, Inc.*, No. 1:20-cv-1083 (W.D. Mich. Nov. 16, 2020), D.E. 19.

8738. Opinion, *id.* (Nov. 17, 2020), D.E. 20, 2020 WL 857863.

8739. *Id.* at 6; *see* Motion, *id.* (Nov. 17, 2020), D.E. 21; *see also* Concurrences, *id.* (Nov. 18, 2020), D.E. 29 to 31.

certify the results of the presidential election."[8740] Detroit moved to strike the dismissal as containing "immaterial, impertinent and false language" respecting the certification: "The affidavits and the impertinent text in the Notice were submitted for an improper purpose: to make a gratuitous, public statement about their purported reason for voluntary dismissal, before the Court could reject their baseless claims of election fraud."[8741] The plaintiffs responded six days later that the motion "is not proper and is [a] nullity that requires no further action by this Court."[8742] Judge Neff denied the motion:

> This unique case, while dismissed only eight days after it started, arises from a national election of great public interest and has been rife with "public statements" since its inception, both gratuitous and otherwise. With the filing of its motion, the City of Detroit's factual position is part of the court record, and the Court, in its discretion, declines to impose the requested sanction.[8743]

Three Michigan Counties

A second federal complaint filed in the Western District on November 11 sought exclusion of presidential-election results from "key counties"—Ingham, Washtenaw, and Wayne—because of "sufficient evidence to place in doubt [their] November 3 presidential-election results."[8744] The plaintiffs were four voters, and the defendants were state and county election officials.[8745] On the following day, the plaintiffs filed a motion for "an expedited schedule, expedited discovery, and an expedited hearing on the

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8740. Notice, *id.* (Nov. 19, 2020), D.E. 33; *see* Dave Boucher, *Trump Campaign Withdraws Federal Lawsuit in Michigan*, Detroit Free Press, Nov. 20, 2020, at A7 (reporting that the Trump campaign "incorrectly characteriz[ed] the actions of the Wayne County Board of Canvassers as its rationale for the decision").

Regarding the statement about Wayne County as incorrect, the *Detroit Free Press* reported, "The board did certify results, but two commissioners filed affidavits with this lawsuit indicating they wanted to flip their votes." Dave Boucher, Paul Egan & Clara Hendrickson, *Courts Reject Claims of Fraud, Misconduct in Legal Challenges*, Detroit Free Press, Dec. 13, 2020, at A11; *see* Paul Egan, *GOP Members: Rescind Wayne Certification*, Detroit Free Press, Nov. 20, 2020, at A7; *see also* Beth LeBlanc, Francis X. Donnelly & Craig Mauger, *Wayne Co. Votes OK'd After Initial Deadlock*, Detroit News, Nov. 18, 2020, at A11.

8741. Motion, *Donald J. Trump for President, Inc.*, No. 1:20-cv-1083 (W.D. Mich. Nov. 19, 2020), D.E. 34.

8742. Response, *id.* (Nov. 25, 2020), D.E. 38.

8743. Opinion, *id.* (Dec. 1, 2020), D.E. 40.

8744. Complaint at 9, Bally v. Whitmer, No. 1:20-cv-1088 (W.D. Mich. Nov. 11, 2020), D.E. 1 [hereinafter *Bally* Complaint]; *see* Egan & Hendrickson, *supra* note 8736.

8745. *Bally* Complaint, *supra* note 8744.

merits of the Verified Complaint."[8746] On the case's third day, the plaintiffs filed a notice that the case was related to the other case before Judge Neff,[8747] to whom the court assigned the second case.[8748]

The third set of intervenors in the first case moved to intervene in the second case on Friday, November 14.[8749] On Monday, Judge Neff ordered plaintiffs to respond to the motion that day.[8750] The plaintiffs voluntarily dismissed their case instead.[8751]

Special Master

Four days after the other cases were filed, a third case was filed in the Western District by two voters against Michigan's secretary of state and the chair of Michigan's board of state canvassers.[8752] Among the requested relief was an injunction against Michigan's "certifying the election results and declaring winners of the 2020 general election until a special master can be appointed to review and certify the legality of all absentee ballots ordered through the Secretary of State's absentee ballot scheme."[8753] Two days later, the court assigned the case to Judge Neff.[8754]

On the day after that, the Democratic Party[8755] and the set of intervenors who had sought intervention in the first two cases[8756] sought intervention in this case. The plaintiffs voluntarily dismissed the complaint that day.[8757]

8746. Motion, *Bally*, No. 1:20-cv-1088 (W.D. Mich. Nov. 12, 2020), D.E. 3.

8747. Notice, *id.* (Nov. 13, 2020), D.E. 6.

8748. Notice, *id.* (Nov. 13, 2020), D.E. 7.

8749. Intervention Motion, *id.* (Nov. 14, 2020), D.E. 10.

8750. Order, *id.* (Nov. 16, 2020), D.E. 13.

8751. Voluntary-Dismissal Notice, *id.* (Nov. 16, 2020), D.E. 14; *see* Boucher, *supra* note 8740.

8752. Complaint, Johnson v. Benson, No. 1:20-cv-1098 (W.D. Mich. Nov. 15, 2020), D.E. 1.

8753. *Id.* at 25.

8754. Notice, *id.* (Nov. 17, 2020), D.E. 4.

8755. Intervention Motion, *id.* (Nov. 18, 2020), D.E. 6.

8756. Intervention Motion, *id.* (Nov. 18, 2020), D.E. 9.

8757. Voluntary-Dismissal Notice, *id.* (Nov. 18, 2020), D.E. 12; *see* Boucher, *supra* note 8740.

No Injunction Against Certification of Pennsylvania's 2020 Presidential Election Results

Donald J. Trump for President v. Boockvar (4:20-cv-2078) and Pirkle v. Wolf (4:20-cv-2088) (Matthew W. Brann, M.D. Pa.)

> Six days after the 2020 presidential election, the apparently defeated incumbent sought an injunction against certification of Pennsylvania's votes, citing alleged mismanagement of the election. The district judge heard oral arguments eight days later, after substantial changes in the plaintiffs' representation. The judge dismissed the case, and the court of appeals affirmed his denial of permission for another amended complaint.
>
> *Topics:* Enjoining certification; election errors; intervention; news media; equal protection; absentee ballots; Covid-19; case assignment; attorney discipline.

On the evening of November 9, 2020, six days after the general election, the apparently unsuccessful reelection campaign for President Trump and two Pennsylvania voters filed a federal complaint in the Middle District of Pennsylvania's Williamsport courthouse against the secretary of the commonwealth and seven county boards of elections alleging mismanagement of the election and seeking an injunction against certification of election results.[8758]

Judge Matthew W. Brann set the case for a telephonic status conference on the afternoon of the following day.[8759] Following the conference, he set the case for oral argument on November 17 and a possible evidentiary hearing on November 19.[8760] He sat in Williamsport, and he denied the secretary's motion to transfer the case to Harrisburg: "Testimony by

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8758. Complaint, Donald J. Trump for President, Inc. v. Boockvar, No. 4:20-cv-2078 (M.D. Pa. Nov. 9, 2020), D.E. 1 [hereinafter *Donald J. Trump for President, Inc.* Complaint]; Donald J. Trump for President, Inc. v. Boockvar, 502 F. Supp. 3d 899, 905–06, 908 (M.D. Pa. 2020); *see* Rebecca Davis O'Brien, Corinne Ramey & Deanna Paul, *Trump Camp Sues to Stop States Certifying Results*, Wall St. J., Nov. 10, 2020, at A6; Jeremy Roebuck, *Trump Campaign Files Pa. Suit*, Phila. Inquirer, Nov. 10, 2020, at A8.

8759. Order, *Donald J. Trump for President, Inc.*, No. 4:20-cv-2078 (M.D. Pa. Nov. 10, 2020), D.E. 27; *Donald J. Trump for President, Inc.*, 502 F. Supp. 3d at 908.

8760. Order, *Donald J. Trump for President, Inc.*, No. 4:20-cv-2078 (M.D. Pa. Nov. 10, 2020), D.E. 35; *Donald J. Trump for President, Inc.*, 502 F. Supp. 3d at 908–09; *see* Transcript, *Donald J. Trump for President, Inc.*, No. 4:20-cv-2078 (M.D. Pa. Nov. 17, 2020, filed Nov. 21, 2020), D.E. 199; *see also* Emily Bazelon, *The Trump Campaign Has Filed 16 Lawsuits Contesting the Election*, N.Y. Times, Nov. 16, 2020, at A16.

witnesses, if it becomes necessary, may be provided either in-person or virtually, in order to accommodate those witnesses."[8761]

Judge Brann granted intervention on November 12 to organizations and individuals represented by the ACLU and to the Democratic National Committee, but he denied intervention to an individual attorney.[8762]

Also on November 12, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction.[8763] Three days later, they filed an amended complaint,[8764] apparently motivated by a decision on standing in election litigation issued by the court of appeals on November 13.[8765]

Four voters filed a federal complaint in the Western District on November 10[8766] and moved to consolidate their case with the Trump campaign's case,[8767] but they dismissed their case voluntarily on November 16.[8768]

Judge Brann expressed concern about frequent and last-minute changes in counsel.[8769] The complaint listed a large law firm and a sole practitioner as the plaintiffs' attorneys.[8770] On November 13, Judge Brann granted the large law firm's November 12 motion to withdraw.[8771] On November 16, the same day that Judge Brann granted special admission to the court's bar to two Texas attorneys,[8772] they and the remaining original attorney moved to withdraw.[8773] Judge Brann granted withdrawal to the

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8761. Order, *Donald J. Trump for President, Inc.*, No. 4:20-cv-2078 (M.D. Pa. Nov. 10, 2020), D.E. 36; *see* Motion, *id.* (Nov. 10, 2020), D.E. 25.

8762. Order, *id.* (Nov. 12, 2020), D.E. 72, 2020 WL 8262029; *see* Motions, *id.* (Nov. 10 and 11, 2020), D.E. 30, 39, 55.

8763. Motion, *id.* (Nov. 12, 2020), D.E. 89; *Donald J. Trump for President, Inc.*, 502 F. Supp. 3d at 909.

8764. Amended Complaint, *Donald J. Trump for President, Inc.*, No. 4:20-cv-2078 (M.D. Pa. Nov. 15, 2020), D.E. 125.

8765. Bognet v. Sec'y Commonwealth of Pa., 980 F.3d 336, 345 (3d Cir. 2020), *vacated as moot*, 593 U.S. ___, 141 S. Ct. 2508 (2021); *see Donald J. Trump for President, Inc.*, 502 F. Supp. 3d 909.

8766. Complaint, Pirkle v. Wolf, No. 4:20-cv-2088 (W.D. Pa. Nov. 10, 2020), D.E. 1.

8767. Motion, *id.* (Nov. 11, 2020), D.E. 5.

8768. Notice, *id.* (Nov. 16, 2020), D.E. 20; *see* Dismissal Order, *id.* (Nov. 16, 2020), D.E. 21.

8769. *Donald J. Trump for President, Inc.*, 502 F. Supp. 3d at 909–10.

8770. *Donald J. Trump for President, Inc.* Complaint, *supra* note 8758, at 84–85.

8771. Order, Donald J. Trump for President, Inc. v. Boockvar, No. 4:20-cv-2078 (M.D. Pa. Nov. 13, 2020), D.E. 117; Motion, *id.* (Nov. 12, 2020), D.E. 106.

8772. Approved Admission Petitions, *id.* (Nov. 16, 2020), D.E. 147, 148.

8773. Motion, *id.* (Nov. 16, 2020), D.E. 151.

Texas attorneys but not to the remaining original attorney.[8774] Judge Brann "believed it best to have some semblance of consistency in counsel ahead of the oral argument [on the following day]."[8775]

Two Pennsylvania attorneys entered an appearance on November 16[8776] and moved for a continuance to allow them to adequately prepare.[8777] Judge Brann denied the request: "given the emergency nature of this proceeding, and the looming deadline for Pennsylvania counties to certify their election results, postponing those proceedings seemed imprudent."[8778] Rudy Giuliani joined the case on behalf of the plaintiffs on the morning of oral argument.[8779]

Judge Brann denied a motion by the Associated Press to attend the oral argument in person as an exception to the court's providing to the public only remote audio access because of the Covid-19 infectious pandemic.[8780]

8774. Order, *id.* (Nov. 16, 2020), D.E. 154.

8775. Donald J. Trump for President, Inc. v. Boockvar, 502 F. Supp. 3d 899, 909–10 (M.D. Pa. 2020).

8776. Appearance, *Donald J. Trump for President, Inc.*, No. 4:20-cv-2078 (M.D. Pa. Nov. 16, 2020), D.E. 149.

8777. Motion, *id.* (Nov. 16, 2020), D.E. 152.

8778. *Donald J. Trump for President, Inc.*, 502 F. Supp. 3d at 910; Order, *Donald J. Trump for President, Inc.*, No. 4:20-cv-2078 (M.D. Pa. Nov. 16, 2020), D.E. 153.

8779. Petition, *Donald J. Trump for President, Inc.*, No. 4:20-cv-2078 (M.D. Pa. Nov. 17, 2020), D.E. 158; *Donald J. Trump for President, Inc.*, 502 F. Supp. 3d at 910; *see* Jon Swaine & Aaron Schaffer, *Trump Attorney Giuliani Fumbles in Federal Court*, Wash. Post, Nov. 19, 2020, at A9; *see also* Jeremy Roebuck, *Giuliani Law License Suspended Over Pa. Lies*, Phila. Inquirer, June 25, 2021, at A1 ("Of all the lies Rudy Giuliani told in his effort to overturn the 2020 presidential election results, it was the whoppers he spread seeking to undermine confidence in Pennsylvania's vote that a New York court highlighted first in suspending his law license Thursday."); Jeremy Roebuck, *Giuliani's Disbarment Is Urged for Push to Overturn Pa. Vote*, Phila. Inquirer, Dec. 16, 2022, at A1 ("Rudy Giuliani violated rules governing attorney conduct through his efforts to overturn Pennsylvania's 2020 election while representing former President Donald Trump, a disciplinary panel of the Washington, D.C. bar found Thursday."). *See generally* Keith L. Alexander, *Appeals Court Panel Recommends That Giuliani Be Disbarred*, Wash. Post, July 8, 2023, at B4; Alan Feuer, *Ethics Panel Says Giuliani Should Lose Law License*, N.Y. Times, July 8, 2023, at A14; Isaac Yu, *Giuliani Should Be Disbarred for Election Effort, Panel Says*, Wall St. J., July 8, 2023, at A2.

Giuliani, Trump, and seventeen others were indicted in Georgia on August 14, 2023, for attempts to alter Georgia's presidential election results. Indictment, State v. Trump, No. 23SC188947 (Ga. Sup. Ct. Fulton Cty. Aug. 14, 2023); *see* Dan Barry, *The Allegiance That Hastened Giuliani's Slide*, N.Y. Times, Aug. 17, 2023, at A1; Aruna Viswanatha & Gimmy Vielkind, *Giuliani Is Caught Up in a Law He Wielded*, Wall St. J., Aug. 16, 2023, at A1.

8780. Opinion, *Donald J. Trump for President, Inc.*, No. 4:20-cv-2078 (M.D. Pa. Nov.

After oral argument, Judge Brann determined that an evidentiary hearing would not be necessary.[8781] He dismissed the action on Saturday evening, November 21.[8782] "[T]his Court has been presented with strained legal arguments without merit and speculative accusations, unpled in the operative complaint and unsupported by evidence. In the United States of America, this cannot justify the disenfranchisement of a single voter, let alone all the voters of the sixth most populated state."[8783]

On November 27, the court of appeals rejected an appeal from Judge Brann's denial of permission for a second amended complaint.[8784] "Free, fair elections are the lifeblood of our democracy. Charges of unfairness are serious. But calling an election unfair does not make it so. Charges require specific allegations and then proof. We have neither here."[8785]

Mediated Agreement on Ballot-Counting Observers

Donald J. Trump for President v. Philadelphia County Board of Elections (Paul S. Diamond, E.D. Pa. 2:20-cv-5533)

> Two days after a general election, a district judge mediated resolution to a dispute over ballot-counting observers.
>
> *Topics:* Matters for state courts; equal protection; Covid-19; 42 U.S.C. § 1983.

Two days after the 2020 general election, the campaign for President Trump filed in the Eastern District of Pennsylvania a two-page federal complaint and motion for an emergency injunction against Philadelphia

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17, 2020), D.E. 157, 2020 WL 6747472; *see* Motion, *id.* (Nov. 16, 2020), D.E. 150.

8781. Order, *id.* (Nov. 18, 2020), D.E. 162; *Donald J. Trump for President, Inc.*, 502 F. Supp. 3d at 910.

8782. *Donald J. Trump for President, Inc.*, 502 F. Supp. 3d 899; *see* Alan Feuer, *In Defeat for Trump, Judge Dismisses Suit Seeking to Nullify Pennsylvania Results*, N.Y. Times, Nov. 22, 2020, at 29; Jeremy Roebuck, *Judge Tosses Trump Suit Seeking to Void Pa. Vote*, Phila. Inquirer, Nov. 22, 2020, at A1; Jon Swaine, *In Scathing Opinion, Federal Judge Dismisses Trump Campaign Lawsuit in Pa.*, Wash. Post, Nov. 22, 2020, at A12.

8783. *Donald J. Trump for President, Inc.*, 502 F. Supp. 3d at 906.

8784. Donald J. Trump for President, Inc. v. Sec'y Commonwealth of Pa., 830 F. App'x 377 (3d Cir. 2020); *see Donald J. Trump for President, Inc.*, 502 F. Supp. 3d at 923; Order, *Donald J. Trump for President, Inc.*, No. 4:20-cv-2078 (M.D. Pa. Nov. 21, 2020), D.E. 203; *see also* Alan Feuer, *Scathing Ruling Sinks President in Pennsylvania*, N.Y. Times, Nov. 28, 2020, at A1; Corinne Ramey, *Court Denies Trump's Pennsylvania Appeal*, Wall St. J., Nov. 28, 2020, at A4; Jeremy Roebuck & Jonathan Lai, *A Two-Month Failed Effort to Overturn Pa.'s Election Results*, Phila. Inquirer, Jan. 10, 2021, at A12; Jon Swaine, Michelle Ye Hee Le & Robert Barnes, *Trump Looks to Supreme Court After Rebuff in Pa.*, Wash. Post, Nov. 28, 2020, at A1.

8785. *Donald J. Trump for President, Inc.*, 830 F. App'x at 381.

County's board of elections to bar the board "from continuing to count any ballots so long as Republican observers are not present as required by law."[8786]

Judge Paul S. Diamond set the case for hearing that afternoon.[8787] At the hearing, held during the first year of the global infectious Covid-19 pandemic, Judge Diamond advised counsel regarding speaking, "if you could, if you feel comfortable doing it, pull your mask down as I'm doing now, because it's very hard to understand somebody when he or she is speaking through a mask."[8788]

At the hearing, Judge Diamond mediated a resolution to the motion regarding number of observers and social distance.[8789] He issued an order: "As stated during today's Emergency Injunction Hearing, in light of the Parties' agreement, Plaintiff's Motion is DENIED without prejudice."[8790] As stated in the campaign's January 8, 2021, notice of dismissal, "Following [the November 5, 2020,] agreement, the issues in this case were litigated by the parties in the Pennsylvania state courts."[8791]

Poll Watchers and Substitute Ballots

Parnell v. Allegheny County Board of Elections (J. Nicholas Ranjan, W.D. Pa. 2:20-cv-1570)

> A federal complaint alleged that poll watchers were wrongfully excluded from election locations established to accommodate the Covid-19 infectious pandemic and the issuing of corrected ballots to mail-in voters created the possibility of invalid votes. The district judge denied relief on the poll watchers, and the parties consented to relief on the substitute ballots.

8786. Complaint at 1, Donald J. Trump for President, Inc. v. Phila. Cty. Bd. of Elections, No. 2:20-cv-5533 (E.D. Pa. Nov. 5, 2020), D.E. 1; *see* Corinne Ramey, Deanna Paul & Brent Kendall, *Election 2020: Trump Campaign Steps Up Legal Challenges*, Wall St. J., Nov. 6, 2020, at A5 ("Thursday afternoon, the Trump campaign filed a federal lawsuit accusing Philadelphia officials of blocking its poll watchers and violating [a state] judge's order").

8787. Order, *Donald J. Trump for President, Inc.*, No. 2:20-cv-5533 (E.D. Pa. Nov. 5, 2020), D.E. 2.

8788. Transcript at 3, *id.* (Nov. 5, 2020, filed Nov. 18, 2020), D.E. 7.

8789. *Id.* at 13–43; *see* Ramey et al., *supra* note 8786 ("After a hearing Thursday evening, the parties came to an agreement to allow equal access to the counting area, which had barricades to enforce social distancing.").

8790. Order, *Donald J. Trump for President, Inc.*, No. 2:20-cv-5533 (E.D. Pa. Nov. 5, 2020), D.E. 5 (citation and emphasis omitted).

8791. Notice, *id.* (Jan. 8, 2021), D.E. 12.

> *Topics:* Early voting; election errors; absentee ballots; intervention; ballot segregation; Covid-19; poll locations; class action.

Two congressional candidates filed a federal class-action complaint in the Western District of Pennsylvania on October 16, 2020, against Allegheny County election officials, alleging that poll watchers were wrongfully excluded from satellite voting locations established because of the Covid-19 infectious pandemic.[8792] With their complaint, the plaintiffs filed a motion for a temporary restraining order.[8793]

Judge J. Nicholas Ranjan set the case for a telephonic status conference on October 20, posting contact information in the docket sheet.[8794] He ordered briefing on the motion complete by October 22 and set the case for a possible videoconference hearing on October 27.[8795]

The plaintiffs filed an amended complaint adding two poll watchers as plaintiffs[8796] and an amended motion for a temporary restraining order[8797] on October 22. Judge Ranjan set the case for another telephonic status conference on October 23, again posting contact information.[8798] Also on October 22, Judge Ranjan granted motions to intervene by persons and organizations affiliated with the Democratic Party.[8799]

At the status conference, Judge Ranjan denied the plaintiffs a temporary restraining order.[8800]

> Given how late all this has unfolded, frankly, I don't have time to write an opinion on this so what I would like to do is explain the basis for my decision on the record here.

8792. Complaint, Parnell v. Allegheny Cty. Bd. of Elections, No. 2:20-cv-1570 (W.D. Pa. Oct. 16, 2020), D.E. 1.

8793. Temporary-Restraining-Order Motion, *id.* (Oct. 16, 2020), D.E. 2.

8794. Docket Sheet, *id.* (Oct. 16, 2020) [hereinafter *Parnell* Docket Sheet] (Order, Oct. 19, 2020, D.E. 7); *see* Transcript, *id.* (Oct. 20, 2022, filed Oct. 26, 2020), D.E. 54; Minutes, *id.* (Oct. 20, 2020), D.E. 10.

8795. *Parnell* Docket Sheet, *supra* note 8794 (Order, Oct. 21, 2020, D.E. 17).

8796. Amended Complaint, *Parnell*, No. 2:20-cv-1570 (W.D. Pa. Oct. 22, 2020), D.E. 28 [hereinafter Amended *Parnell* Complaint].

8797. Amended Temporary-Restraining-Order Motion, *id.* (Oct. 22, 2020), D.E. 32.

8798. *Parnell* Docket Sheet, *supra* note 8794 (Order, Oct. 22, 2020); *see* Minutes, *Parnell*, No. 2:20-cv-1570 (W.D. Pa. Oct. 23, 2020), D.E. 44.

8799. *Parnell* Docket Sheet, *supra* note 8794 (Order, Oct. 22, 2020, D.E. 34); *see* Intervention Motions, *Parnell*, No. 2:20-cv-1570 (W.D. Pa. Oct. 22, 2020), D.E. 22, 25.

8800. Transcript at 8, *Parnell*, No. 2:20-cv-1570 (W.D. Pa. Oct. 23, 2020, filed Oct. 26, 2020), D.E. 55 [hereinafter Oct. 23, 2020, *Parnell* Transcript].

> I'll issue just a short order after this hearing referring to the transcript, and the purpose for that would be obviously that the plaintiffs or any party, if they so wish, can have my decision in a written form in an expeditious manner in order to file any type of emergency appeal if the plaintiffs decide to proceed in that manner.
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> . . .
>
> . . . [T]here is no individual constitutional right to serve as a poll watcher. State law, not the federal constitution, grants individuals the ability to serve as poll watchers and state law gives that right to the parties and candidates the authority to select those individuals.
>
> There is no constitutional right to be a poll watcher at all. There is no right to be a poll watcher in a specific location.
>
> I also find that not allowing poll watchers at satellite offices doesn't really interfere with the exercise of the right to vote. It doesn't limit voters' right to choices and not permitting poll watchers at these locations do not make the actual active casting a vote any harder.[8801]

A remaining claim concerned 28,879 voters who received incorrect absentee and mail-in ballots, followed by election officials issuing revised ballots, and "a dilemma on how to treat the ballots cast by electors who used erroneous ballots, if those electors do not utilize the replacement ballots."[8802]

Judge Ranjan signed a consent order on October 26 stating that for voters who cast only initial ballots, the ballots would be counted for any offices on the ballots that the voters were eligible to vote for.[8803]

Litigating a Close Election

Joshua Cole for Delegate v. Virginia State Board of Elections (Claude M. Hilton, 1:17-cv-1295) and Lecky v. Virginia State Board of Elections (T.S. Ellis III, 1:17-cv-1336) (E.D. Va.)

> In an election that would narrowly determine which party controlled the state legislature, a district judge denied a motion to order the counting of absentee ballots that were delivered late, allegedly because of postal-service error. A second district judge declined to enjoin certification of a close election after it had been discovered that hundreds of voters were given ballots for a different district.

8801. *Id.* at 8–11.

8802. Amended *Parnell* Complaint, *supra* note 8796, at 12–13; *see* Oct. 23, 2020, *Parnell* Transcript, *supra* note 8800, at 15.

8803. Consent Order, *Parnell*, No. 2:20-cv-1570 (W.D. Pa. Oct. 26, 2020), D.E. 57, 2020 WL 6276845.

Topics: Election errors; absentee ballots; enjoining certification; intervention; presiding remotely.

On the day after the November 7, 2017, general election in Virginia, control of the commonwealth's house of delegates would depend on resolution of four races too close to call, including the race for district 28's delegate.[8804]

Suit by the Candidate

One week after the election, a delegate campaign for district 28 filed a federal complaint in the Eastern District of Virginia's Alexandria courthouse seeking the counting of fifty-five absentee ballots that were delivered to Stafford County's registrar on the day after the election because of alleged errors by the postal service.[8805] With its complaint, the campaign filed an emergency injunction motion.[8806] The commonwealth's Republican Party moved to intervene on the following day in opposition to the complaint.[8807]

At a November 17 hearing, Judge Claude M. Hilton granted intervention over the campaign's objection.[8808] Judge Hilton also denied the campaign relief.[8809]

> All right. Well, I find that there's no constitutional implications involved here. The evidence is that these 55 ballots were received the day after the election. And, in accordance with Virginia law—which Virginia

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8804. *See* Fenit Nirappil, *Democratic Victories Could Upend Control of Virginia House*, Wash. Post, Nov. 8, 2017, at A7; *see also* Fenit Nirappil, *Undecided Races Leave Control of Va. House in Limbo*, Wash. Post, Nov. 9, 2017, at B1.

8805. Complaint, Joshua Cole for Delegate v. Va. State Bd. of Elections, No. 1:17-cv-1295 (E.D. Va. Nov. 14, 2017), D.E. 1; *see* Graham Moomaw, *Democratic Caucus Files Suit Over Absentee Ballots*, Richmond Times Dispatch, Nov. 16, 2017, at 1B; Laura Vozzella, *Democrats Sue Over Uncounted Va. Ballots*, Wash. Post, Nov. 16, 2017, at B1 ("By a 2-to-1 vote, Stafford's electoral board agreed on Tuesday not to count them.").

8806. Emergency Injunction Motion, *Joshua Cole for Delegate*, No. 1:17-cv-1295 (E.D. Va. Nov. 14, 2017), D.E. 2; Emergency-Injunction-Motion Brief, *id.* (Nov. 14, 2017), D.E. 3.

8807. Intervention Motion, *id.* (Nov. 15, 2017), D.E. 11; Intervention Brief, *id.* (Nov. 15, 2017), D.E. 12; Opposition Brief, *id.* (Nov. 16, 2017), D.E. 14; *see* Jeff Branscome, *Thomas Pushes Back on Vote Suit*, Fredericksburg Free Lance-Star, Nov. 17, 2017, at 1A.

8808. Transcript at 4–5, *Joshua Cole for Delegate*, No. 1:17-cv-1295 (E.D. Va. Nov. 17, 2017, filed Dec. 5, 2017), D.E. 26 [hereinafter *Joshua Cole for Delegate* Transcript]; Order, *id.* (Nov. 17, 2017), D.E. 21 [hereinafter *Joshua Cole for Delegate* Order]; Minutes, *id.* (Nov. 17, 2017), D.E. 18.

8809. *Joshua Cole for Delegate* Transcript, *supra* note 8808, at 42–43; *Joshua Cole for Delegate* Order, *supra* note 8808; *see* Rachel Weiner & Laura Vozzella, *Va. Judge Won't Count Absentee Votes*, Wash. Post, Nov. 18, 2017, at B1.

> has every right to establish the rules and regulations for an election, these ballots were late, and the decision was not to count them. And I find nothing at all wrong about that.
>
> . . .
>
> And it's not my business to be involved in writing the state's rules and regulations. Certainly I don't find anything improper here. And there's no harm.[8810]

Judge Hilton approved a voluntary dismissal of the case on December 7.[8811]

Suit by Voters

Observing that "the current margin is only 82 votes," three voters filed a federal complaint in the Eastern District on November 21 alleging that they were two of many voters who were improperly given ballots for district 88 instead of district 28.[8812] With their complaint, they filed an emergency motion for a temporary restraining order and a preliminary injunction against certification of election results for the district.[8813]

As evidence developed, it became clear that several hundred voters had been assigned to the wrong district; 147 of them voted.[8814] Determining why the voters were misassigned was hampered by the intervening death of the registrar who committed the error.[8815]

Judge T.S. Ellis III, who was away from the courthouse, set the case for a telephonic hearing on the afternoon of November 22, granting news media and the public an opportunity to listen to the hearing in his courtroom.[8816] At the hearing, Judge Ellis granted a motion by the leading candidate's party to intervene, and Judge Ellis denied the plaintiffs immediate relief.[8817] On the one hand, the plaintiffs had not shown a clear likelihood

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8810. *Joshua Cole for Delegate* Transcript, *supra* note 8808, at 42–43.

8811. Order, *Joshua Cole for Delegate*, No. 1:17-cv-1295 (E.D. Va. Dec. 7, 2017), D.E. 27; *see* Notice, *id.* (Dec. 4, 2017), D.E. 25.

8812. Complaint, Lecky v. Va. State Bd. of Elections, No. 1:17-cv-1336 (E.D. Va. Nov. 21, 2017), D.E. 1; Lecky v. Va. State Bd. of Elections, 285 F. Supp. 3d 908, 912–13 (E.D. Va. 2018).

8813. Motion, *Lecky*, No. 1:17-cv-1336 (E.D. Va. Nov. 21, 2017), D.E. 2; *Lecky*, 285 F. Supp. 3d at 912–13.

8814. *Lecky*, 285 F. Supp. 3d at 912; *see* Laura Vozzella, *Va. House Still in Limbo 3 Weeks After Elections*, Wash. Post, Nov. 27, 2017, at B1; Laura Vozzella & Rachel Weiner, *Judge Won't Block Certification of Va. Elections*, Wash. Post, Nov. 23, 2017, at B1.

8815. *See* Vozzella, *supra* note 8814; *see also Lecky*, 285 F. Supp. 3d at 911–12 (describing the assignment of voters to legislative districts).

8816. Order, *Lecky*, No. 1:17-cv-1336 (E.D. Va. Nov. 22, 2017), D.E. 24.

8817. Show-Cause Order, *id.* (Nov. 29, 2017), D.E. 31 [hereinafter *Lecky* Show-Cause

of merits success; on the other hand, there was a potential state remedy for misdistribution of ballots.[8818] The district 28 election results were certified on November 28,[8819] and Judge Ellis issued an order on November 29 to show cause why the case should not be dismissed as moot.[8820]

On December 6, the plaintiffs filed an amended complaint and a motion for a preliminary injunction ordering a new election for the district.[8821] They filed a notice that counsel "seeks to present argument . . . before Friday, December 22, 2017."[8822] On December 8, Judge Ellis informed the parties that he would hear the motion, "[t]o accommodate the Court's schedule," on January 5, 2018.[8823]

At the hearing, in response to the plaintiff's argument that "the only remedy left to cure the constitutional harm is a new election," Judge Ellis observed, "This losing candidate could have instituted proceedings to have the General Assembly address this issue."[8824] After not receiving complete, prompt, and candid information about coordination between the voter plaintiffs and the candidate, Judge Ellis moved on: "Never mind. It's not material to my decision tonight, but remember in the future if I ask a question, answer it directly. We don't have time to play lawyers' games. Proceed."[8825]

At the conclusion of the hearing, Judge Ellis decided not to enjoin the swearing in of the Republican victor,[8826] and Judge Ellis issued an opinion explaining the result six days later.[8827]

> Plaintiffs have not made the requisite clear showing that the assignment of voters to the incorrect house districts and the distribution of ballots associated with those incorrect house districts amount to the kind of

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Order]; *Lecky*, 285 F. Supp. 3d at 913; *see* Intervention Motion, *Lecky*, No. 1:17-cv-1336 (E.D. Va. Nov. 22, 2017), D.E. 3; *see* Vozzella & Weiner, *supra* note 8814.

8818. *Lecky* Show-Cause Order, *supra* note 8817, at 2.

8819. *See* Laura Vozzella, *Board Certifies Va. Vote Results*, Wash. Post, Nov. 28, 2017, at B1.

8820. *Lecky* Show-Cause Order, *supra* note 8817; *Lecky*, 285 F. Supp. 3d at 913.

8821. Preliminary-Injunction Motion, *Lecky*, No. 1:17-cv-1336 (E.D. Va. Dec. 6, 2017), D.E. 36; Amended Complaint, *id.* (Dec. 6, 2017), D.E. 35; *Lecky*, 285 F. Supp. 3d at 913–14; *see* Laura Vozzella, *Democrats Seek New Va. Election*, Wash. Post, Dec. 8, 2017, at B1.

8822. Notice, *Lecky*, No. 1:17-cv-1336 (E.D. Va. Dec. 6, 2017), D.E. 38.

8823. Order, *id.* (Dec. 8, 2017), D.E. 63.

8824. Transcript at 11–12, *id.* (Jan. 5, 2018, filed Jan. 8, 2018), D.E. 110.

8825. *Id.* at 12–13.

8826. *Id.* at 71; Minutes, *id.* (Jan. 5, 2018), D.E. 107; *see* Fenit Nirappil & Rachel Weiner, *No New Vote in Disputed Va. Race*, Wash. Post, Jan. 6, 2018, at B1.

8827. Lecky v. Va. State Bd. of Elections, 285 F. Supp. 3d 908 (E.D. Va. 2018).

> broad gauged unfairness necessary to state a due process claim. Rather, the allegations in the amended complaint attribute these election irregularities largely to innocent human or mechanical error in entering the addresses assigned to each precinct, and at most, negligence on the part of election officials in failing to correct those errors.[8828]

The court of appeals denied the plaintiffs injunctive relief on January 10.[8829] The plaintiffs dismissed the case voluntarily in February.[8830]

Control

Control of the legislature was decided by the results in district 94. Before a recount, the Republican incumbent was ten votes ahead,[8831] but after the recount the Democratic challenger led by one vote.[8832] A panel of three state judges decided that an ambiguous ballot should be counted in the Republican's favor, resulting in a tie vote.[8833] In a random draw, the Republican incumbent won,[8834] and the Republican Party controlled the house by a margin of fifty-one to forty-nine.[8835]

Later, the *Washington Post* determined that statewide approximately 6,000 voters had been assigned to the wrong delegate district, including

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8828. *Id.* at 916.

8829. Order, Lecky v. Va. State Bd. of Elections, No. 18-1020 (4th Cir. Jan. 10, 2018), D.E. 34; *see* Rachel Weiner, *Federal Court Won't Block Swearing-In*, Wash. Post, Jan. 11, 2018, at B4.

8830. Order, *Lecky*, No. 1:17-cv-1336 (E.D. Va. Feb. 15, 2018), D.E. 134; Order, *Lecky*, No. 18-1020 (4th Cir. Feb. 9, 2018), D.E. 51; *see* Rachel Weiner, *4 Democrats Challenge Court Ruling Favoring GOP in Disputed House Race*, Wash. Post, Jan. 8, 2018, at B3 (reporting on appeal).

8831. *See* Fenit Nirappil, *A Battle Over 10 Votes Builds Political Tension*, Wash. Post, Dec. 7, 2017, at B1.

8832. *See* Gregory S. Schneider, *One Vote Shifts Power in the Virginia Legislature*, Wash. Post, Dec. 20, 2017, at A1.

8833. *See* Trip Gabriel, *One-Vote Victory in Virginia Becomes Tie*, N.Y. Times, Dec. 21, 2017, at A23; Jim Morrison, Fenit Nirappil & Gregory S. Schneider, *Control of Virginia House Comes Down to a Coin Toss*, Wash. Post, Dec. 21, 2017, at A1; Laura Vozzella, *He Could've Settled Va.'s Last Tied Election*, Wash. Post, Jan. 1, 2018, at B1.

8834. *See* Laura Vozzella, *Drawing Settles Tied Va. Contest*, Wash. Post, Jan. 5, 2018, at B1; *see also* Trip Gabriel, *Another Twist in Tied Virginia Political Race: Drawing to Pick a Winner Is Postponed*, N.Y. Times, Dec. 27, 2017, at A14; Fenit Nirappil, *Majority in House Hinges on Drawing After Republican Wins Last of Recounts*, Wash. Post, Dec. 22, 2017, at B2; Jenna Portnoy, *Va. Will Rely on Film Canisters, and Chance to Settle a Key Race*, Wash. Post, Dec. 22, 2017, at B1; Laura Vozzella, *Luck Will Decide Va. House Race, but Delay Means GOP Holds the Cards*, Wash. Post, Jan. 4, 2018, at B1.

8835. *See* Paul Schwartzman & Laura Vozzella, *Simonds Concedes, Rejects a Recount*, Wash. Post, Jan. 11, 2018, at B1.

nearly 2,600 who actually voted, among which were over two dozen actual voters left out of the district 94 race.[8836]

The Presidential Advisory Commission on Election Integrity

Electronic Privacy Information Center v. Presidential Advisory Commission on Election Integrity (1:17-cv-1320), ACLU v. Trump (1:17-cv-1351), and Lawyers' Committee for Civil Rights Under Law v. Presidential Advisory Commission on Election Integrity (1:17-cv-1354) (Colleen Kollar-Kotelly, D.D.C.) and Joyner v. Presidential Advisory Commission on Election Integrity (Marcia G. Cooke, S.D. Fla. 1:17-cv-22568)

> In mid-2017, President Trump created the Presidential Advisory Commission on Election Integrity. The commission's vice chair asked all states to submit extensive voter-registration data to the commission. Following states' reluctance to comply and lawsuits challenging the request, President Trump disbanded the commission early in 2018.
>
> *Topics:* Registration procedures; case assignment.

Privacy Impact Assessment

The Electronic Privacy Information Center (EPIC), an organization "established in 1994 to focus public attention on emerging privacy and civil liberties issues," filed a federal complaint in the district court for the District of Columbia on Monday, July 3, 2017, challenging requests to state election officials by the vice chair of President Trump's Presidential Advisory Commission on Election Integrity for detailed, publicly available voter-roll data.[8837] EPIC sought an injunction against "collection of personal voter data" and an order that the commission prepare a privacy-impact assessment of its requests.[8838] At a hearing, EPIC described its membership as approximately one hundred persons on its advisory board.[8839]

8836. Ted Mellnik, Reuben Fischer-Baum & Kim Soffen, *Thousands of Virginians May Have Voted in the Wrong State House Districts*, Wash. Post, Jan. 14, 2018, at C5; Laura Vozzella & Ted Mellnik, *Va. Race May Have Hinged on Mistakes*, Wash. Post, May 14, 2018, at A1.

8837. Complaint, Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity, No. 1:17-cv-1320 (D.D.C. July 3, 2017), D.E. 1 [hereinafter *Elec. Privacy Info. Ctr.* Complaint]; Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity, 878 F.3d 371, 374, 376 (D.C. Cir. 2017); *see* Mark Berman & John Wagner, *At Least 44 States Deny Full Data to Voting Panel*, Wash. Post, July 6, 2017, at A10.

8838. *Elec. Privacy Info. Ctr.* Complaint, *supra* note 8837, at 10–11; *Elec. Privacy Info. Ctr.*, 878 F.3d at 374, 376.

8839. Transcript at 15–18, *Elec. Privacy Info. Ctr.*, No. 1:17-cv-1320 (D.D.C. July 7, 2017, filed July 9, 2017), D.E. 22 [hereinafter *Elec. Privacy Info. Ctr.* Hearing Transcript].

President Trump created the advisory commission—chaired by Vice President Pence—by executive order on May 11.[8840] Kansas's secretary of state was named vice chair.[8841] The vice chair's letters to other secretaries of state, requesting responses by July 14,[8842] were sent out on June 28, and approximately half of the states immediately declined to fully comply with the request.[8843] By a week later, nearly all of the states had balked.[8844] The vice chair reported in litigation, "To my knowledge, as of July 5, 2017, no Secretary of State had yet provided to the Commission any of the information requested in my letter."[8845] On July 6, Arkansas submitted data, but

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8840. Exec. Order No. 13,799, 82 Fed. Reg. 22,389 (May 16, 2017); *Elec. Privacy Info. Ctr.*, 878 F.3d at 375; Brennan Ctr. for Justice v. U.S. Dep't of Justice, 377 F. Supp. 3d 428, 430 (S.D.N.Y. 2019); United to Protect Democracy v. Presidential Advisory Comm'n on Election Integrity, 288 F. Supp. 3d 99, 101–02 (D.D.C. 2017); Dunlap v. Presidential Advisory Comm'n on Election Integrity, 286 F. Supp. 3d 96, 100 (D.D.C. 2017); Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity, 266 F. Supp. 3d 297, 302 (D.D.C. 2017); ACLU v. Trump, 266 F. Supp. 3d 131, 135 (D.D.C. 2017); *see* John Wagner & Jenna Johnson, *Creation of Voter-Fraud Panel Is Met with Criticism*, Wash. Post, May 12, 2017, at A2.

8841. *Elec. Privacy Info. Ctr.*, 266 F. Supp. 3d at 303; *ACLU*, 266 F. Supp. 3d at 135; *see* Ari Berman, *The Man Behind Trump's Voter-Fraud Obsession*, N.Y. Times, June 13, 2017, Magazine; Wagner & Johnson, *supra* note 8840. *See generally* Allan J. Lichtman, The Embattled Vote in America 223–27 (2018).

8842. *See* Ex. 3, *Elec. Privacy Info. Ctr.* Complaint, *supra* note 8837; Transcript at 4, *Elec. Privacy Info. Ctr.*, No. 1:17-cv-1320 (D.D.C. July 3, 2017, filed July 6, 2017), D.E. 10 [hereinafter *Elec. Privacy Info. Ctr.* Initial Conference Transcript].

8843. *Elec. Privacy Info. Ctr.*, 878 F.3d at 375–76; *United to Protect Democracy*, 288 F. Supp. 3d at 102; *Dunlap*, 286 F. Supp. 3d at 101; *ACLU*, 266 F. Supp. 3d at 136–37; *see Elec. Privacy Info. Ctr.* Complaint, *supra* note 8837, at 10–11; *Elec. Privacy Info. Ctr.*, 878 F.3d at 374 (noting that the commission could only request information because it lacked authority to demand information); *see also* Mark Berman & David Weigel, *States Resist Turning Over Voter Data*, Wash. Post, July 1, 2017, at A2; Michael Wines & Rachel Shorey, *Inside the Uproar Over a Government-Led Search for Voter Fraud*, N.Y. Times, July 8, 2017, at A14.

"The Colorado Secretary of State's Office reported Monday that of the 3,738 people who withdrew their registrations between June 28 and Friday, 367 are Republicans and 1,255 are unaffiliated voters. Just over 2,000 Democrats have also canceled their registrations." Jesse Paul, *Thousands Cancel Registrations*, Denver Post, July 18, 2017, at 3A (reporting that some voters responded to the data requests by canceling their voter registrations).

8844. *See* Berman & Wagner, *supra* note 8837.

8845. Kobach Declaration at 3, *attached to* Government Response, *Elec. Privacy Info. Ctr.*, No. 1:17-cv-1320 (D.D.C. July 5, 2017), D.E. 8; *see Elec. Privacy Info. Ctr.* Hearing Transcript, *supra* note 8839, at 12.

they were subsequently deleted without the commission looking at them.[8846]

With its complaint against the commission, the Vice President, the Executive Office of the President, and the General Services Administration, EPIC filed a motion for a temporary restraining order to "safeguard the privacy interests of registered voters and maintain the *status quo* while more permanent solutions may be considered."[8847]

Judge Colleen Kollar-Kotelly held a telephonic scheduling conference at approximately 4:50 p.m. on the day that the case was filed, a day before the Independence Day holiday.[8848] She asked the government to file a response to the motion by noon following the holiday, with a reply due the morning after that.[8849] Arguing a difficulty in reaching the people that she would need to reach, the government's attorney asked for an additional day; following back-and-forth bids by the judge and the attorney, Judge Kotelly extended the deadline four hours, observing, "I would've assumed that since the reaction was not a positive one by a lot of states, that [the people the government's attorney needs to reach] would've expected that there would be a lawsuit."[8850] On the day that briefing was completed, Judge Kotelly scheduled a hearing for the following afternoon, identifying seven specific issues for the parties to address.[8851]

At a telephonic conference later in the litigation, Judge Kotelly succinctly specified an approach that she used in proceedings throughout the litigation:

> I would ask that if you listen to me, there may be an instance where I'm going to interrupt you either because I think you've wandered off what we want to talk about or I've heard enough and we need to move on to something else. So I would ask that you please listen.[8852]

8846. *Elec. Privacy Info. Ctr.*, 878 F.3d at 376; *Elec. Privacy Info. Ctr.* Hearing Transcript, *supra* note 8839, at 40.

8847. Temporary-Restraining-Order Motion, *Elec. Privacy Info. Ctr.*, No. 1:17-cv-1320 (D.D.C. July 3, 2017), D.E. 3.

8848. *Elec. Privacy Info. Ctr.* Initial Conference Transcript, *supra* note 8842; Docket Sheet, *Elec. Privacy Info. Ctr.*, No. 1:17-cv-1320 (D.D.C. July 3, 2017) [hereinafter *Elec. Privacy Info. Ctr.* Docket Sheet].

8849. *Elec. Privacy Info. Ctr.* Initial Conference Transcript, *supra* note 8842, at 8.

8850. *Id.* at 8–11.

8851. Order, *Elec. Privacy Info. Ctr.*, No. 1:17-cv-1320 (D.D.C. July 6, 2017), D.E. 15.

8852. Transcript at 4, Dunlap v. Presidential Advisory Comm'n on Election Integrity, No. 1:17-cv-2361 (D.D.C. Nov. 17, 2017, filed Nov. 29, 2017), D.E. 29.

By the time of the Friday injunction hearing it was determined that the Department of Defense would be maintaining data for the commission,[8853] so EPIC amended its complaint to add the department as a defendant,[8854] and Judge Kotelly allowed the government an opportunity to file a brief on Monday respecting the adding of the additional party.[8855] She allowed EPIC to file a response on the next day.[8856] The government informed Judge Kotelly and EPIC that the director of White House information technology would develop a system for receiving and maintaining the states' data instead of the Department of Defense, and on Monday the government asked the states not to send data until after Judge Kotelly's ruling.[8857]

Following additional briefing, Judge Kotelly granted an unopposed motion to file a second amended complaint adding information-technology authorities as defendants.[8858] In light of the amended complaints and "substantial changes in factual circumstances since this action was filed," Judge Kotelly asked EPIC to amend its motion for any injunctive relief that it still sought,[8859] which EPIC did on Thursday.[8860]

On July 24, Judge Kotelly denied EPIC immediate relief, without prejudice to later consideration should the factual circumstances change.[8861] The second paragraph of her opinion was informative to the general public:

8853. *Elec. Privacy Info. Ctr.* Hearing Transcript, *supra* note 8839, at 58.

8854. Amended Complaint, *Elec. Privacy Info. Ctr.*, No. 1:17-cv-1320 (D.D.C. July 7, 2017), D.E. 21; Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity, 266 F. Supp. 3d 297, 304 (D.D.C. 2017).

8855. Order, *Elec. Privacy Info. Ctr.*, No. 1:17-cv-1320 (D.D.C. July 10, 2017), D.E. 23; *see* Government Brief, *id.* (July 10, 2017), D.E. 24.

8856. Order, *id.* (July 10, 2017), D.E. 26; *see* EPIC Brief, *id.* (July 11, 2017), D.E. 27.

8857. Kobach Declaration, *attached to* Government Notice, *Elec. Privacy Info. Ctr.*, No. 1:17-cv-1320 (D.D.C. July 13, 2017), D.E. 12; *see* Rebecca Ballhaus, *States Push Back on Voter Records*, Wall St. J., July 11, 2017, at A3; Spencer S. Hsu, *Trump Voting Panel Asks States to Hold Off on Sending Data*, Wash. Post, July 11, 2017, at A2; Spencer S. Hsu, *Voter Data to Go on White House Computers Under Purview of Pence Staff*, Wash. Post, July 7, 2017, at A4.

8858. *Elec. Privacy Info. Ctr.* Docket Sheet, *supra* note 8848; Second Amended Complaint, *Elec. Privacy Info. Ctr.*, No. 1:17-cv-1320 (D.D.C. July 11, 2017), D.E. 33; *Elec. Privacy Info. Ctr.*, 266 F. Supp. 3d at 305.

8859. Order, *Elec. Privacy Info. Ctr.*, No. 1:17-cv-1320 (D.D.C. July 11, 2017), D.E. 31.

8860. Amended Injunction Motion, *id.* (July 13, 2017), D.E. 35; *Elec. Privacy Info. Ctr.*, 266 F. Supp. 3d at 305.

8861. *Elec. Privacy Info. Ctr.*, 266 F. Supp. 3d 297; *see* Spencer S. Hsu, *Trump Voting Panel Wins a Round in Federal Court*, Wash. Post, July 25, 2017, at A9.

> Although substantial public attention has been focused on the Commission's request, the legal issues involved are highly technical. In addition to the Fifth Amendment of the Constitution, three federal laws are implicated: the Administrative Procedure Act, the E-Government Act of 2002, and the Federal Advisory Committee Act. All three are likely unfamiliar to the vast majority of Americans, and even seasoned legal practitioners are unlikely to have encountered the latter two. Matters are further complicated by the doctrine of standing, a Constitutional prerequisite for this Court to consider the merits of this lawsuit.[8862]

Judge Kotelly found that EPIC's members did not have standing to challenge transfer of the data, because all of the members who submitted declarations lived in states who had refused to comply, and even if the states complied, the risk that their data would be improperly exposed was speculative.[8863] EPIC did have informational standing to challenge the commission's failure to prepare a privacy-impact assessment, but (1) the E-Government Act did not provide it a cause of action, and (2) the commission was not an agency covered by the Administrative Procedures Act.[8864]

The court of appeals determined on December 26 that EPIC did not have informational standing—because it was not a voter, its privacy interests were not at stake—and affirmed Judge Kotelly's denial of preliminary relief.[8865]

Three days later, District Judge Rudolph Contreras held that the commission was not an agency with respect to the Paperwork Reduction Act and dismissed a September 29 complaint alleging that the commission "acted without transparency and without providing legally required opportunities for the public to comment on the appropriateness of the request" to the states.[8866]

8862. *Elec. Privacy Info. Ctr.*, 266 F. Supp. 3d at 301 (citations omitted).

8863. *Id.* at 302, 307–09.

8864. *Id.* at 302, 309–19; Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity, 878 F.3d 371, 374, 376 (D.C. Cir. 2017); *see* Matthew Haag, *Judge Clears Path for Voter Fraud Panel*, N.Y. Times, July 25, 2017, at A14.

8865. *Elec. Privacy Info. Ctr.*, 878 F.3d at 376–80; *see* Rachel Weiner, *Appeals Court Rejects Challenge to Voting Panel*, Wash. Post, Dec. 27, 2017, at A3.

8866. United to Protect Democracy v. Presidential Advisory Comm'n on Election Integrity, 288 F. Supp. 3d 99 (D.D.C. 2017); Complaint at 2, United to Protect Democracy v. Presidential Advisory Comm'n on Election Integrity, No. 1:17-cv-2016 (D.D.C. Sept. 29, 2017), D.E. 1; *see* 44 U.S.C. §§ 3501–3558.

This case was initially assigned to Judge Kotelly as related to the EPIC case, Docket Sheet, *United to Protect Democracy*, No. 1:17-cv-2016 (D.D.C. Sept. 29, 2017); Notice, *id.* (Sept. 29, 2017), D.E. 4, and then reassigned to Judge Contreras, Reassignment, *id.* (Oct.

Transparency and Balance

The ACLU filed a federal complaint in the district on Monday, July 10, challenging the commission's ideological balance and seeking a judicial order requiring more transparency pursuant to the Federal Advisory Committee Act (FACA).[8867] With its complaint, the ACLU filed a motion for a temporary restraining order and a preliminary injunction.[8868] The ACLU notified the court that its case was related to EPIC's,[8869] and the court assigned the case to Judge Kotelly.[8870] She set the case for a chambers telephonic conference the following morning, and negotiated with the parties a completion of motion briefing by the end of the week.[8871]

The Lawyers' Committee for Civil Rights Under Law also filed a District of Columbia July 10 federal complaint seeking judicially imposed transparency pursuant to FACA.[8872] With its complaint, the committee filed a motion for a temporary restraining order or a preliminary injunction[8873] and a notice that its case was related to the other two before Judge Kotelly.[8874] Judge Kotelly held a courtroom telephonic conference with the parties on the following morning.[8875]

She ruled in both cases on July 18.

With respect to the ACLU case, she determined, "The only jurisdictional basis pursued by Plaintiffs is in the form of mandamus. Because the Court concludes that mandamus jurisdiction is unavailable in this case at the present time, Plaintiffs' motion must be denied."[8876] Litigation on an amended complaint was stayed pending the results of other litigation.[8877] Judge Kotelly approved a voluntary dismissal on July 22, 2020.[8878]

With respect to the Lawyers' Committee case, Judge Kotelly concluded that the committee "has not demonstrated that, at the present time, De-

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3, 2017), D.E. 9.

8867. Complaint, ACLU v. Trump, No. 1:17-cv-1351 (D.D.C. July 10, 2017), D.E. 1.

8868. Motion, *id.* (July 10, 2017), D.E. 3.

8869. Notice, *id.* (July 10, 2017), D.E. 5.

8870. Docket Sheet, *id.* (July 10, 2017) [hereinafter *ACLU* Docket Sheet].

8871. *Id.*

8872. Complaint, Lawyers' Comm. for Civil Rights Under Law v. Presidential Advisory Comm'n on Election Integrity, No. 1:17-cv-1354 (D.D.C. July 10, 2017), D.E. 1.

8873. Motion, *id.* (July 10, 2017), D.E. 3.

8874. Notice, *id.* (July 10, 2017), D.E. 2.

8875. Docket Sheet, *id.* (July 10, 2017).

8876. ACLU v. Trump, 266 F. Supp. 3d 131, 134 (D.D.C. 2017).

8877. *ACLU* Docket Sheet, *supra* note 8870; Amended Complaint, ACLU v. Trump, No. 1:17-cv-1351 (D.D.C. Jan. 3, 2018), D.E. 30.

8878. Order, *ACLU*, No. 1:17-cv-1351 (D.D.C. July 22, 2020), D.E. 39.

fendants are out of compliance with FACA's open meetings and document disclosure provisions."[8879]

> There is no doubt that the Commission and its request for voter roll information have generated substantial public interest and debate. Nonetheless, Plaintiff has failed to demonstrate that, absent preliminary injunctive relief, its ability to engage in this public debate would be substantially impaired in a manner that is both "certain and great."[8880]

On December 22, 2017, Judge Kotelly granted relief to Matthew Dunlap—Maine's secretary of state and a member of the commission—in an action seeking a judicial order requiring the commission to share with him information that the commission was providing to other members.[8881]

Other Privacy Cases

Public Citizen filed a federal complaint in the district on July 10, 2017, challenging the army's involvement in maintaining the commission's data[8882] with a notice that the case was related to EPIC's case,[8883] so the court assigned the case to Judge Kotelly.[8884] On July 14, Common Cause filed a complaint against the commission, the Department of Homeland Security, and the Social Security Administration seeking "to enjoin Defendants

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8879. Lawyers' Comm. for Civil Rights Under Law v. Presidential Advisory Comm'n on Election Integrity, 266 F. Supp. 3d 54, 59 (D.D.C. 2017), *interlocutory appeal dismissed*, Order, No. 17-5167 (D.C. Cir. Dec. 20, 2017), 2017 WL 6945782 (granting voluntary dismissal following an order to show cause why the appeal was not moot because of the intervening July 19, 2017, meeting of the commission that was the subject of the injunction motion).

8880. *Id.* at 70.

8881. Dunlap v. Presidential Advisory Comm'n on Election Integrity, 286 F. Supp. 3d 96 (D.D.C. 2017); Dunlap v. Presidential Advisory Comm'n on Election Integrity, 944 F.3d 945, 947 (D.C. Cir. 2019); *see* Complaint, Dunlap v. Presidential Advisory Comm'n on Election Integrity, No. 1:17-cv-2361 (D.D.C. Nov. 9, 2017), D.E. 1 ("by obstructing certain commissioners' access to information and failing to allow substantive participation of commissioners with balance in terms of points of view, the Commission and its staff have compromised the legitimacy of any findings that may emerge from this process"); *see also* Spencer S. Hsu, *Voting Fraud Panel Will Destroy, Not Share, Data*, Wash. Post, Jan. 11, 2018, at A9; John Wagner, *Trump Voting Panel Sued by Democratic Member Complaining of Exclusion*, Wash. Post, Nov. 10, 2017, at A9; Michael Wines, *Voter Fraud Panel Is Sued, This Time by a Member*, N.Y. Times, Nov. 10, 2017, at A18.

8882. Complaint, Public Citizen, Inc. v. U.S. Dep't of the Army, No. 1:17-cv-1355 (D.D.C. July 10, 2017), D.E. 1.

8883. Notice, *id.* (July 10, 2017), D.E. 2.

8884. Docket Sheet, *id.* (July 10, 2017); Transcript at 3, Common Cause v. Presidential Advisory Comm'n on Election Integrity, No. 1:17-cv-1398 (D.D.C. Aug. 1, 2017, filed Aug. 3, 2017), D.E. 19 [hereinafter *Common Cause* Transcript].

from collecting, maintaining, using, or disseminating [voter-roll] data and to destroy or return any such data that has already been collected and is being maintained in violation of the law."[8885] Common Cause also told the court that its action was related to EPIC's,[8886] so the court assigned this case also to Judge Kotelly.[8887] The court's calendar committee later determined that these two new cases were not related to EPIC's, so they were reassigned to Judge Royce C. Lamberth on July 19.[8888]

Public Citizen dismissed its action voluntarily on July 25.[8889] At 8:10 p.m. on Friday, July 28, two weeks after filing its complaint, Common Cause filed a motion for a temporary restraining order or a preliminary injunction.[8890] At a hearing on Tuesday morning, Judge Lamberth denied Common Cause immediate relief and gave the plaintiff guidance on amending its motion for a preliminary injunction.[8891] On Thursday, Common Cause withdrew its motion instead.[8892]

Challenge by Voters

Five Florida voters, Florida's branch of the ACLU, and the Florida Immigrant Coalition filed a federal complaint in the Southern District of Florida on July 10 challenging the legality of the commission's request of the states on behalf of Florida voters and voters throughout the United States.[8893] Named as defendants were the commission, its chair, and its vice chair; the executive offices of the President and the Vice President, the General Services Administration's administrator, and Florida's secretary of state.[8894] With their complaint, the plaintiffs filed a motion for a temporary restraining order.[8895]

8885. Complaint, *Common Cause*, No. 1:17-cv-1398 (D.D.C. July 14, 2017), D.E. 1.

8886. Notice, *id.* (July 14, 2017), D.E. 1-2.

8887. Docket Sheet, *id.* (July 14, 2017); *Common Cause* Transcript, *supra* note 8884, at 3.

8888. Reassignment, *Common Cause*, No. 1:17-cv-1398 (D.D.C. July 19, 2017), D.E. 6; Reassignment, *Public Citizen, Inc.*, No. 1:17-cv-1355 (D.D.C. July 19, 2017), D.E. 6; *Common Cause* Transcript, *supra* note 8884, at 3.

8889. Notice, *Public Citizen, Inc.*, No. 1:17-cv-1355 (D.D.C. July 25, 2017), D.E. 7.

8890. Motion, *Common Cause*, No. 1:17-cv-1398 (D.D.C. July 28, 2017), D.E. 10.

8891. *Common Cause* Transcript, *supra* note 8884; Order, *Common Cause*, No. 1:17-cv-1398 (D.D.C. Aug. 1, 2017), D.E. 18; *see* Spencer S. Hsu, *Common Cause's Effort to Block Trump Voter Panel Is Denied*, Wash. Post, Aug. 2, 2017, at A15.

8892. Notice, *Common Cause*, No. 1:17-cv-1398 (D.D.C. Aug. 3, 2017), D.E. 20.

8893. Complaint, Joyner v. Presidential Advisory Comm'n on Election Integrity, No. 1:17-cv-22568 (S.D. Fla. July 10, 2017), D.E. 1.

8894. *Id.*

8895. Temporary-Restraining-Order Motion, *id.* (July 10, 2017), D.E. 4; *see* Corrected

The court assigned the case to Judge Marcia G. Cooke,[8896] who was relieved that as emergency election cases go this one did not have the time pressure presented by cases involving legal issues arising while voters are at the polls.[8897] Three days after the case was filed, the government notified Judge Cooke of the three actions pending before Judge Kotelly.[8898]

On July 17, Judge Cooke ordered the plaintiffs to show cause why their motion for a temporary restraining order should not be regarded as a motion for a preliminary injunction because of a failure to show why relief should be granted before the defendants could be heard.[8899]

Judge Kotelly issued her July 18 decision while Judge Cooke was conducting a telephonic hearing in her own case.[8900] Government attorneys received notice of Judge Kotelly's ruling during the hearing, so Judge Cooke took a break in the proceeding so that she and the parties could review the other judge's ruling.[8901]

Judge Cooke decided to "defer to the United States District Court for the District of Columbia's July 18, 2017 Order and Memorandum Opinion for the limited purpose of determining whether to grant a temporary restraining order against the Federal Defendants," and Judge Cooke therefore denied the plaintiffs immediate relief against the commission.[8902]

Termination of the Commission

On January 3, 2018, President Trump disbanded the commission.[8903]

Temporary-Restraining-Order Motion, *id.* (July 13, 2017), D.E. 6.

8896. Docket Sheet, *id.* (July 13, 2017) [hereinafter *Joyner* Docket Sheet].

Tim Reagan interviewed Judge Cooke and her law clerk Alex St. Pierre for this report by telephone on March 27, 2018. Judge Cooke died on January 27, 2023. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

8897. Interview with Judge Marcia G. Cooke and her law clerk Alex St. Pierre, Mar. 27, 2018.

8898. Notice, *Joyner*, No. 1:17-cv-22568 (S.D. Fla. July 13, 2017), D.E. 12; *see Joyner* Docket Sheet, *supra* note 8896 (noting assignment of the case to Judge Cooke, D.E. 2).

8899. *Joyner* Docket Sheet, *supra* note 8896 (D.E. 17).

8900. Order at 2, *Joyner*, No. 1:17-cv-22568 (S.D. Fla. July 20, 2017), D.E. 31 [hereinafter July 20, 2017, *Joyner* Order], 2017 WL 3113486; Interview with Judge Marcia G. Cooke and her law clerk Alex St. Pierre, Mar. 27, 2018.

8901. Interview with Judge Marcia G. Cooke and her law clerk Alex St. Pierre, Mar. 27, 2018.

8902. July 20, 2017, *Joyner* Order, *supra* note 8900.

8903. Exec. Order No. 13,820, 83 Fed. Reg. 969 (Jan. 8, 2018); *see* Notice, Dunlap v. Presidential Advisory Comm'n on Election Integrity, No. 1:17-cv-2361 (D.D.C. Jan. 3, 2018), D.E. 34; Notice, United to Protect Democracy v. Presidential Advisory Comm'n on Election Integrity, No. 1:17-cv-2016 (D.D.C. Jan. 3, 2018), D.E. 34; Notice, Common Cause v. Presidential Advisory Comm'n on Election Integrity, No. 1:17-cv-1398 (D.D.C.

On April 2, the District of Columbia Circuit's court of appeals denied EPIC's motion to vacate as moot the affirmance of Judge Kotelly's denying EPIC preliminary relief.[8904]

The Florida Action Continued

In Florida, litigation over voter-roll data continued. In a January 5 motion for emergency relief, the plaintiffs alleged,

> New, disturbing developments have arisen, requiring emergency Court intervention. On January 3, 2018, the President executed an Executive Order, terminating the Commission. Within hours, Kansas Secretary of State Kris Kobach, the Commission's Vice Chair and notorious vote suppressor, gave statements to the media that he and the White House are working together to transfer private, protected voter data to Immigration and Customs Enforcement ("ICE") so that Secretary Kobach, the White House, and ICE can work together to purge voter rolls. Secretary Kobach called this a "tactical shift," saying "[t]he investigations will continue now, but they won't be able to stall [it] through litigation." Using Commission data, the Federal Defendants seek to "Stop Aliens From Voting," without complying with FACA and other laws.[8905]

According to the government, "As of September 29, 2017, the Commission had received data from nineteen states, including Florida, and one county."[8906] On January 18, 2018, Judge Cooke ordered the government to address the plaintiffs' concerns:

> Federal Defendants shall submit a declaration from Kris Kobach, or another member of the Commission with knowledge of the Commission's activities and authority to speak on the Government's behalf, stating what information was collected or created by the Commission and/or its members on behalf of the Commission, where that information was

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Jan. 3, 2018), D.E. 42; Notice, Lawyers' Comm. for Civil Rights Under Law v. Presidential Advisory Comm'n on Election Integrity, No. 1:17-cv-1354 (D.D.C. Jan. 3, 2018), D.E. 39; Notice, ACLU v. Trump, No. 1:17-cv-1351 (D.D.C. Jan. 3, 2018), D.E. 29; Notice, Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity, No. 1:17-cv-1320 (D.D.C. Jan. 3, 2018), D.E. 57; *see also* Michael C. Bender, *Trump Ends Voter Fraud Commission*, Wall St. J., Jan. 4, 2018, at A3; John Wagner, *Panel Studying Alleged Voter Fraud Is Dismantled*, Wash. Post, Jan. 4, 2018, at A1; Michael Wines & Maggie Haberman, *Voter Fraud Commission Started by a Tweet Is Ended by Another*, N.Y. Times, Jan. 5, 2018, at A1.

8904. Orders, Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity, No. 17-5171 (D.C. Cir. Apr. 2), *cert. denied*, 586 U.S. ___, 139 S. Ct. 791 (2018).

8905. Emergency Motion at 2, *Joyner*, No. 1:17-cv-22568 (S.D. Fla. Jan. 5, 2018), D.E. 69 [hereinafter Jan. 5, 2018, *Joyner* Emergency Motion]; *see* Report and Recommendation, *id.* (Feb. 6, 2018), D.E. 97 [hereinafter *Joyner* Report and Recommendation].

8906. Government Brief at 8, *id.* (Jan. 26, 2018), D.E. 89.

> and is being stored, by whom the information has been accessed, and what plans were made by the Commission to maintain or dispose of the information, including the voter information data held by the [Director of White House Information Technology], upon termination of the Commission.[8907]

A January 16, 2018, letter from Kobach to government counsel stated, "I never accessed the state voting data that the [commission] collected, and I do not now have access to it."[8908] On January 26, the former commission's executive director declared, "The state voter data has never been provided to, or accessed by, the former Commissioners, or any agency."[8909]

Reviewing amended pleadings, Judge Cooke affirmed and adopted on March 19 Magistrate Judge Jonathan Goodman's February 6 recommended denial of immediate relief.[8910] And Judge Cooke dismissed the case as moot on May 30.[8911]

A Commissioner's Entitlement to Documents

Judge Kotelly decided on June 27 that Commissioner Dunlap was still entitled to the relief that she had granted him in December.[8912] First, "The Commission's termination does not affect the premise of the Court's December 22, 2017, opinion . . . ."[8913] Second, "Only upon Plaintiff's review of the documents generated by the Commission will the extent to which his participation was thwarted become clear."[8914] Third, Judge Kotelly regarded evasion of her order as a possible motivating factor in terminating the commission as a lack of respect for the tribunal: "Were it not so, the Court would have expected Defendants to pursue an interlocutory appeal, rather than termination of the Commission twelve days after this Court's prelim-

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8907. Order, *id.* (Jan. 18, 2018), D.E. 83, 2018 WL 481880.

8908. Kobach Letter, *attached as* Ex. D, Government Brief, *id.* (Jan. 26, 2018), D.E. 89 [hereinafter Jan. 26, 2018, *Joyner* Government Brief].

8909. Kossack Declaration, *attached as* Ex. D, Jan. 26, 2018, *Joyner* Government Brief, *supra* note 8908; *see* Hsu, *supra* note 8881.

8910. Order, *Joyner*, No. 1:17-cv-22568 (S.D. Fla. Mar. 19, 2018), D.E. 105, 2018 WL 1859347; *Joyner* Report and Recommendation, *supra* note 8905; *see* Jan. 5, 2018, *Joyner* Emergency Motion, *supra* note 8905; Amended Complaint, *Joyner*, No. 1:17-cv-22568 (S.D. Fla. Dec. 29, 2017), D.E. 65.

8911. Opinion, *Joyner*, No. 1:17-cv-22568 (S.D. Fla. May 30, 2018), D.E. 108, 2018 WL 4776089.

8912. Dunlap v. Presidential Advisory Comm'n on Election Integrity, 319 F. Supp. 3d 70, 78, 83–90, 110 (D.D.C. 2018); *see* Lawyers' Comm. for Civil Rights Under Law v. Presidential Advisory Comm'n on Election Integrity, 316 F. Supp. 3d 230, 232 (D.D.C. 2018).

8913. *Dunlap*, 319 F. Supp. 3d at 86.

8914. *Id.* at 87.

inary injunction compelling a document production. They shall not be permitted to further postpone compliance with a preliminary injunction."[8915]

Documents were produced on July 18,[8916] as ordered by Judge Kotelly.[8917] Dunlap reported in a status report that the production may not have been complete,[8918] and the commission filed an appeal.[8919] A second appeal from a subsequent production order also was heard on November 18, 2019.[8920] The court of appeals decided on December 20 that it was improper for Judge Kotelly to use mandamus authority to order production of "emails between the Vice President's staff and individuals who were then commissioners discussing potential appointees to the Commission."[8921]

On May 29, 2020, Judge Kotelly terminated the action, finding that Dunlap had received by then all documents to which he was entitled.[8922]

Satisfying Litigation by Destroying Data

On July 19, 2018, the plaintiffs in the pending actions notified Judge Kotelly that they did not object to the government's proposal to destroy the state voter data that was collected by the commission.[8923] Expressing a "view that no further adjudication in this matter is necessary," Judge Kotelly ordered a notice filed by August 20 confirming the planned deletion

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8915. *Id.* at 89 (citing the commission vice chair's description of the termination as an "option play" in response to litigation).

8916. Notice, Dunlap v. Presidential Advisory Comm'n on Election Integrity, No. 1:17-cv-2361 (D.D.C. July 18, 2018), D.E. 53 ("relevant documents that *any* of the former commissioners generated or received").

8917. *Dunlap*, 319 F. Supp. 3d at 78, 110.

8918. Status Report, *Dunlap*, No. 1:17-cv-2361 (D.D.C. July 27, 2018), D.E. 54.

8919. Docket Sheet, Dunlap v. Presidential Advisory Comm'n on Election Integrity, No. 18-5266 (D.C. Cir. Aug. 31, 2018).

8920. Oral Argument, Dunlap v. Presidential Advisory Comm'n on Election Integrity, No. 19-5051 (D.C. Cir. Nov. 18, 2019), www.cadc.uscourts.gov/recordings/recordings2019.nsf/6C6EF3E04D6AF1D6852584B6006408DE/$file/18-5266.mp3 (audio recording); *see* Order, *Dunlap*, No. 1:17-cv-2361 (D.D.C. Jan. 28, 2019), D.E. 64.

8921. Dunlap v. Presidential Advisory Comm'n on Election Integrity, 944 F.3d 945, 947 (D.C. Cir. 2019).

8922. Dunlap v. Presidential Advisory Comm'n on Election Integrity, 464 F. Supp. 3d 247 (D.D.C. 2020).

8923. Notice, Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity, No. 1:17-cv-1320 (D.D.C. July 19, 2018), D.E. 62; *see* Notice of Compliance, *id.* (July 17, 2018), D.E. 61.

of data.[8924] On that date, the government certified that the files had been deleted, and remaining fragments and backups had been overwritten.[8925]

Judge Kotelly dismissed the EPIC case on August 22.[8926] Common Cause stipulated dismissal on August 29,[8927] and Judge Kotelly approved the Lawyers' Committee for Civil Rights Under Law's voluntary dismissal on September 7.[8928] In 2020, Judge Kotelly approved the ACLU's voluntary dismissal of its action.[8929]

Other Actions

A July 18, 2017, action filed in the Southern District of New York to enjoin the cooperation of the commission as created for an improper purpose was voluntarily dismissed.[8930]

An August 21, 2017, action under the Freedom of Information Act (FOIA) filed in the Southern District of New York sought records from government agencies about the commission so as to discover the true purpose of the commission.[8931] On April 30, 2019, Judge Alvin K. Hellerstein ordered agencies using more restrictive search terms to expand their searches according to search terms specified in the order, and Judge Hellerstein decided that private emails needed to be searched for agency officials conducting substantial government work using private email accounts.[8932] Following additional productions to the plaintiffs, Judge Heller-

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8924. Order, *id.* (July 19, 2018), D.E. 63.

8925. Notice, *id.* (Aug. 20, 2018), D.E. 64.

8926. Order, *id.* (Aug. 22, 2018), D.E. 65.

8927. Stipulation, Common Cause v. Presidential Advisory Comm'n on Election Integrity, No. 1:17-cv-1398 (D.D.C. Aug. 29, 2018), D.E. 54.

8928. Order, Lawyers' Comm. for Civil Rights Under Law v. Presidential Advisory Comm'n on Election Integrity, No. 1:17-cv-1354 (D.D.C. Sept. 7, 2018), D.E. 47.

8929. Order, ACLU v. Trump, No. 1:17-cv-1351 (D.D.C. July 22, 2020), D.E. 39.

8930. Order, NAACP Legal Def. & Educ. Fund, Inc. v. Trump, No. 1:17-cv-5427 (S.D.N.Y. Feb. 28, 2018), D.E. 94; *see* Second Amended Complaint, *id.* (Oct. 20, 2017), D.E. 66; First Amended Complaint, *id.* (Sept. 5, 2017), D.E. 39; Complaint, *id.* (July 18, 2017), D.E. 1; *see also* John Wagner & Sari Horwitz, *Trump Voter Panel Has Rocky Start Before First Meeting*, Wash. Post, July 19, 2017, at A15.

8931. Supplemental Complaint, Brennan Ctr. for Justice v. U.S. Dep't of Justice, No. 1:17-cv-6335 (S.D.N.Y. Sept. 11, 2017), D.E. 12; Amended Complaint, *id.* (Sept. 11, 2017), D.E. 12; Complaint, *id.* (Aug. 21, 2017), D.E. 1; *see* Opinion at 2, *id.* (Jan. 31, 2018), D.E. 42, 2018 WL 637424 (denying immediate relief); *see also* Brennan Ctr. for Justice v. U.S. Dep't of Justice, 377 F. Supp. 3d 428, 431–32 (S.D.N.Y. 2019).

8932. *Brennan Ctr. for Justice*, 377 F. Supp. 3d 428; *id.* at 434 ("Where challenged, agencies have to explain why certain search terms, clearly relevant, were not used."); *id.* at 436 ("In an environment of widespread use of personal devices for official work, there is danger of an incentive to shunt critical and sensitive communication away from official

stein approved a stipulated dismissal of the action on December 21, 2020.[8933] He issued a stipulated $140,000 award of attorney fees and costs on July 7, 2021.[8934]

In the district court for the District of Columbia, Magistrate Judge G. Michael Harvey determined on October 16, 2020, that the Department of Homeland Security had not yet demonstrated adequate searches or adequate justifications for withholding some information.[8935] District Judge Emmet G. Sullivan adopted Judge Harvey's conclusions on March 30, 2021.[8936] The matter of attorney fees in a January 26, 2018, FOIA action was resolved on April 11, 2023.[8937]

Does the Electoral College Dilute Votes?

Park v. Parnell (Timothy M. Burgess, D. Alaska 3:16-cv-281), James v. Cascos (Robert Pitman and Jeffrey C. Manske, W.D. Tex. 6:16-cv-457), Conant v. Oregon (Marco A. Hernandez, D. Or. 3:16-cv-2290), and Barnes v. Wisconsin (William C. Griesbach, E.D. Wis. 1:16-cv-1692)

> A pro se complaint sought to enjoin on a vote-dilution theory a state's Electoral College votes' going to the prevailing presidential candidate in the state, because although that candidate earned a majority of electoral votes, an opposing candidate earned more votes nationwide. Four days later, the district judge ruled against the plaintiff. Although the judge granted the plaintiff in forma pauperis status during the emergency phase of the litigation, the judge denied in forma pauperis status on appeal because the plaintiff did not present supplementary financial information as ordered. Pro se actions in Virginia, Oregon, Texas, and Wisconsin challenging winner-take-all allocations of Electoral College votes also were unsuccessful.
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> *Topics:* Electoral College; pro se party.

A 2016 lawsuit in Alaska unsuccessfully challenged the state's contribution to an Electoral College victory for the presidential candidate who placed

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channels and out of public scrutiny."); *see* Opinion, *Brennan Ctr. for Justice*, No. 1:17-cv-6335 (S.D.N.Y. June 28, 2019), D.E. 111 (denying reconsideration).

8933. Order, *Brennan Ctr. for Justice*, No. 1:17-cv-6335 (S.D.N.Y. Dec. 21, 2020), D.E. 133 (retaining jurisdiction over possible attorney-fee litigation).

8934. Stipulated Order, *id.* (July 7, 2021), D.E. 144.

8935. Report and Recommendation, *id.* (Oct. 16, 2020), D.E. 46, 2020 WL 7319365.

8936. Order, *id.* (Mar. 30, 2021), D.E. 47, 2021 WL 1197730.

8937. Stipulated Dismissal, Lawyers' Comm. for Civil Rights Under Law v. U.S. Dep't of Justice, No. 1:18-cv-167 (D.D.C. Apr. 11, 2023), D.E. 62; Complaint, *id.* (Jan. 26, 2018), D.E. 1.

second in national popular votes. Suits challenging the winner-take-all rule in Virginia, Oregon, Texas, and Wisconsin also were unsuccessful.

Alaska

A voter filed a pro se federal complaint in the District of Alaska on December 12, 2016, against Alaska's three delegates to the Electoral College, seeking to enjoin the delegates from voting for Donald Trump as President because Hillary Clinton's receiving nearly three million more votes than Trump nationwide meant that an Electoral College victory for Trump would "effectively cause a single vote for Clinton to be valued less than a single vote for Trump."[8938] The voter filed a motion for expedited consideration with her complaint.[8939]

Two days later, Judge Timothy M. Burgess set the case for hearing on December 15.[8940] Although the voter did not "explain efforts to communicate with or the positions taken by opposing parties," Judge Burgess observed that the matter needed to be resolved by the December 19 meeting of the Electoral College.[8941]

At the hearing, the voter said that she had not received a copy of the delegates' motion to dismiss the complaint, which was filed that day, so Judge Burgess agreed to accept a written response from the voter on the following day.[8942] Following oral arguments on December 15 and the voter's December 16 written response[8943] to the motion to dismiss the complaint, Judge Burgess dismissed the complaint as barred by the United States Constitution's establishment of the Electoral College as the body responsible for selecting the President of the United States.[8944]

On the day that he announced his decision, Judge Burgess granted the voter in forma pauperis status.[8945]

> Based on the Court's review of [the in forma pauperis application], it appears that Park's ability to pay filing fees and costs is a close call. Under more normal circumstances, the Court would make further inquiry into Park's eligibility to proceed in forma pauperis. However, in light of the

8938. Complaint at 3, Park v. Parnell, No. 3:16-cv-281 (D. Alaska Dec. 12, 2016), D.E. 1; *see Alaska's Presidential Electors Set to Vote Trump Despite Intense Lobbying*, Alaska Dispatch News, Dec. 16, 2016.

8939. Motion, *Park*, No. 3:16-cv-281 (D. Alaska Dec. 12, 2016), D.E. 4.

8940. Order, *id.* (Dec. 14, 2016), D.E. 5.

8941. *Id.*

8942. Minutes, *id.* (Dec. 15, 2016), D.E. 13; *see* Motion to Dismiss, *id.* (Dec. 15, 2016), D.E. 9.

8943. Response, *id.* (Dec. 16, 2016), D.E. 16.

8944. Opinion, *id.* (Dec. 16, 2016), D.E. 18.

8945. Order, *id.* (Dec. 16, 2016), D.E. 15.

> expedited schedule by which this case is proceeding, the Court believes that its time and resources are better spent considering the merits of this case rather than Park's finances.[8946]

In response to the voter's motion to proceed on appeal in forma pauperis,[8947] Judge Burgess concluded, "As the Court is no longer faced with the same time constraints, the Court determines that additional inquiry into whether Park qualifies for in forma pauperis status for purposes of her appeal is warranted."[8948] Because the voter did not file supplementary information by February 6, 2017, as ordered,[8949] Judge Burgess denied the voter in forma pauperis status on appeal on February 14.[8950]

Texas and Virginia

On Wednesday, December 14, 2016, a Texas voter filed a pro se complaint in the Western District of Texas complaining, "my vote, and the vote cast by every other Texas voter for a Clinton elector, will be changed, against our democratically expressed wishes, to a vote for a Trump elector under Texas' winner-take-all presidential elector election scheme."[8951] With his complaint, the voter filed a motion for a temporary restraining order and a preliminary injunction.[8952]

On Monday, Judge Robert Pitman concluded, "The court finds that it need not address any philosophical or political arguments regarding the justification of the 'winner-take-all' approach because it is bound by Supreme Court precedent on this issue."[8953] Judge Pitman also noted[8954] that relief was denied in a similar pro se action filed in the Western District of Virginia on October 4,[8955] and Judge Norman K. Moon in the Virginia case

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8946. *Id.*

8947. *See* Docket Sheet, Park v. Parnell, No. 17-35061 (9th Cir. Jan. 23, 2017).

8948. Order, *Park*, No. 3:16-cv-281 (D. Alaska Jan. 27, 2017), D.E. 25.

8949. *See id.*

8950. Order, *id.* (Feb. 14, 2017), D.E. 26; *see* Order, *id.* (Mar. 24, 2017), D.E. 30 (denying reconsideration).

8951. Complaint at 3, James v. Cascos, No. 6:16-cv-457 (W.D. Tex. Dec. 14, 2016), D.E. 1.

8952. Motion, *id.* (Dec. 14, 2016), D.E. 3.

8953. Opinion at 4, *id.* (Dec. 19, 2016), D.E. 6.

8954. *Id.* at 5.

8955. Opinion, Schweikert v. Herring, No. 3:16-cv-72 (W.D. Va. Oct. 18, 2016), D.E. 17; *see* Complaint, *id.* (Oct. 4, 2016), D.E. 1; *see also* Opinion, *id.* (Dec. 2, 2016), D.E. 29, 2016 WL 7046845 (dismissing the action); Order, *id.* (Nov. 1, 2016), D.E. 23 (denying reconsideration of the preliminary-relief decision); Order, *id.* (Nov. 14, 2016), D.E. 25 (denying a motion to recuse the judge because he was nominated to the bench by the husband of one of the presidential candidates).

relied on a 1968 three-judge decision in the Eastern District of Virginia, summarily affirmed by the Supreme Court, upholding the constitutionality of winner-take-all allocations of a state's Electoral College votes.[8956] The 1968 court observed that awarding all of a state's Electoral College votes to a single candidate maximized the state's influence on the Electoral College result.[8957]

Also on Monday, December 19, 2016, Western District of Texas Magistrate Judge Jeffrey C. Manske recommended dismissal of the complaint for lack of standing: "A general interest in seeing that the government abides by the Constitution is not [sufficient]."[8958] Finding no clear error, and observing no objection from the plaintiff, Judge Pitman adopted Judge Manske's recommendation on January 9, 2017.[8959]

Oregon and Wisconsin

Pro se plaintiffs challenged the winner-take-all rule in federal complaints filed in the District of Oregon on December 7, 2016,[8960] and in the Eastern District of Wisconsin on December 21.[8961]

On December 23, Eastern District of Wisconsin Judge William C. Griesbach determined that the plaintiff was unable to establish a strong likelihood of success on the merits.[8962] Judge Griesbach ruled quickly:

> The Defendant State of Wisconsin has not yet been served with the complaint, and it seems unlikely that once it is served, it will have much time to respond to Barnes' request for preliminary relief before the event Barnes seeks to enjoin occurs. The Court will therefore proceed to address Barnes' request for a preliminary injunction without waiting for the State's response.[8963]

The plaintiff voluntarily dismissed the action on January 13, 2017.[8964]

8956. Williams v. Va. State Bd. of Elections, 288 F. Supp. 622 (E.D. Va. 1968), *summarily aff'd*, 393 U.S. 320 (1969).

8957. *Id.* at 626–28.

8958. Report and Recommendation, *James*, No. 6:16-cv-457 (W.D. Tex. Dec. 19, 2016), D.E. 7.

8959. Order, *id.* (Jan. 9, 2017), D.E. 10.

8960. Complaint, Conant v. Oregon, No. 3:16-cv-2290 (D. Or. Dec. 7, 2016), D.E. 1 [hereinafter *Conant* Complaint].

8961. Complaint, Barnes v. Wisconsin, No. 1:16-cv-1692 (E.D. Wis. Dec. 21, 2016), D.E. 1; *see* Amended Complaint, *id.* (Dec. 28, 2016), D.E. 3.

8962. Opinion at 2, *id.* (Dec. 23, 2016), D.E. 2 [hereinafter *Barnes* Opinion]; *see* Order, *id.* (Dec. 30, 2016), D.E. 7 (denying reconsideration).

8963. *Barnes* Opinion, *supra* note 8962, at 1.

8964. Notice, *Barnes*, No. 1:16-cv-1692 (E.D. Wis. Jan. 13, 2017), D.E. 14.

With his complaint, which was filed "late in the day,"[8965] the Oregon plaintiff filed a motion for expedited emergency hearing "no later than Monday, December 12, 2016,"[8966] on his challenge to Oregon's winner-take-all allocation of Electoral College votes.[8967] District Judge Marco A. Hernandez observed on December 9 that the plaintiff's "urgency, which was created by his own late filing, is due to a December 13, 2016 deadline for state certification of Oregon electors."[8968] Observing also that "challenges to the Electoral College have been routinely rejected,"[8969] Judge Hernandez construed the motion as a motion for a temporary restraining order, which he denied.[8970] On December 28, he again denied the plaintiff immediate relief[8971] following a December 22 motion for a temporary restraining order[8972] and a December 27 amended complaint.[8973]

On March 29, 2017, Judge Hernandez dismissed the case.[8974] He also denied relief from the omission of Electoral College electors' names from the presidential ballot and the exclusion of independent voters from party primary elections.[8975] The court of appeals affirmed the dismissal for lack of standing.[8976]

Faithless Electors

Baca v. Hickenlooper (Wiley Y. Daniel, D. Colo. 1:16-cv-2986), Chiafalo v. Inslee (James L. Robart, W.D. Wash. 2:16-cv-1886), Koller v. Brown (Edward J. Davila, N.D. Cal. 5:16-cv-7069), and Abdurrahman v. Dayton (Paul A. Magnuson, D. Minn. No. 0:16-cv-4279)

> After one party's candidate earned more votes in the 2016 presidential election, but the other party's candidate earned more Electoral College votes, electors in four states won by the popular-vote victor filed federal complaints to relieve electors from voting as pledged. No federal court granted any plaintiff immediate relief. But in 2019, a court of appeals ruled that the Consti-

8965. Opinion at 1, Conant v. Oregon, No. 3:16-cv-2290 (D. Or. Dec. 9, 2016), D.E. 4 [hereinafter *Conant* Opinion].

8966. Motion, *id.* (Dec. 7, 2016), D.E. 2.

8967. *Conant* Complaint, *supra* note 8960.

8968. *Conant* Opinion, *supra* note 8965, at 2.

8969. *Id.* at 4.

8970. *Id.* at 4–5.

8971. Docket Sheet, *Conant*, No. 3:16-cv-2290 (D. Or. Dec. 7, 2016) (D.E. 12).

8972. Temporary-Restraining-Order Motion, *id.* (Dec. 22, 2016), D.E. 11.

8973. Amended Complaint, *id.* (Dec. 27, 2016), D.E. 14.

8974. Conant v. Brown, 248 F. Supp. 3d 1014 (D. Or. 2017).

8975. *Id.*

8976. Conant v. Brown, 726 F. App'x 611 (9th Cir. 2018).

tution requires states to allow electors to vote as they please. The Supreme Court disagreed.

Topics: Electoral College; intervention; laches.

The 2016 presidential election resulted in a majority of votes for Hillary Clinton, but Donald Trump earned a majority of Electoral College votes.[8977] Electors in four states that Clinton won filed unsuccessful federal lawsuits seeking judicial rulings freeing electors from voting as pledged. A later lawsuit resulted in a ruling by a court of appeals that electors retain the right to vote as they please, but the Supreme Court reversed that holding.

Colorado

Two members of the Electoral College who were pledged to vote for the Democratic nominees for President and Vice President who prevailed in Colorado on November 8, 2016, filed a federal complaint in the District of Colorado on December 6 seeking relief from legal obligations preventing the Electoral College from being a deliberative body.[8978] The electors sought, for example, an opportunity to vote for a consensus candidate other than Hillary Clinton, who prevailed in Colorado, or Donald Trump, who was expected to earn the most votes in the Electoral College and whom the plaintiffs regarded as unfit.[8979] With their complaint, the electors filed a motion for a temporary restraining order and a preliminary injunction.[8980]

On Friday, December 9, Judge Wiley Y. Daniel granted a motion by Colorado's Republican Party to intervene to protect its candidates' ultimate victories.[8981] On Monday, Judge Daniel granted Trump's motion to intervene to protect the Electoral College process.[8982]

8977. *See, e.g.*, Michael Finnegan, *Electors Stick to Script, Seal Trump as President*, L.A. Times, Dec. 20, 2016, at A1.

8978. Complaint, Baca v. Hickenlooper, No. 1:16-cv-2986 (D. Colo. Dec. 6, 2016), D.E. 1 [hereinafter *Baca* Complaint]; Baca v. Colo. Dep't of State, 935 F.3d 887, 903 (10th Cir. 2019); *see* John Frank, *Anti-Trump Electors Sue State*, Denver Post, Dec. 7, 2016, at 2A; Sean Sullivan & Ed O'Keefe, *Electors for Trump Urged to Have Second Thoughts*, Wash. Post, Dec. 7, 2016, at A4.

8979. *Baca* Complaint, *supra* note 8978, at 3–4.

8980. Motion, *Baca*, No. 1:16-cv-2986 (D. Colo. Dec. 6, 2016), D.E. 2.

8981. Intervention Order, *id.* (Dec. 9, 2016), D.E. 15; Transcript at 3, *id.* (Dec. 12, 2016, filed Dec. 14, 2016), D.E. 23 [hereinafter *Baca* Transcript]; Intervention Motion, *id.* (Dec. 9, 2016), D.E. 11.

Judge Daniel died on May 10, 2019. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

8982. Intervention Order, *Baca*, No. 1:16-cv-2986 (D. Colo. Dec. 12, 2016), D.E. 18;

At a hearing on the afternoon of December 12, Judge Daniel denied the electors immediate relief.[8983] Four days later, the court of appeals denied the electors' motion for an injunction pending appeal.[8984] On December 21, Judge Daniel issued an opinion explaining his December 12 ruling.[8985] He noted that the plaintiffs were seeking immediate relief that would change rather than preserve the status quo.[8986] As to the merits, "I agree with Defendants' contention that the presidential electors waived their First Amendment rights when they accepted the nomination to be presidential electors."[8987]

The electors voted for the Democratic nominees on December 19.[8988] They filed an amended complaint on July 18, 2017,[8989] and six days later the parties stipulated dismissal of Trump as a party.[8990] Judge Daniel granted a voluntary dismissal of the whole case in August.[8991]

Washington

Also pleading the presumptive Electoral College victors as unfit, two Washington electors filed a federal complaint in the Western District of Washington on December 8, 2016, seeking relief from a legal obligation to vote for the Democratic nominees.[8992] With their complaint, they filed a motion for a temporary restraining order and a preliminary injunction.[8993]

Baca Transcript, *supra* note 8981, at 3; Intervention Motion, *Baca*, No. 1:16-cv-2986 (D. Colo. Dec. 12, 2016), D.E. 16.

8983. *Baca* Transcript, *supra* note 8981, at 3; Minutes, *Baca*, No. 1:16-cv-2986 (D. Colo. Dec. 12, 2016), D.E. 19; *Baca*, 935 F.3d at 903; *see* Amended Minute Order, *Baca*, No. 1:16-cv-2986 (D. Colo. Dec. 8, 2016), D.E. 10 (scheduling the hearing); *see also* Brian Eason, *Will Electors Revolt?*, Denver Post, Dec. 19, 2016, at 1A; John Frank, *Electors' Injunction Request Rejected*, Denver Post, Dec. 13, 2016, at 1A.

8984. Opinion, Baca v. Hickenlooper, No. 16-1482 (10th Cir. Dec. 16, 2016); *Baca*, 935 F.3d at 903.

8985. Opinion, *Baca*, No. 1:16-cv-2986 (D. Colo. Dec. 21, 2016), D.E. 27 [hereinafter D. Colo. *Baca* Opinion], 2016 WL 7384286.

8986. *Id.* at 4; *Baca* Transcript, *supra* note 8981, at 9.

8987. D. Colo. *Baca* Opinion, *supra* note 8985, at 8.

8988. 2016 Electoral College Results, www.archives.gov/electoral-college/2016 [hereinafter Electoral College Vote Certificates] (compilation of the certificates of Electoral College votes).

8989. Amended Complaint, *Baca*, No. 1:16-cv-2986 (D. Colo. July 18, 2017), D.E. 55.

8990. Stipulation, *id.* (July 24, 2017), D.E. 56.

8991. Order, *id.* (Aug. 2, 2017), D.E. 58; *see* Baca v. Colo. Dep't of State, 935 F.3d 887, 904 (10th Cir. 2019).

8992. Complaint, Chiafalo v. Inslee, No. 2:16-cv-1886 (W.D. Wash. Dec. 8, 2016), D.E. 1; Chiafalo v. Inslee, 224 F. Supp. 3d 1140, 1142–43 (W.D. Wash. 2016); *see* Jim Brunner, *Two Washington State Electors Sue Over Law on Election Results*, Seattle Times,

On December 9, Judge James L. Robart set the case for hearing on the afternoon of December 14.[8994]

On December 12, Washington's Republican Party moved to intervene "to protect its interest in ensuring its electors are faithful,"[8995] and Trump moved to intervene to protect the Electoral College process.[8996] Deferring a ruling on intervention, Judge Robart ordered the putative intervenors to appear at the December 14 hearing.[8997]

At the hearing, Judge Robart again deferred ruling on the intervention motions and denied the electors immediate relief.[8998] He concluded that it would be unlikely for First Amendment freedoms to extend to the casting of electoral votes by electors who voluntarily chose their rule-governed role.[8999] Two days later, the court of appeals determined that the electors had not "shown a likelihood of success or serious questions going to the merits" and denied an emergency motion for an injunction pending appeal.[9000]

Trump withdrew his motion to intervene on December 21,[9001] and Judge Robart granted intervention to Washington's Republican Party on February 2, 2017.[9002] The case was resolved by stipulated dismissal on March 15.[9003]

On December 19, 2016, the Western District of Washington plaintiffs were two of seven faithless electors: for President, three in Washington, including the plaintiffs, voted for Colin Powell, and one voted for Faith Spotted Eagle; in Texas, one voted for Ron Paul, and one voted for John Kasich; and one in Hawaii voted for Bernie Sanders.[9004]

Dec. 13, 2016, at B3.

8993. Motion, *Chiafalo*, No. 2:16-cv-1886 (W.D. Wash. Dec. 8, 2016), D.E. 2.

8994. Order, *id.* (Dec. 9, 2016), D.E. 7; *see* Brunner, *supra* note 8992.

8995. Intervention Motion at 1–2, *Chiafalo*, No. 2:16-cv-1886 (W.D. Wash. Dec. 12, 2016), D.E. 9.

8996. Intervention Motion, *id.* (Dec. 12, 2016), D.E. 13.

8997. Order, *id.* (Dec. 13, 2016), D.E. 24.

8998. Chiafalo v. Inslee, 224 F. Supp. 3d 1140, 1142, 1148–49 (W.D. Wash. 2016); Transcript at 3–4, 36–41, *Chiafalo*, No. 2:16-cv-1886 (W.D. Wash. Dec. 14, 2016, filed Dec. 23, 2016), D.E. 38 [hereinafter *Chiafalo* Transcript]; Docket Sheet, *id.* (Dec. 8, 2016) (D.E. 27); *see* Finnegan, *supra* note 8977.

8999. *Chiafalo* Transcript, *supra* note 8998, at 38–39.

9000. Order, Chiafalo v. Inslee, No. 16-36034 (9th Cir. Dec. 16, 2016).

9001. Intervention Withdrawal, *Chiafalo*, No. 2:16-cv-1886 (W.D. Wash. Dec. 21, 2016), D.E. 36.

9002. Intervention Order, *id.* (Feb. 2, 2017), D.E. 40.

9003. Stipulation, *id.* (Mar. 15, 2017), D.E. 44.

9004. Electoral College Vote Certificates, *supra* note 8988; Chiafalo v. Washington,

On May 23, 2019, Washington's supreme court affirmed $1,000 fines against the electors who voted for Powell as within the state's authority to direct the manner and mode of appointing electors.[9005] The United States Supreme Court also affirmed the fines.[9006]

California

A California member of the Electoral College who was pledged to vote for the Democratic nominees filed a federal complaint in the Northern District of California on December 9 seeking relief from California statutes compelling him to vote for the California victors.[9007]

On December 12, the elector filed a motion for a temporary restraining order and a preliminary injunction.[9008] That day, Judge Edward J. Davila observed that the notice requirements of Federal Rule of Civil Procedure 65(b)(1) had not been met for a temporary restraining order, and he ordered service and briefing on the motion completed by 4:00 p.m. on December 14.[9009] On December 15, Judge Davila scheduled a hearing for the following morning.[9010]

California's Republican Party and Trump moved on December 13 to intervene in the case.[9011] Trump withdrew his motion on December 20,[9012]

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591 U.S. ___, ___, 140 S. Ct. 2316, 2322 (2020); Baca v. Colo. Dep't of State, 935 F.3d 887, 950 (10th Cir. 2019); *In re* Guerra, 193 Wash. 2d 380, 384 & n.3, 441 P.3d 807, 808 & n.3 (2019); Notice, *Chiafalo*, No. 2:16-cv-1886 (W.D. Wash. Feb. 15, 2017), D.E. 41; *see* Rick Anderson, *"Faithless Electors" Are Now Paying the Price*, L.A. Times, Mar. 10, 2017, at A5; Jim Brunner, *4 Washington State Electors Break Ranks, Cast Protest Votes as Trump Seals Victory*, Seattle Times, Dec. 20, 2016, at A1.

9005. *Guerra*, 193 Wash. 2d 380, 441 P.3d 807; *Chiafalo*, 591 U.S. at ___, 140 S. Ct. at 2323; *see* David Gutman, *High Court Backs Fines for Rogue Electors*, Seattle Times, May 24, 2019, at B6; *see also* Jim Brunner, *Four State "Faithless Electors" Are Fined*, Seattle Times, Dec. 30, 2016, at B1.

9006. *Chiafalo*, 591 U.S. at ___, 140 S. Ct. at 2322–23; *see* Robert Barnes, *States May Bind Electors to Popular Vote, Justices Decide*, Wash. Post, July 7, 2020, at A1; Brent Kendall & Jess Bravin, *Ban on "Faithless" Electors Upheld*, Wall St. J., July 7, 2020, at A3; Adam Liptak, *States Can Curb Elector Choices, Justices Affirm*, N.Y. Times, July 7, 2020, at A1.

9007. Complaint, Koller v. Brown, No. 5:16-cv-7069 (N.D. Cal. Dec. 9, 2016), D.E. 1; Koller v. Harris, 312 F. Supp. 3d 814, 820 (N.D. Cal. 2018); Koller v. Brown, 224 F. Supp. 3d 871, 875 (N.D. Cal. 2016).

9008. Motion, *Koller*, No. 5:16-cv-7069 (N.D. Cal. Dec. 12, 2016), D.E. 4; *Koller*, 312 F. Supp. 3d at 820.

9009. Order, *Koller*, No. 5:16-cv-7069 (N.D. Cal. Dec. 12, 2016), D.E. 10.

9010. Order, *id.* (Dec. 15, 2016), D.E. 31.

9011. Intervention Motion, *id.* (Dec. 13, 2016), D.E. 22 (candidate); Intervention Motion, *id.* (Dec. 13, 2016), D.E. 14 (party).

and Judge Davila granted the Republican Party's motion on January 3, 2017.[9013] On June 2, noting that Trump was no longer involved in the action, Judge Davila denied a December 16, 2016, pro se intervention motion by an attorney and his wife seeking, among other things, that Trump answer for the kidnapping of their son.[9014]

At the December 16, 2016, hearing, Judge Davila denied the elector immediate relief.[9015] Judge Davila acknowledged that the original plan for the Electoral College may have been for a collection of independent voters, but the Supreme Court had recognized in 1952 that modern electors were not unfettered.[9016]

On December 19, 2016, the elector voted for the Democratic nominees.[9017]

On April 20, 2018, Judge Davila dismissed an amended complaint, finding that the elector's role in the 2016 election was moot, his role in future elections was speculative, and there could be no liability for the 2016 election, because "Plaintiff has not convincingly shown why it was clearly-established in 2016 that [California's election code was] unconstitutional and could not be enforced."[9018]

Minnesota

In Minnesota, an elector attempted to vote on December 19, 2016, for Bernie Sanders instead of Hillary Clinton, the Minnesota victor.[9019] Instead of counting the elector's vote, Minnesota's secretary of state selected an alternate elector, who voted for Clinton.[9020] The original elector filed a fed-

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9012. Notice, *id.* (Dec. 20, 2016), D.E. 47.

9013. Order, *id.* (Jan. 3, 2017), D.E. 57; *Koller*, 312 F. Supp. 3d at 820.

9014. Order, *Koller*, No. 5:16-cv-7069 (N.D. Cal. June 2, 2017), D.E. 100; *see* Intervention Motion, *id.* (Dec. 16, 2016), D.E. 38; Docket Sheet, *id.* (Dec. 9, 2016) (showing several additional filings).

9015. Transcript at 47, *id.* (Dec. 16, 2016, filed Dec. 16, 2016), D.E. 41; *Koller*, 312 F. Supp. 3d at 820.

9016. Koller v. Brown, 224 F. Supp. 3d 871, 875–77 (N.D. Cal. 2016), *appeal dismissed*, Order, Koller v. Brown, No. 16-17283 (9th Cir. Dec. 21, 2016); *see* Ray v. Blair, 343 U.S. 214 (1952).

9017. Electoral College Vote Certificates, *supra* note 8988.

9018. *Koller*, 312 F. Supp. 3d 814; *see* Amended Complaint, *Koller*, No. 5:16-cv-7069 (N.D. Cal. Feb. 17, 2017), D.E. 83.

9019. Opinion at 2, Abdurrahman v. Dayton, No. 0:16-cv-4279 (D. Minn. Dec. 23, 2016), D.E. 22 [hereinafter D. Minn. *Abdurrahman* Opinion], 2016 WL 7428193; *see* Complaint at 8, *id.* (Dec. 19, 2016), D.E. 1 [hereinafter *Abdurrahman* Complaint]; Transcript at 2–3, *id.* (Dec. 22, 2016, filed Dec. 30, 2016), D.E. 281 [hereinafter *Abdurrahman* Transcript].

9020. D. Minn. *Abdurrahman* Opinion, *supra* note 9019, at 2; *see Abdurrahman*

eral complaint in the District of Minnesota on December 19 challenging his replacement.[9021] The elector also filed on that day a motion for a temporary restraining order and a temporary injunction,[9022] a motion for summary judgment,[9023] and a motion for expedited briefing and hearing.[9024]

Judge Paul A. Magnuson heard the case on Thursday, December 22.[9025] His first question was, "Why is this entire matter not moot?"[9026] On the following day, he denied the elector relief and dismissed the case.[9027] Because the Electoral College ballots had already been submitted by the time of Judge Magnuson's decision, the elector's complaint was moot.[9028] The elector's claims were not among those capable of repetition but evading review, Judge Magnuson decided, because the would-be faithless elector was unlikely to be selected as an elector again.[9029] In addition, the complaint was barred by laches, because the elector brought the action forty days after he knew he would become an elector.[9030]

On September 12, 2018, the court of appeals affirmed dismissal of the case.[9031] Noting that "an action does not evade review if the short duration results from the party's failure to file suit sooner," the court concluded that the elector "did not proceed expeditiously with his claim."[9032]

Tenth Circuit

The two electors in the Colorado case dismissed their 2016 complaint, and on August 10, 2017, they filed a new complaint against Colorado's department of state seeking nominal damages for intimidating the plaintiffs into voting against their preferences and seeking a judgment that Colorado's infringement of their voting according to personal choice in the Elec-

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Complaint, *supra* note 9019, at 8; *Abdurrahman* Transcript, *supra* note 9019, at 3; *see also* Electoral College Vote Certificates, *supra* note 8988.

9021. *See Abdurrahman* Complaint, *supra* note 9019.

9022. Injunction Motion, *Abdurrahman*, No. 0:16-cv-4279 (D. Minn. Dec. 19, 2016), D.E. 5.

9023. Summary-Judgment Motion, *id.* (Dec. 19, 2016), D.E. 11.

9024. Ex Parte Motion, *id.* (Dec. 19, 2016), D.E. 8.

9025. *Abdurrahman* Transcript, *supra* note 9019.

9026. *Id.* at 3.

9027. D. Minn. *Abdurrahman* Opinion, *supra* note 9019.

9028. *Id.* at 3.

9029. *Id.* at 4.

9030. *Id.* at 4–6.

9031. Abdurrahman v. Dayton, 903 F.3d 813 (8th Cir. 2018).

9032. *Id.* at 818 (identifying January 6, 2017, as the day that the claim became moot).

toral College was unconstitutional.[9033] A September 20 amended complaint added a third plaintiff, who was removed as an elector for voting for Kasich instead of Clinton.[9034] On April 10, 2018, Judge Daniel dismissed a second amended complaint for lack of standing.[9035]

The court of appeals determined on August 20, 2019, that the replaced elector did have standing.[9036] The court further concluded that

> while the Constitution grants the states plenary power to appoint their electors, it does not provide the states the power to interfere once voting begins, to remove an elector, to direct the other electors to disregard the removed elector's vote, or to appoint a new elector to cast a replacement vote. In the absence of such a delegation, the states lack such power.[9037]

Moreover, the "uninterrupted history of Congress counting every anomalous vote cast by an elector weighs against a conclusion that historical practices allow states to enforce elector pledges by removing faithless electors from office and nullifying their votes."[9038]

By a two-to-one vote, the court remanded the removed elector's claims to the district court for further proceedings.[9039] A third judge determined that the case was moot.[9040]

Supreme Court

The Supreme Court originally consolidated its two cases on faithless electors: the Tenth Circuit case originating in Colorado and the state-court case in Washington, but Justice Sotomayor recused herself from the Colo-

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9033. Complaint, Baca v. Colo. Dep't of State, No. 1:17-cv-1937 (D. Colo. Aug. 10, 2017), D.E. 1; Baca v. Colo. Dep't of State, 935 F.3d 887, 901, 904 (10th Cir. 2019); *see* Brian Eason, *"Faithless Electors" in Colorado Seek Damages in Lawsuit*, Denver Post, Aug. 16, 2017, at 6A.

9034. Amended Complaint, *Baca*, No. 1:17-cv-1937 (D. Colo. Sept. 20, 2017), D.E. 13; *see Baca*, 935 F.3d at 904; *see also* Jesse Paul, *Third Presidential Elector Joins Suit Against Colorado Secretary of State*, Denver Post, Sept. 22, 2017, at 8A.

9035. Opinion, *Baca*, No. 1:17-cv-1937 (D. Colo. Apr. 10, 2018), D.E. 53; *Baca*, 935 F.3d at 901, 904; *see* Second Amended Complaint, *Baca*, No. 1:17-cv-1937 (D. Colo. Oct. 25, 2017), D.E. 39; *see also* Jesse Paul, *Federal Judge Tosses Out "Faithless" Lawsuit*, Denver Post, Apr. 11, 2018, at 2A.

9036. *Baca*, 935 F.3d at 901, 905–22.

9037. *Id.* at 943; *see* Trip Gabriel, *Electoral College Members Can Defy Voters' Wishes, Federal Court Rules*, N.Y. Times, Aug. 23, 2019, at A14; Justin Wingerter, *Court: State Electors Were Wrongly Forced to Vote for Hillary Clinton*, Denver Post, Aug. 22, 2019, at 2A.

9038. *Baca*, 935 F.3d at 950; *see* Chiafalo v. Washington, 591 U.S. ___, ___, 140 S. Ct. 2316, 2323 (2020).

9039. *Baca*, 935 F.3d at 902, 956.

9040. 935 F.3d at 956–59 (Judge Mary Beck Briscoe, dissenting).

rado case when she realized that one of the plaintiffs was a friend, so the cases were deconsolidated.[9041] On July 6, 2020, the Colorado case was resolved without opinion, reversing the court of appeals' decision "for the reasons stated in" the Washington case.[9042]

2020

There were no faithless electors in 2020.[9043]

Challenging Disqualified Votes in a Close Election

Ron Barber for Congress v. Bennett (Cindy K. Jorgenson, D. Ariz. 4:14-cv-2489)

> Before the certification of election results in a close election for Congress, the trailing candidate filed a federal complaint challenging the disqualification of some votes. The district judge determined that the plaintiff had not justified federal-court interference with election administration.
>
> *Topics:* Enjoining certification; election errors; provisional ballots; intervention; recusal; case assignment.

Twenty days after the 2014 general election, a candidate for Congress 161 votes behind the election leader filed a federal complaint in the District of Arizona challenging how votes were counted.[9044] With his complaint, the candidate filed an application for a temporary restraining order and a motion for a preliminary injunction.[9045] The leading candidate filed a motion

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9041. Docket Sheet, Colo. Dep't of State v. Baca, No. 19-518 (U.S. Oct. 21, 2019); Docket Sheet, Chiafalo v. Washington, No. 19-465 (U.S. Oct. 9, 2019); *see* Robert Barnes, *Sotomayor Recuses from 1 of 2 High Court Electoral College Cases*, Wash. Post, Mar. 11, 2020, at A2.

9042. Colo. Dep't of State v. Baca, 591 U.S. ___, 140 S. Ct. 2316 (2020); *see* Order, Baca v. Colo. Dep't of State, No. 18-1173 (10th Cir. Oct. 1, 2020) (remanding the case to the district court); Docket Sheet, No. 1:17-cv-1937 (D. Colo. Aug. 10, 2017) (order dismissing the case, D.E. 73).

9043. *See* Nick Corasaniti & Jim Rutenberg, *Electors Affirm Biden's Victory; Vote Is Smooth*, N.Y. Times, Dec. 15, 2020, at A1; John McCormick & Alexa Corse, *Biden's Win Affirmed by Electoral College*, Wall St. J., Dec. 15, 2020, at A1; Elise Viebeck, Dan Simmons, Amy Worden & Omar Sofradzija, *Vote Proceeds Without Surprises or Disruption, Despite Efforts of President and His Supporters*, Wash. Post, Dec. 15, 2020, at A1.

9044. Complaint, Rob Barber for Congress v. Bennett, No. 4:14-cv-2489 (D. Ariz. Nov. 24, 2014), D.E. 1; *see* Rob O'Dell, *Barber Sues to Count 133 Votes in Dist. 2 Race*, Ariz. Republic, Nov. 25, 2014, at A9.

9045. Motion, *Rob Barber for Congress*, No. 4:14-cv-2489 (D. Ariz. Nov. 24, 2014), D.E. 2.

to intervene on the following day, November 25,[9046] and the court ultimately granted this motion.[9047]

Because of Judge David C. Bury's recusal, the court assigned the case to Judge Cindy K. Jorgenson, who set the case for hearing on November 26.[9048] On November 27, Judge Jorgenson denied the candidate relief.[9049] Considering 133 votes in seven categories of possibly improper exclusion, she concluded that "Plaintiffs point to no case where scattered election-procedure violations regarding a small number of voters was found to raise a constitutional violation warranting a federal court's entry into the details of the administration of an election."[9050] On February 20, 2015, she approved the parties' stipulated dismissal without prejudice.[9051]

After a recount, the plaintiff's opponent was declared the winner by 167 votes.[9052]

Remedy for Leaving a Candidate Off of the Ballot

Krieger v. Peoria (David G. Campbell, D. Ariz. 2:14-cv-1762)

> During early voting for a position on a city council, a candidate's name was left off of the ballot twice. He filed a federal complaint seeking a special election instead of a third mailing. The district judge granted him the requested relief. The judge and the parties resolved issues of whether the special election would allow for a runoff election and how campaign-finance rules would apply.
>
> *Topics:* Election errors; enjoining elections; getting on the ballot; absentee ballots; early voting; primary election; campaign finance.

On Thursday, August 7, 2014, a candidate for city council in Peoria, Arizona, filed a federal complaint in the District of Arizona challenging election officials' remedy for the omission of the plaintiff's name on early bal-

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9046. Intervention Motion, *id.* (Nov. 25, 2014), D.E. 11.

9047. Minutes, *id.* (Nov. 26, 2014), D.E. 26; Transcript at 4, *id.* (Nov. 26, 2014, filed Dec. 2, 2014), D.E. 30.

9048. Amended Order, *id.* (Nov. 26, 2014), D.E. 24 (correcting the case caption); Order, *id.* (Nov. 25, 2014), D.E. 14; Recusal, *id.* (Nov. 24, 2014), D.E. 8.

9049. Opinion, *id.* (Nov. 27, 2014), D.E. 27 [hereinafter *Rob Barber for Congress* Opinion], 2014 WL 6694451; *see Court Rejects Incumbent's Bid on Ballot Count*, N.Y. Times, Nov. 28, 2014, at A21.

9050. *Rob Barber for Congress* Opinion, *supra* note 9049, at 11.

9051. Order, *Rob Barber for Congress*, No. 4:14-cv-2489 (D. Ariz. Feb. 20, 2015), D.E. 34.

9052. *See* Rebekah L. Sanders, *McSally Wins Recount in Bitter House Race*, Ariz. Republic, Dec. 18, 2014, at A3.

lots sent out beginning on July 31 for an August 26 election.[9053] The candidate wanted a special election instead of officials' sending out corrected ballots.[9054] On August 8, the plaintiff filed a motion to file an overlong motion for a temporary restraining order and a preliminary injunction,[9055] and Judge David G. Campbell accepted the overlong motion on August 11.[9056]

On August 12, Judge Campbell set a telephone conference for the following afternoon.[9057] He held a hearing on August 22.[9058]

On the day of the hearing, Judge Campbell issued a temporary restraining order, agreeing with the candidate that ballots cast omitting the candidate could not be adequately remedied by providing voters with corrected ballots for their optional use; a special election with correct ballots was required.[9059]

On August 28, the parties notified Judge Campbell that disputes remained about how to handle a runoff election if one of the candidates did not get a majority of votes on general-election day, when the race for the plaintiff's seat would be held.[9060] On September 3, Judge Campbell set the

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9053. Complaint, Krieger v. Peoria, No. 2:14-cv-1762 (D. Ariz. Aug. 7, 2014), D.E. 1 [hereinafter *Krieger* Complaint]; *see* Second Amended Complaint, *id.* (Aug. 15, 2014), D.E. 15 [hereinafter *Krieger* Second Amended Complaint]; Amended Complaint, *id.* (Aug. 8, 2014), D.E. 5 [hereinafter *Krieger* Amended Complaint]; *see also* Jackee Coe, *Ballot Blunder in Peoria*, Ariz. Republic, Aug. 7, 2014, at A1; Gary Grado, *Doctor Mistakenly Left Off Peoria Ballot, Plans to Sue*, Ariz. Capitol Times, Aug. 5, 2014; *Mesquite Candidate's Name Left Off Early Ballots*, Peoria Times, Aug. 5, 2014; *Peoria Candidate Sues in Ballot Fiasco*, Ariz. Republic, Aug. 8, 2014, at A3; *Peoria Council Candidate Left Off Primary Ballot, Twice*, Peoria Indep., Aug. 13, 2014, at 2.

9054. *Krieger* Second Amended Complaint, *supra* note 9053, at 10, 21; *Krieger* Amended Complaint, *supra* note 9053, at 9, 21; *Krieger* Complaint, *supra* note 9053, at 8, 17–18; *see* Jackee Coe, *3 Polling Locations Open to Help Fix Ballot Mistake*, Ariz. Republic, Aug. 15, 2014, at A5.

9055. Page Motion, *Krieger*, No. 2:14-cv-1762 (D. Ariz. Aug. 8, 2014), D.E. 7.

9056. Order, *id.* (Aug. 11, 2014), D.E. 11; *see* Injunction Motion, *id.* (Aug. 11, 2014), D.E. 12.

9057. Docket Sheet, *id.* (Aug. 7, 2014) [hereinafter *Krieger* Docket Sheet] (D.E. 14); *see id.* (D.E. 22).

9058. *Id.* (D.E. 37).

9059. Temporary Restraining Order, *id.* (Aug. 22, 2014), D.E. 39, 2014 WL 4187500; *see Ballot Foul-Ups Derail Peoria Primary*, Ariz. Republic, Aug. 23, 2014, at A7; *Mesquite Election Decision Due This Week*, Peoria Times, Sept. 2, 2014.

9060. Status Report, *Krieger*, No. 2:14-cv-1762 (D. Ariz. Aug. 28, 2014), D.E. 40.

matter for hearing on the following day.[9061] On September 5, he ordered that a runoff election would be held, if necessary, on March 10, 2015.[9062]

On September 15, 2014, the parties stipulated that campaign-finance limits would apply to the special election on general-election day for the plaintiff's seat as if the August 26 election had not happened.[9063]

Although a runoff election was in fact required, the plaintiff's third-place showing did not qualify him for it.[9064]

Seeking Voter Records to Challenge Crossover Voting

True the Vote v. Hosemann (Michael P. Mills, N.D. Miss. 3:14-cv-144) and True the Vote v. Hosemann (Henry T. Wingate and Nancy F. Atlas, S.D. Miss. 3:14-cv-532)

> A federal complaint sought voter information to investigate the possibility of voting in a runoff senatorial primary election for one party after voting in another party's earlier primary election. The judge who was assigned the case determined that it should have been brought in the other district, which includes the capital. A second suit there was transferred to a district in another state within the circuit because of the federal bench's close ties to the incumbent senator, a candidate in the runoff primary election. The transferee judge dismissed claims under the National Voter Registration Act for failure to comply with the act's notice requirements. By the time of decision, the defendants had disclosed to the plaintiffs all of the information required by the act anyway.
>
> *Topics:* National Voter Registration Act; primary election; recusal; case assignment; attorney fees; matters for state courts.

According to a federal complaint filed in the Northern District of Mississippi on July 1, 2014, "After learning of reports of irregularities in Mississippi's June 2014 Republican Primary Run-Off Election, True the Vote requested access to Mississippi's voter rolls. The purpose of its request was to investigate claims that voters illegally double-voted in both the democratic and republican primary races."[9065] The organization and thirteen

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9061. *Krieger* Docket Sheet, *supra* note 9057 (D.E. 41); *see id.* (D.E. 44).

9062. Order, *Krieger*, No. 2:14-cv-1762 (D. Ariz. Sept. 5, 2014), D.E. 45; *see* Jackee Coe, *Special Election for Peoria Council Set to Be Held Nov. 4*, Ariz. Republic, Sept. 5, 2014, at A11; *Mesquite Election Dates Set*, Peoria Times, Sept. 5, 2014.

9063. Stipulation, *Krieger*, No. 2:14-cv-1762 (D. Ariz. Sept. 15, 2014), D.E. 46.

9064. *See It's a Runoff in Mesquite*, Peoria Times, Nov. 5, 2014.

9065. Complaint at 2, True the Vote v. Hosemann, No. 3:14-cv-144 (N.D. Miss. July 1, 2014), D.E. 1 [hereinafter N.D. Miss. *True the Vote* Complaint]; True the Vote v. Hose-

voters filed the complaint against Mississippi's secretary of state and the Republican Party to enforce the organization's requests and to seek remedies for alleged improper participation in the Republican primary election.[9066]

> On June 24, 2014, the Republican Party held its run-off election [for United States Senate]. [Incumbent] Thad Cochran won with a majority of the vote. Some attribute Thad Cochran's win to his campaign's outreach to African American voters and to other Democratic voters. The Chris McDaniel campaign [a Tea Party campaign that came in first on June 3] has "cried foul" over this alleged approach, and has contended that traditionally Democratic voters illegally voted in the Republican primary run-off election.
>
> Mississippi has an "open primary" system, meaning that voters are not required to register with a particular party, and anyone can vote in either the Republican or the Democratic primaries. Voters however, cannot vote in both the Republican and Democratic primaries, nor can an individual who voted in one party's primary decide to vote in another party's primary runoff.[9067]

As the court would find, "Plaintiffs did not seek a [temporary restraining order] or other emergency relief, and this court has had no contact from plaintiffs' counsel requesting any sort of emergency hearing (as is typically the case when parties seek expedited relief)."[9068] On his own motion, Judge Michael P. Mills issued an order on July 7 to show cause why the case should not be transferred to the Southern District, which includes the capital, Jackson.[9069]

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mann, 43 F. Supp. 3d 693, 705 n.49 (S.D. Miss. 2014).

True the Vote is an election advocacy organization headquartered in Houston, Texas. N.D. Miss. Complaint, *supra* note 9065, at 2.

9066. N.D. Miss. *True the Vote* Complaint, *supra* note 9065.

9067. Recusal Order at 2, True the Vote v. Hosemann, No. 3:14-cv-532 (S.D. Miss. July 14, 2014), D.E. 16 [hereinafter S.D. Miss. *True the Vote* Recusal Order] (citations omitted); *see True the Vote*, 43 F. Supp. 3d at 702 ("The Republican Party officially certified Cochran as the primary winner on July 7, 2014.").

"With an unusual assist from African-American voters and other Democrats who feared his opponent, Senator Thad Cochran on Tuesday beat back a spirited challenge from State Senator Chris McDaniel, triumphing in a Republican runoff and defeating the Tea Party in the state where the movement's hopes were bright." Jonathan Weisman, *Cochran Holds Off Tea Party Challenger in Mississippi*, N.Y. Times, June 25, 2014, at A1.

9068. True the Vote v. Hosemann, 29 F. Supp. 3d 870, 875 (N.D. Miss. 2014); *True the Vote*, 43 F. Supp. 3d at 705 n.49.

9069. *True the Vote*, 29 F. Supp. 3d at 876. "[I]t appears that the decision to file suit in Oxford may have been based upon political calculations, the exact nature of which are

On July 8, the organization dismissed its Northern District case.[9070] On July 9, the plaintiffs in the first suit and an additional nine voters filed a complaint in the Southern District against Mississippi's secretary of state, the Republican Party, and nine county election commissions.[9071] With their complaint, the plaintiffs filed a motion for a temporary restraining order "not to redact or otherwise destroy voter records" while the plaintiffs litigated disclosure of voter records pursuant to the National Voter Registration Act (NVRA).[9072] On July 10, Judge Henry T. Wingate set the case for hearing on the following day.[9073]

At the Friday hearing, Judge Wingate announced that he would recuse himself.[9074] He issued a recusal order on Monday, explaining that Senator Cochran had recommended to President Reagan Judge Wingate's nomination to the bench, and "Thad Cochran is, and has been, a personal friend of the undersigned for over thirty years."[9075] That day, Chief Judge Louis Guirola, Jr., referred the case to Chief Circuit Judge Carl E. Stewart for assignment to a judge outside of Mississippi.[9076] Judge Stewart assigned the case to Southern District of Texas Judge Nancy F. Atlas.[9077] Judge Atlas held a telephone conference on July 15 and set the case for an evidentiary hearing in Jackson on July 24.[9078] "The defense representatives committed to [Judge Atlas] on the telephone conference, which was on the record,

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unclear to this court." *Id.* at 875.

9070. Notice, *True the Vote*, No. 3:14-cv-144 (N.D. Miss. July 8, 2014), D.E. 10; *True the Vote*, 43 F. Supp. 3d at 705 n.49.

9071. Complaint, *True the Vote*, No. 3:14-cv-532 (S.D. Miss. July 9, 2014), D.E. 1; *True the Vote*, 43 F. Supp. 3d at 705 & n.49; *see* Amended Complaint, *True the Vote*, No. 3:14-cv-532 (S.D. Miss. July 30, 2014), D.E. 58.

9072. Temporary-Restraining-Order Motion at 11, *True the Vote*, No. 3:14-cv-532 (S.D. Miss. July 9, 2014), D.E. 8; *see True the Vote*, 43 F. Supp. 3d at 706; *see also* Pub. L. No. 103-31, 107 Stat. 77 (1993), *as amended*, 52 U.S.C. §§ 20501–20511 (2015). *See generally* Robert Timothy Reagan, Motor Voter: The National Voter Registration Act (Federal Judicial Center 2014).

9073. Docket Sheet, *True the Vote*, No. 3:14-cv-532 (S.D. Miss. July 9, 2014).

9074. *Id.*

9075. S.D. Miss. *True the Vote* Recusal Order, *supra* note 9067, at 4.

9076. Order, *True the Vote*, No. 3:14-cv-532 (S.D. Miss. July 14, 2014), D.E. 17.

9077. Order, *id.* (July 14, 2014), D.E. 19.

Judge Atlas retired on July 31, 2022. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

9078. Minutes, *True the Vote*, No. 3:14-cv-532 (S.D. Miss. July 15, 2014), D.E. 40; True the Vote v. Hosemann, 43 F. Supp. 3d 693, 701, 706 (S.D. Miss. 2014); *see* Jimmie E. Gates, *Fed Hearing Set for Runoff*, Jackson Clarion-Ledger, July 23, 2014, at A3; Jimmie E. Gates, *Motive Questioned in Voter-Info Suit*, July 25, 2014, at A3.

that no disruption or alteration would occur. And so the immediacy of the TRO, the temporary restraining order, was alleviated."[9079] Judge Atlas, therefore, regarded the July 24 hearing as a preliminary-injunction hearing.[9080] Following the hearing, she invited the parties to move for summary judgment.[9081]

On August 29, Judge Atlas awarded the defendants summary judgment on their NVRA claims.[9082] The majority of the plaintiffs' claims were barred by the plaintiffs' failure to provide the defendants with presuit notice and an opportunity to cure, as required by the NVRA.[9083] By the time of decision, the defendants had disclosed to the plaintiffs all information that the NVRA required them to disclose.[9084]

On October 17, Judge Atlas denied the Republican Party's motion for attorney fees.[9085] She concluded that the plaintiffs' claims were legally incorrect but not unreasonable.[9086]

On October 24, Mississippi's supreme court affirmed dismissal of an August 4 state-court challenge by McDaniel as filed more than twenty days after the election.[9087] Senator Cochran won reelection on November 4.[9088]

The Legitimacy of President Obama's Reelection

Grinols v. Electoral College (Morrison C. England, Jr., E.D. Cal. 2:12-cv-2997)

> Four days before the Electoral College's 2012 vote, a federal complaint challenged the President's reelection on the grounds that the President allegedly was a citizen of Indonesia. The district court ultimately dismissed the action as a political question. The court of appeals affirmed the dismissal on the ground that the case was moot.

9079. Transcript at 9–10, *True the Vote*, No. 3:14-cv-532 (S.D. Miss. July 24, 2014, filed July 29, 2014), D.E. 50 [hereinafter S.D. Miss. *True the Vote* Transcript]; *see True the Vote*, 43 F. Supp. 3d at 706.

9080. *True the Vote*, 43 F. Supp. 3d at 700–01 n.5; *id.* at 706 ("Plaintiffs' requests for unredacted voter records is the focus of the pending motions."); S.D. Miss. *True the Vote* Transcript, *supra* note 9079, at 10.

9081. Order, *True the Vote*, No. 3:14-cv-532 (S.D. Miss. July 25, 2014), D.E. 46.

9082. *True the Vote*, 43 F. Supp. 3d 693.

9083. *Id.* at 717, 745.

9084. *Id.* at 723–40, 745.

9085. Opinion, *True the Vote*, No. 3:14-cv-532 (S.D. Miss. Oct. 17, 2014), D.E. 168.

9086. *Id.* at 10.

9087. McDaniel v. Cochran, 158 So. 3d 992 (Miss. 2014).

9088. *See* Geoff Pender, *Cochran Sails to 7th Senate Term*, Jackson Clarion-Ledger, Nov. 5, 2014, at A1.

Topics: Enjoining certification; case assignment; Electoral College.

On December 13, 2012, four days before the Electoral College's official voting, two would-be electors and three unsuccessful candidates for President filed a federal class-action complaint in the Eastern District of California's Sacramento courthouse alleging that President Obama was ineligible for reelection because, among other things, he allegedly was a citizen of Indonesia.[9089] The complaint prayed for various stays of the President's reelection.[9090]

The case was assigned to Judge Morrison C. England, Jr., who was out of the state at the time.[9091] As duty judge, Judge Kimberly J. Mueller denied the plaintiffs immediate relief, on December 14, for various procedural defects, and she gave the plaintiffs a deadline of December 21 to properly seek a temporary restraining order.[9092] The plaintiffs filed such a motion on December 20.[9093] Judge England heard the motion on January 3, 2013.[9094]

Judge England denied the plaintiffs immediate relief from the bench and supported his decision with an opinion issued thirteen days later.[9095] On May 23, he dismissed the federal claim in the plaintiffs' amended complaint as a nonjusticiable political question, and he declined jurisdiction over state-law claims.[9096] On November 2, 2015, the court of appeals affirmed the dismissal on the ground that the case was moot.[9097]

9089. Complaint, Grinols v. Electoral Coll., No. 2:12-cv-2997 (E.D. Cal. Dec. 13, 2012), D.E. 2.

9090. *Id.* at 29–30.

9091. Transcript at 2–3, *id.* (Jan. 3, 2013, filed Jan. 17, 2013), D.E. 54 [hereinafter Jan. 3, 2013, *Grinols* Transcript].

9092. Order, *id.* (Dec. 14, 2012), D.E. 8; Jan. 3, 2013, *Grinols* Transcript, *supra* note 9091, at 3.

9093. Temporary-Restraining-Order Motion, *Grinols*, No. 2:12-cv-2997 (E.D. Cal. Dec. 20, 2012), D.E. 12; Jan. 3, 2013, *Grinols* Transcript, *supra* note 9091, at 2–3.

9094. Jan. 3, 2013, *Grinols* Transcript, *supra* note 9091; Docket Sheet, *Grinols*, No. 2:12-cv-2997 (E.D. Cal. Dec. 12, 2012) [hereinafter E.D. Cal. *Grinols* Docket Sheet] (D.E. 13, 48).

9095. Jan. 3, 2013, *Grinols* Transcript, *supra* note 9091, at 39–40; Opinion, *Grinols*, No. 2:12-cv-2997 (E.D. Cal. Jan. 16, 2013), D.E. 52, 2013 WL 211135; E.D. Cal. *Grinols* Docket Sheet, *supra* note 9094.

9096. Opinion, *Grinols*, No. 2:12-cv-2997 (E.D. Cal. May 23, 2013), D.E. 127; *see* Transcript, *id.* (Apr. 22, 2013, filed May 21, 2013), D.E. 126; *see also* Amended Complaint, *id.* (Feb. 11, 2013), D.E. 69.

9097. Grinols v. Electoral College, 622 F. App'x 624 (9th Cir. 2015).

On two occasions, the court of appeals denied the plaintiffs interlocutory relief. Order,

A Suit by Unsuccessful Candidates to Overturn an Election

Picard Samuel v. Virgin Islands Joint Board of Elections (Curtis V. Gómez and Raymond L. Finch, D.V.I. 3:12-cv-94)

> Following a general election, unsuccessful candidates filed a pro se federal complaint to nullify the results and enjoin the swearing in of the winners. A district judge denied the plaintiffs a temporary restraining order. The plaintiffs sought reversal of the denial by recusal of the judge, also naming as a recusal ground the judge's sister's being a winning candidate in the election. The case was already reassigned to another judge for the sake of efficiency, and the second judge denied the plaintiffs a preliminary injunction because they could not show that the election irregularities of which they complained resulted in their defeats. Later, the second judge dismissed the complaint for lack of standing.
>
> *Topics:* Enjoining certification; election errors; laches; pro se party; voting technology.

Five unsuccessful candidates for office in the November 6, 2012, general election filed a pro se federal complaint in the District of the Virgin Islands on December 11 to nullify election results and enjoin the swearing in of the victors because of various alleged election irregularities.[9098] An amended complaint filed on December 21 included an application for a temporary restraining order.[9099] On December 28, Judge Curtis V. Gómez denied the plaintiffs immediate relief.[9100]

On January 2, 2013, the plaintiffs sought Judge Gómez's recusal on the grounds that his denying them relief was in error and his sister was a winner in the election.[9101] On January 2, however, Judge Gómez reassigned the case to Judge Raymond L. Finch to enable prompt consideration of the pending motion for a preliminary injunction.[9102]

Grinols v. Electoral Coll., No. 13-15627 (9th Cir. June 20, 2013); Order, *In re* Grinols, No. 13-70744 (9th Cir. Apr. 1, 2013).

9098. Complaint, Picard Samuel v. V.I. Joint Bd. of Elections, No. 3:12-cv-94 (D.V.I. Dec. 11, 2012), D.E. 1.

9099. Amended Complaint, *id.* (Dec. 21, 2012), D.E. 33.

9100. Amended Order, *id.* (Jan. 2, 2013), D.E. 69 (correcting a typographical error); Order, *id.* (Dec. 28, 2012), D.E. 51.

Judge Gómez was replaced by Judge Robert Molloy in 2020. *See* Judicial Milestones, www.uscourts.gov/judicial-milestones/robert-molloy; Suzanne Carlson, *AG: 17-Year-Old VLT Contract Was Never Legal*, V.I. Daily News, May 12, 2020; Suzanne Carlson, *Judge Robert Molloy Confirmed to District Court*, V.I. Daily News, Feb. 26, 2020.

9101. Motion, *Picard Samuel*, No. 3:12-cv-94 (D.V.I. Jan. 2, 2013), D.E. 68.

9102. Docket Sheet, *id.* (Dec. 11, 2012) (D.E. 70); Recusal Opinion at 2–3, *id.* (Jan. 7,

Following a January 4 hearing, Judge Finch denied the plaintiffs a preliminary injunction on January 6.[9103] He determined that he lacked jurisdiction to enjoin the swearing in of election victors, because welcoming new members of a legislature is a matter for the legislative branch of government, not the judicial.[9104] As for overturning the election results, the plaintiffs did not show that they would have been elected in the absence of the alleged election irregularities.[9105] Moreover, Judge Finch was averse to rewarding the plaintiffs' waiting until after the election to file their suit over matters that began to arise before the election.[9106]

On January 7, Judge Gómez ruled that the recusal issue was moot and questioned the validity of the ground pertaining to his sister, who prevailed in a race that included none of the plaintiffs.[9107] More important, because the plaintiffs were not entitled to injunctive relief with respect to the election, there was no valid ground for recusal with respect to the judge's sister.[9108]

On March 7, Judge Finch dismissed the complaint for lack of standing; the plaintiffs' speculative claims of election irregularities did not show any injuries different from the general public's.[9109] An appeal was dismissed for failure to prosecute it.[9110]

2013), D.E. 80 [hereinafter *Picard Samuel* Recusal Opinion], 2013 WL 68633.

Judge Finch died on February 23, 2023. *See* Suzanne Carlson, *Judge Raymond Finch Remembered as Wise, Kind Mentor to Many*, V.I. Daily News, Feb. 25, 2023.

9103. Preliminary-Injunction-Denial Opinion, *Picard Samuel*, No. 3:12-cv-94 (D.V.I. Jan. 6, 2013), D.E. 76 [hereinafter *Picard Samuel* Preliminary-Injunction-Denial Opinion], 2013 WL 67886; Opinion, *id.* (Feb. 1, 2013), D.E. 87, 2013 WL 398666 (denying reconsideration); Order, *id.* (Feb. 4, 2013), D.E. 88 (denying as moot a motion to stay proceedings pending resolution of the motion for reconsideration).

9104. *Picard Samuel* Preliminary-Injunction-Denial Opinion, *supra* note 9103, at 9–10.

9105. *Id.* at 17.

9106. *Id.* at 18–19.

9107. *Picard Samuel* Recusal Opinion, *supra* note 9102, at 7–8.

9108. *Id.* at 6–7.

9109. Opinion at 9–11, Picard Samuel v. V.I. Joint Bd. of Elections, No. 3:12-cv-94 (D.V.I. Mar. 7, 2013), D.E. 92, 2013 WL 842946.

9110. Order, Picard Samuel v. V.I. Joint Bd. of Elections, No. 13-2007 (3d Cir. Sept. 13, 2013).

Challenging Post-Election Disqualification of Winning Candidates

Orgeron v. Quartzsite (Roslyn O. Silver, D. Ariz. 2:12-cv-1238)

> A federal complaint challenged the disqualification of a town-council election victor for insufficient residency and the disqualification of the mayoral election victor for indebtedness to the city. The district judge ruled in favor of the council victor, but she determined that the council victor did not have standing to seek a remedy for the mayoral victor's injury.
>
> *Topics:* Enjoining certification; matters for state courts; case assignment.

Nearly four weeks after a May 15, 2012, election in Quartzsite, Arizona, an allegedly prevailing candidate for town council filed a federal complaint challenging his June 4 disqualification for insufficient residency and the allegedly victorious mayoral candidate's June 4 disqualification for indebtedness to the town.[9111] With the complaint, the plaintiff filed a motion for a temporary restraining order.[9112]

On the day that the complaint was filed, Judge Susan R. Bolton set the case for hearing before Judge Roslyn O. Silver eight days later.[9113] Following the hearing, Judge Silver took the matter under advisement;[9114] on July 5, she set a preliminary-injunction hearing for July 12.[9115]

On July 20, Judge Silver ruled that evidence of the plaintiff's more-than-one-year term of residency in Quartzsite was uncontroverted, so he was qualified to be a member of the town council.[9116] He did not, however, have standing to sue on behalf of the mayoral candidate.[9117]

Judge Silver declined to abstain from ruling in light of a pending quo warranto action in state court by the county attorney to determine the

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9111. Complaint, Orgeron v. Quartzsite, No. 2:12-cv-1238 (D. Ariz. June 11, 2012), D.E. 1; *see* Amended Complaint, *id.* (June 18, 2012), D.E. 19; *see also Quartzsite Refuses to Seat Winning Mayor*, Ariz. Republic, June 12, 2012, at A1 (reporting that the mayoral candidate "was disqualified because he failed to pay court-ordered attorney fees from a lawsuit he lost against the town").

9112. Temporary-Restraining-Order Motion, *Quartzsite*, No. 2:12-cv-1238 (D. Ariz. June 11, 2012), D.E. 3.

9113. Order, *id.* (June 11, 2012), D.E. 5.

9114. Docket Sheet, *id.* (June 11, 2012) (D.E. 24).

9115. Order, *id.* (July 5, 2012), D.E. 30; *see* Minutes, *id.* (July 12, 2012), D.E. 32.

9116. Opinion at 6–7, *id.* (July 20, 2012), D.E. 38; *see id.* at 7 ("Defendants presumably had *some* basis for determining Plaintiff was not a resident of Quartzsite but Defendants chose not to present the Court with that basis.").

9117. *Id.* at 8–9.

election winners, because the federal plaintiff was not a party in the state court case.[9118] Judge Silver signed a stipulated dismissal of the case on August 2.[9119]

The plaintiff assumed his seat on the council, which voted on October 9 against a settlement with the disputed mayoral victor.[9120] Later that month, the disputed victor was mayor.[9121]

Write-In Spellings

Miller v. Campbell (Ralph R. Beistline, D. Alaska 3:10-cv-252)

> A candidate for U.S. senator sued to enjoin the counting of write-in ballots for the incumbent unless her name was spelled correctly. The federal judge determined that this was a matter for the state courts if they could act promptly. The state courts ruled in favor of counting misspellings, and the legislature later amended the election statutes to clarify that slight misspellings were permissible.
>
> *Topics:* Write-in candidate; matters for state courts; enjoining certification; ballot segregation; recusal; presiding remotely.

One week after the 2010 general election, a bit after 5:00 p.m. on Tuesday, November 9, Joe Miller, Republican candidate for U.S. senator from Alaska, filed a federal action in the District of Alaska to enjoin Alaska from counting as votes misspellings of the name of incumbent Lisa Murkowski, who was running as a write-in candidate because Miller had defeated her in the Republican primary election.[9122]

9118. *Id.* at 5–6.

9119. Order, *id.* (Aug. 2, 2012), D.E. 43.

9120. Quartzsite Town Council Minutes, Oct. 9, 2012, ci.quartzsite.az.us/Support%20Docs/Council_meeting_minutes/2012%20Council%20Minutes/100912%20Council%20Min.html, *archived at* web.archive.org/web/20211130033438/ci.quartzsite.az.us/Support%20Docs/Council_meeting_minutes/2012%20Council%20Minutes/100912%20Council%20Min.html.

9121. Quartzsite Town Council Draft Minutes, Oct. 23, 2012, ci.quartzsite.az.us/Support%20Docs/Council_meeting_minutes/2012%20Council%20Minutes/102312%20Council%20Min%20Draft.html, *archived at* web.archive.org/web/20211130032212/ci.quartzsite.az.us/Support%20Docs/Council_meeting_minutes/2012%20Council%20Minutes/102312%20Council%20Min%20Draft.html; *see* Docket Sheet, Foster v. Quartzsite, No. S-1500-cv-201200100 (Ariz. Super. Ct. La Paz Cty. Aug. 13, 2012) (noting an October 18, 2012, judgment), apps.supremecourt.az.gov/PublicAccess/caselookup.aspx.

9122. Complaint, Miller v. Campbell, No. 3:10-cv-252 (D. Alaska Nov. 9, 2010), D.E. 1; Miller v. Treadwell, 736 F. Supp. 2d 1240, 1241 (D. Alaska 2010); Order at 1, *Miller*, No. 3:10-cv-252 (D. Alaska Nov. 10, 2010), D.E. 16 [hereinafter Nov. 10, 2010, D. Alaska *Miller* Order]; Miller v. Treadwell, 245 P.3d 867, 874 (Alaska 2010) ("Without seeking a stat-

The court originally assigned the case to Judge John W. Sedwick, but he recused himself on November 10 because of his "negative opinion of Mr. Miller."[9123] Judge Sedwick was chief judge when Miller resigned from his position as the court's Fairbanks magistrate judge, with only minutes' notice, to run for the Senate.[9124] In addition, Judge Sedwick's wife contributed to Murkowski's write-in campaign.[9125]

The court reassigned the case to Judge Ralph R. Beistline.[9126] He was away on vacation at the time, but all of the other judges also recused themselves.[9127] With the help of his three law clerks working in chambers, Judge Beistline was able to preside over the case remotely and electronically.[9128] No proceeding was necessary in his court.[9129]

In his filings, Miller asked the court to order Alaska to respond to his motion for a preliminary injunction by noon on November 10 and requested a hearing on the motion at 3:00 p.m. that day.[9130] Miller also sought the court's forgiveness for an overlong brief.[9131] Judge Beistline

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utorily available vote recount by the Division [footnote omitted] or filing a lawsuit in state court to contest the election [footnote omitted], on November 9 Miller filed a federal court lawsuit."); *see* Kyle Hopkins & Sean Cockerham, *Miller Files Suit Over Spelling*, Anchorage Daily News, Nov. 10, 2010, at A1; Richard Mauer, *Miller Moves Forward with Suit*, Anchorage Daily News, Nov. 23, 2010, at A1. *See generally* Richard L. Hasen, *What to Expect When You're Electing*, Fed. Law., June 2012, at 35–37 (summarizing the litigation).

9123. Recusal Order, *Miller*, No. 3:10-cv-252 (D. Alaska Nov. 10, 2010), D.E. 11 [hereinafter D. Alaska *Miller* Recusal Order]; *see* Richard Mauer, *Judge Steps Down from Miller Case*, Anchorage Daily News, Nov. 11, 2010, at A14.

9124. D. Alaska *Miller* Recusal Order, *supra* note 9123 ("Mr. Miller's failure to give reasonable notice of his resignation left the court with no judicial officer resident in Fairbanks, and no ability to fill the vacancy for many months."); *see* Mauer, *supra* note 9123.

9125. D. Alaska *Miller* Recusal Order, *supra* note 9123 ("As a federal judicial officer, it is my duty to discourage political activity by my family members, and I do so. Nevertheless, members of my family have civil rights which they are entitled to exercise."); *see* Mauer, *supra* note 9123.

9126. Docket Sheet, *Miller*, No. 3:10-cv-252 (D. Alaska Nov. 10, 2010) [hereinafter D. Alaska *Miller* Docket Sheet]; *see* Mauer, *supra* note 9123.

Tim Reagan interviewed Judge Beistline for this report by telephone on May 8, 2012.

9127. Interview with Judge Ralph R. Beistline, May 8, 2012.

9128. *Id.*

9129. *Id.*

9130. Plaintiff's Motion for Shortened Time, *Miller*, No. 3:10-cv-252 (D. Alaska Nov. 9, 2010), D.E. 5-10; *see* Hopkins & Cockerham, *supra* note 9122.

9131. Plaintiff's Motion for Overlong Brief, *Miller*, No. 3:10-cv-252 (D. Alaska Nov. 9, 2010), D.E. 5.

Local rules limited briefs supporting motions other than motions to dismiss or for

ruled that Alaska could have an additional five days to respond to Miller's overlong brief, and Miller could have another three days to reply.[9132]

The parties then engaged in a timing spat. On the day of Judge Beistline's order, Alaska moved to dismiss the action on the ground that state court was the appropriate forum[9133] and requested that briefing on its motion be completed by November 15.[9134] On November 11, the federal Veterans Day holiday, Miller responded that the court's previous briefing schedule was fast enough.[9135] On the following day, Judge Beistline reaffirmed his original briefing schedule.[9136] Alaska filed its opposition to Miller's injunction motion on November 15,[9137] and on that day requested oral argument on November 19, if needed, because the lawyer arguing the case would be out of the country after that.[9138] Miller responded that day that he would be out of the state on November 19, so oral argument should be held on November 20.[9139] Judge Beistline reminded the parties that he would decide whether to hold oral argument after reading the briefs.[9140]

Judge Beistline did not hold oral argument.[9141] On Friday, November 19, Judge Beistline ruled that there was no reason to enjoin the counting of the ballots, because separate tallies were retained for correctly spelled names and incorrectly spelled names.[9142] Judge Beistline determined that resolution of which votes should be counted should be determined by the

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summary judgment to twenty-five pages. D. Alaska L.R. 10.1(m). Miller's brief was thirty-six pages in length, including the signature page. Preliminary-Injunction Brief, *Miller*, No. 3:10-cv-252 (D. Alaska Nov. 9, 2010), D.E. 5-1.

9132. Nov. 10, 2010, D. Alaska *Miller* Order, *supra* note 9122.

9133. Motion to Dismiss, *Miller*, No. 3:10-cv-252 (D. Alaska Nov. 10, 2010), D.E. 17; *see* Richard Mauer, *Miller Challenged in Wrong Court, State Says*, Anchorage Daily News, Nov. 12, 2010, at A5.

9134. Defendants' Motion for Shortened Time, *Miller*, No. 3:10-cv-252 (D. Alaska Nov. 10, 2010), D.E. 18.

9135. Plaintiff's Opposition to Shortened Time, *id.* (Nov. 11, 2010), D.E. 20.

9136. D. Alaska *Miller* Docket Sheet, *supra* note 9126 (D.E. 21).

9137. Opposition to Preliminary Injunction, *Miller*, No. 3:10-cv-252 (D. Alaska Nov. 15, 2010), D.E. 23.

9138. Defendants' Argument Motion, *id.* (Nov. 15, 2010), D.E. 27.

9139. Plaintiff's Opposition to Argument Motion, *id.* (Nov. 15, 2010), D.E. 28.

9140. D. Alaska *Miller* Docket Sheet, *supra* note 9126 (D.E. 30); *see* Richard Mauer, *Judge Rejects AFN Intervention in Miller Lawsuit*, Anchorage Daily News, Nov. 17, 2010, at A14.

9141. Interview with Judge Ralph R. Beistline, May 8, 2012.

9142. Order at 1–2, *Miller*, No. 3:10-cv-252 (D. Alaska Nov. 19, 2010), D.E. 39 [hereinafter Nov. 19, 2010, D. Alaska *Miller* Order], 2010 WL 5071599; *see* William Yardley, *Naming of Alaska Winner Delayed*, N.Y. Times, Nov. 20, 2010, at A11.

state courts, so he stayed the case and enjoined certification of the election until the state courts could resolve the matter, conditional on a state court action's being filed by November 22.[9143]

Meanwhile, Judge Beistline denied a motion by the Alaska Federation of Natives to intervene in the action in opposition to Miller: "The State of Alaska is responsible for and fully capable of representing the interests of all its citizens."[9144]

On the day of Judge Beistline's stay, Miller filed an amended complaint and five other documents.[9145] On Monday, Judge Beistline reminded the parties that the case was stayed.[9146]

Miller filed an action in the state's Fairbanks court on November 22, adding several objections to how votes were counted.[9147] On Alaska's motion, the action was transferred to Juneau on November 29, and Judge William B. Carey received the case on November 30.[9148] Judge Carey permitted Senator Murkowski to intervene; in addition to defending misspellings of her name, she wanted write-in votes for her to count even if the voter did not fill in the bubble for write-in votes.[9149] Judge Carey also de-

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9143. Nov. 19, 2010, D. Alaska *Miller* Order, *supra* note 9142, at 2–4; Miller v. Treadwell, 736 F. Supp. 2d 1240, 1241–42 (D. Alaska 2010); Miller v. Treadwell, 245 P.3d 867, 874 (Alaska 2010); *see* Becky Bohrer, *Miller's Challenge Will Be in State Court*, Anchorage Daily News, Nov. 20, 2010, at A1; Hasen, *supra* note 9122; Sandhya Somashekhar, *Murkowski Poised for Second Full Senate Term*, Wash. Post, Dec. 28, 2010, at A5.

9144. D. Alaska *Miller* Docket Sheet, *supra* note 9126 (Nov. 16, 2010, D.E. 31); *see* Intervention Motion, *Miller*, No. 3:10-cv-252 (D. Alaska Nov. 15, 2010), D.E. 24; AFN Opposition to Injunction, *id.* (Nov. 15, 2010), D.E. 23; Joinder in Alaska Opposition to Injunction, *id.* (Nov. 15, 2010), D.E. 25; *see also* Mauer, *supra* note 9140 (describing AFN as "the state's largest Native organization").

9145. D. Alaska *Miller* Docket Sheet, *supra* note 9126 (D.E. 40 to 45); *Miller*, 736 F. Supp. 2d at 1241; *see* Bohrer, *supra* note 9143.

9146. D. Alaska *Miller* Docket Sheet, *supra* note 9126 (D.E. 46).

9147. Docket Sheet, Miller v. Campbell, No. 1JU-10-01007CI (Alaska Super. Ct. Nov. 22, 2010), records.courts.alaska.gov/eaccess/searchresults.page; Opinion at 4, *id.* (Dec. 10, 2010) [hereinafter Alaska Super. Ct. *Miller* Opinion], 2010 WL 5072024, *filed as attachment to* Notice, *Miller*, No. 3:10-cv-252 (D. Alaska Dec. 10, 2010), D.E. 62; Notice, *Miller*, No. 3:10-cv-252 (D. Alaska Nov. 22, 2010), D.E. 47 (including a copy of the state-court complaint); *Miller*, 245 P.3d at 874; *see* Mauer, *supra* note 9122.

9148. Alaska Super. Ct. *Miller* Opinion, *supra* note 9147, at 4; *see* Becky Bohrer, *Murkowski Lawyers: Miller Makes False Claims*, Anchorage Daily News, Nov. 30, 2010, at A1 (reporting that the move of the case 620 miles would bring it closer to the physical location of the ballots).

9149. *Miller*, 245 P.3d at 874, 877–78; Alaska Super. Ct. *Miller* Opinion, *supra* note 9147, at 4; *see* Becky Bohrer, *Judge Lets Murkowski Into Case*, Anchorage Daily News, Dec. 3, 2010, at A4.

nied the Alaska Federation of Natives' motion to intervene as a party, but permitted it to participate as an amicus curiae.[9150] On Friday, December 10, Judge Carey upheld all decisions by the division of elections.[9151]

Knowing that Judge Carey was going to issue his ruling on that day[9152] and wanting to ensure that Alaska would be fully represented when the U.S. Senate convened in January, Alaska moved earlier in the day to lift Judge Beistline's stay,[9153] expedite resolution of the case,[9154] and permit the certification injunction to continue only if Miller immediately appealed a judgment against him.[9155] Judge Beistline agreed to expedite consideration of the motions and required a response from Miller by Monday, December 13, at 10:00 a.m.[9156] Judge Beistline granted Miller's request for two additional hours.[9157]

On the Monday after Judge Carey's Friday ruling, Alaska filed amended motions taking into account how Judge Carey actually ruled and a briefing schedule established by Alaska's supreme court in the event of an appeal.[9158] On Tuesday, Judge Beistline denied Senator Murkowski's motion to intervene[9159] and accommodated the Alaska supreme-court briefing

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9150. Alaska Super. Ct. *Miller* Opinion, *supra* note 9147, at 4.

9151. Alaska Super. Ct. *Miller* Opinion, *supra* note 9147; *Miller*, 245 P.3d at 874; Miller v. Treadwell, 736 F. Supp. 2d 1240, 1242 (D. Alaska 2010); *see* Sean Cockerham, *Miller Loses Election Lawsuit*, Anchorage Daily News, Dec. 11, 2010, at A1; William Yardley, *Court Rejects Challenge to Alaska Write-In Votes*, N.Y. Times, Dec. 11, 2010, at A14.

9152. *See* Becky Bohrer, *Judge to Rule by Friday on Miller's Election Challenge*, Anchorage Daily News, Dec. 9, 2010, at A4.

9153. Motion to Lift Stay, Miller v. Campbell, No. 3:10-cv-252 (D. Alaska Dec. 10, 2010), D.E. 48.

9154. Motion to Expedite, *id.* (Dec. 10, 2010), D.E. 49.

9155. Motion to Recondition Preliminary Injunction, *id.* (Dec. 10, 2010), D.E. 51 (seeking an order that "the injunction against certification will be lifted unless Mr. Miller files an appeal with the Alaska Supreme Court by the end of the business day following the issuance of that order"); *see* Motion to Expedite Motion to Recondition Preliminary Injunction, *id.* (Dec. 10, 2010), D.E. 50.

9156. Order, *id.* (Dec. 10, 2010), D.E. 55.

9157. D. Alaska *Miller* Docket Sheet, *supra* note 9126 (Dec. 10, 2010, D.E. 64); *see* Plaintiff's Statement, *Miller*, No. 3:10-cv-252 (D. Alaska Dec. 10, 2010), D.E. 61.

9158. Amended Motion, *Miller*, No. 3:10-cv-252 (D. Alaska Dec. 14, 2010), D.E. 67; Notice of Supplemental Facts, *id.* (Dec. 13, 2010), D.E. 66.

9159. Order at 1, *id.* (Dec. 14, 2010), D.E. 75 [hereinafter Dec. 14, 2010, D. Alaska *Miller* Order] ("Murkowski is clearly an interested party in this dispute. However, her interests are well represented by Defendants and she raises no new federal claims."); *see* Murkowski Motion to Intervene, *id.* (Dec. 10, 2010), D.E. 57; Murkowski Motion for Shortened Time on Her Motion to Intervene, *id.* (Dec. 10, 2010), D.E. 56; Prospective Intervenor's Joinder in Motion to Lift Stay, *id.* (Dec. 10, 2010), D.E. 53; Proposed Inter-

schedule by giving Miller forty-eight hours from the entry of the supreme court's decision to present his position to the federal court.[9160]

Both Miller and Murkowski appealed the Alaska trial-court ruling,[9161] which Alaska's supreme court affirmed on Wednesday, December 22.[9162]

Taking into account the federal holiday of Friday, December 24, Judge Beistline gave Miller until 9:00 a.m. on Monday, December 27, to move his federal case forward and gave Alaska until the following Wednesday morning to respond.[9163] On December 27, Miller filed a motion to lift the injunction against certification so that Alaska would be fully represented in January, arguing that correction to its representation could be resolved later.[9164] Miller also filed a second amended complaint[9165] and a motion for summary judgment.[9166]

On December 28, Judge Beistline ruled that Miller's federal constitutional claims were without merit, and he dismissed the action.[9167]

In dismissing the action, Judge Beistline noted, "What we have before us is a poorly drafted state statute. Wisdom would suggest that the Alaska

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venor Answer, *id.* (Dec. 10, 2010), D.E. 58.

9160. Dec. 14, 2010, D. Alaska *Miller* Order, *supra* note 9159, at 2–3; *see* Sean Cockerham, *Ruling on Senate Race May Be Today*, Anchorage Daily News, Dec. 17, 2010, at A1.

9161. Docket Sheet, Miller v. Treadwell, No. S-14121 (Alaska Dec. 13, 2010), appellate-records.courts.alaska.gov/CMSPublic/Case/General?q=EggjQXz44W24RgcxhvJhBg==%27; Docket Sheet, Miller v. Treadwell, No. S-14112 (Alaska Dec. 13, 2010), appellate-records.courts.alaska.gov/CMSPublic/Case/General?q=EggjQXz44W3plArduuNulQ==%27.

9162. Miller v. Treadwell, 245 P.3d 867 (Alaska 2010); Miller v. Treadwell, 736 F. Supp. 2d 1240, 1242 (D. Alaska 2010); *see* Sean Cockerham, *Supreme Court Rules Against Miller*, Anchorage Daily News, Dec. 23, 2010, at A1; Somashekhar, *supra* note 9143; William Yardley, *Court Ruling Favors Murkowski*, N.Y. Times, Dec. 23, 2010, at A23.

Judge Beistline had a law clerk attend the December 17, 2010, oral argument before Alaska's supreme court to help the judge stay on top of the case's progress. Interview with Judge Ralph R. Beistline, May 8, 2012.

9163. D. Alaska *Miller* Docket Sheet, *supra* note 9126 (D.E. 78).

9164. Notice of Consent, *Miller*, No. 3:10-cv-252 (D. Alaska Dec. 27, 2010), D.E. 79; *see* William Yardley, *Republican Drops a Tack in Alaska Senate Race*, N.Y. Times, Dec. 28, 2010, at A12.

9165. Motion to Amend Complaint, *Miller*, No. 3:10-cv-252 (D. Alaska Dec. 27, 2010), D.E. 80; *Miller*, 736 F. Supp. 2d at 1241, 1246 (accepting amended complaint).

9166. Summary-Judgment Brief, *Miller*, No. 3:10-cv-252 (D. Alaska Dec. 27, 2010), D.E. 82; Summary-Judgment Motion, *id.* (Dec. 27, 2010), D.E. 81; *Miller*, 736 F. Supp. 2d at 1242.

9167. *Miller*, 736 F. Supp. 2d 1240; *see* Lisa Demer, *Federal Judge Dismisses Miller's Lawsuit*, Anchorage Daily News, Dec. 29, 2010, at A1; Felicia Sonmez, *Murkowski Is Certified Victor in Senate Race*, Wash. Post, Dec. 29, 2010, at A4; William Yardley, *State to Declare Victory for Murkowski*, N.Y. Times, Dec. 29, 2010, at A13.

Legislature act to clarify it to avoid similar disputes in the future."[9168] On May 17, 2011, Alaska's governor approved an amendment to Alaska's statutes providing that "in counting votes for a write-in candidate, the [elections] director shall disregard any abbreviation, misspelling, or other minor variation in the form of the name of a candidate if the intention of the voter can be ascertained."[9169]

Ballot Errors for Local Election

Caudell v. Thomas (William C. O'Kelley, N.D. Ga. 2:10-cv-217)

> A defendant probate judge removed to federal court an action seeking relief from ballot errors in an election for county commissioners. The composition of the commission had recently changed from a chair in post 1 and two other members in posts 2 and 3, all elected at large, to a chair elected at large and four members representing districts 1 through 4. Commissioners in districts 1 and 3 were up for election, but the ballot listed them as running for posts 1 and 3. In addition, the plaintiffs alleged malapportionment. The federal district judge remanded the ballot issue as a state matter but retained the malapportionment challenge for regular proceedings. The parties, however, stipulated dismissal.
>
> *Topics:* Election errors; matters for state courts; malapportionment; removal.

On October 15, 2010, six voters filed a complaint in Georgia's superior court for Banks County, seeking relief from errors in the ballot prepared for the 2010 general election to elect two county commissioners.[9170] The defendant probate judge, who acted as election superintendent for the county, removed the action to the U.S. District Court for the Northern District of Georgia on October 26.[9171]

In 2008, the composition of the county's board of commissioners was changed from a chair, occupying commissioner post 1, and two other members, occupying commissioner posts 2 and 3, all elected at large, to a chair elected at large and four members representing commissioner dis-

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9168. *Miller*, 736 F. Supp. 2d at 1243.

9169. Alaska Stat. § 15.15.360(d) (2012); Enrolled 2011 Alaska S.B. 31.

9170. Complaint, Caudell v. Thomas, No. 10-cv-588 (Ga. Sup. Ct. Banks Cty. Oct. 15, 2010) [hereinafter *Caudell* Complaint], *attached to* Notice of Removal, Caudell v. Thomas, No. 2:10-cv-217 (N.D. Ga. Oct. 26, 2010), D.E. 1 [hereinafter *Caudell* Notice of Removal].

9171. *Caudell* Notice of Removal, *supra* note 9170.

tricts 1 through 4.[9172] Incumbents occupied the seats for districts 1 and 3 until the 2010 election.[9173] The 2010 ballot listed elections for county commissioner posts 1 and 3 instead of for commissioner districts 1 and 3.[9174] The main alleged confusion arose from the previous designation of post 1 as the chair.[9175] The plaintiffs also alleged that the districts were unequally drawn.[9176]

On October 25, the state judge issued a rule nisi, setting a show-cause hearing for October 27,[9177] and the federal court construed this as a motion for a temporary restraining order.[9178] The federal court assigned the case to Judge William C. O'Kelley, who heard the matter by telephone at 9:30 a.m. on October 27.[9179] He decided that the ballot issue was a state matter, so he denied immediate injunctive relief and remanded that claim to the state court.[9180] He retained the equal-protection claim for regular proceedings.[9181]

The parties stipulated dismissal on November 24.[9182]

A Change in the Mayor's Power Does Not Require Preclearance

Patterson v. Esch (William H. Barbour, Jr., S.D. Miss. 3:09-cv-438)

> A mayor filed a federal complaint claiming that a board of selectmen's pending vote to reduce the mayor's powers violated section 5 of the Voting Rights Act, which prohibited changes in voting procedures in covered jurisdictions without federal pre-

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9172. Order Denying Temporary Restraining Order, *Caudell*, No. 2:10-cv-217 (N.D. Ga. Oct. 29, 2010), D.E. 5 [hereinafter *Caudell* Order Denying Temporary Restraining Order]; *see Caudell* Complaint, *supra* note 9170, at 2–3.

9173. *Caudell* Order Denying Temporary Restraining Order, *supra* note 9172, at 3; *see Caudell* Complaint, *supra* note 9170, at 3–4.

9174. *See Caudell* Complaint, *supra* note 9170, at 5.

9175. *Id.*

9176. *Id.* at 10–14 (noting a population range from 3,504 to 3,666).

9177. Rule Nisi, Caudell v. Thomas, No. 10-cv-588 (Ga. Sup. Ct. Banks Cty. Oct. 25, 2010), *filed as* State-Court Filings at 27, *Caudell*, No. 2:10-cv-217 (N.D. Ga. Oct. 26, 2010), D.E. 2.

9178. Docket Sheet, *Caudell*, No. 2:10-cv-217 (N.D. Ga. Oct. 26, 2010).

9179. Minutes, *id.* (Oct. 27, 2010), D.E. 3.

Judge O'Kelley died on July 5, 2017. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

9180. Remand Order at 3–5, *Caudell*, No. 2:10-cv-217 (N.D. Ga. Oct. 27, 2010), D.E. 4 [hereinafter *Caudell* Remand Order]; *Caudell* Minutes, *supra* note 9179.

9181. *Caudell* Order Denying Temporary Restraining Order, *supra* note 9172; *Caudell* Remand Order, *supra* note 9180, at 2–3, 5; *Caudell* Minutes, *supra* note 9179.

9182. Stipulated Dismissal, *Caudell*, No. 2:10-cv-217 (N.D. Ga. Nov. 24, 2010), D.E. 8.

clearance. The district judge determined that mayoral powers were not covered by section 5.

Topic: Section 5 preclearance.

The mayor of McComb, Mississippi, filed a federal complaint on July 24, 2009, against members of the city's board of selectmen and civil-service commission, alleging that defendants were planning to vote on July 28 to diminish the authority of the mayor in violation of section 5 of the Voting Rights Act.[9183] Three days later, on Monday, July 27, the mayor filed a motion for a temporary restraining order or a preliminary injunction.[9184]

Judge William H. Barbour, Jr., issued an order on July 28 denying the mayor an ex parte temporary restraining order for failure to comply with Federal Rule of Civil Procedure 65, holding in abeyance consideration of a preliminary injunction pending the mayor's seeking the empaneling of a three-judge district court to hear the section 5 claim.[9185]

Acting alone, Judge Barbour denied the mayor relief on August 5.[9186] "The Court finds that as the subject amendments 'affect only the distribution of power' among the officials of the City of McComb, and do not have a 'direct relation to voting and the election process,' they are not subject to Section 5 of the Voting Rights Act."[9187]

9183. Complaint, Patterson v. Esch, No. 3:09-cv-438 (S.D. Miss. July 24, 2009), D.E. 1; *see* Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (2015) (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination and requiring that preclearance disputes be heard by a three-judge district court).

On June 25, 2013, the Supreme Court declined to hold section 5 unconstitutional, but the Court did hold unconstitutional the criteria for which jurisdictions require section 5 preclearance. Shelby County v. Holder, 570 U.S. 529 (2013).

9184. Motion, *Patterson*, No. 3:09-cv-438 (S.D. Miss. July 27, 2009), D.E. 3.

9185. Order, *id.* (July 28, 2009), D.E. 4; *see id.* at 3 ("As Patterson is seeking an injunction under the Voting Rights Act, his motion for preliminary injunction must be heard by a three-judge court."); *see also* John Surratt, *Judge Denies Mayor's Motion*, McComb Enterprise-J., July 29, 2009.

Judge Barbour died on January 8, 2021. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

9186. Opinion, *Patterson*, No. 3:09-cv-438 (S.D. Miss. Aug. 5, 2009), D.E. 11 [hereinafter Aug. 5, 2009, *Patterson* Opinion], 2009 WL 2424408; *see* Matt Williamson, *Judge Nixes Mayor's Suit*, McComb Enterprise-J., Aug. 6, 2009.

9187. Aug. 5, 2009, *Patterson* Opinion, *supra* note 9186, at 5; *see* Opinion, *Patterson*, No. 3:09-cv-438 (S.D. Miss. Oct. 15, 2009), D.E. 23 (again denying the plaintiff relief following additional briefing); *see also* Order, *id.* (Dec. 16, 2010), D.E. 49 (dismissing the case).

Remedy for a Ballot Printing Error

Bennett v. Mollis (William E. Smith, D.R.I. 1:08-cv-468)

> Because of a printing error, some ballots included the name of a candidate that had withdrawn from the race. After a mathematical analysis of how many votes the error could have cost the plaintiffs' candidate, with the help of a political science professor as a technical advisor, the district judge denied the plaintiffs relief.
>
> *Topics:* Election errors; special master; enjoining certification; intervention.

On the day before Thanksgiving, three weeks after the 2008 general election, four voters in the election for town council in Smithfield, Rhode Island, filed a federal class action to enjoin certification of the election results.[9188] Thirteen candidates were up for five seats, and voters could vote for as many as five candidates.[9189] On September 30, one of the candidates withdrew; on October 1, the ballot printer received notice of the change.[9190] Because of an error by a printer employee, sample and mail ballots reflected the change, but the ballots used on election day did not, until the error was quickly corrected midday.[9191] There were 570 votes for the withdrawn candidate.[9192] The plaintiffs supported the candidate who came in sixth, and he trailed the fifth-place candidate by thirty-nine votes.[9193]

The court assigned the case to Judge William E. Smith.[9194] It was his practice in emergency cases to quickly assemble the parties for a conference and work toward stipulated facts.[9195] He held a conference in chambers at 3:00 p.m. on the day of filing, and he issued a temporary restraining order to preserve the status quo, enjoining certification of the election un-

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9188. Complaint, Bennett v. Mollis, No. 1:08-cv-468 (D.R.I. Nov. 26, 2008), D.E. 1; Bennett v. Mollis, 590 F. Supp. 2d 273, 275 (D.R.I. 2008).

9189. *Bennett*, 590 F. Supp. 2d at 276.

9190. *Id.*

9191. *Id.* at 276–77.

9192. *Id.* at 277.

9193. *Id.* at 276; *see* Gina Macris, *Board Nixes Bid for New Election for Smithfield Council*, Providence J. Bull., Nov. 25, 2008.

9194. Docket Sheet, Bennett v. Mollis, No. 1:08-cv-468 (D.R.I. Nov. 26, 2008) [hereinafter *Bennett* Docket Sheet].

Tim Reagan interviewed Judge Smith for this report by telephone on May 23, 2012.

9195. Interview with Judge William E. Smith, May 23, 2012.

til December 5.[9196] On December 1, he granted the fifth-place candidate's motion to intervene.[9197]

On December 3, Judge Smith held a preliminary injunction evidentiary hearing.[9198] On December 12, he denied the preliminary injunction.[9199] Of the 570 defective ballots, 458 included votes for the plaintiffs' candidate, leaving 112 ballots that might have had votes for him if the withdrawn candidate had not been included.[9200] Eleven of these ballots had fewer than five votes, suggesting that the voters had decided not to vote for the plaintiffs' candidate.[9201] In addition, there were two ballots with too many votes and not one for the plaintiffs' candidate, leaving ninety-nine ballots that might have included the plaintiffs' candidate if the withdrawn candidate had not been included.[9202] He would have to have received votes on 40% of those ballots to have prevailed, but Judge Smith, with the assistance of a technical advisor, determined that this was nearly impossible based on his performance on accurate ballots.[9203]

The technical advisor was a Brown University political-science professor,[9204] whom Judge Smith had previously met at a conference.[9205] She provided assistance to the court without compensation.[9206]

On July 2, 2009, the court of appeals denied an appeal.[9207] The parties filed a stipulated dismissal on July 23.[9208]

A Suit to Prevent a Legislature from Voiding a Close Election

Ford v. Beavers (Bernice B. Donald, W.D. Tenn. 2:06-cv-2031)

On the day before a state senate was expected to void a senator's election to the senate by a very close special election because of concerns that some votes were fraudulent, a federal district judge

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9196. *Bennett* Docket Sheet, *supra* note 9194; *Bennett*, 590 F. Supp. 2d at 275.

9197. *Bennett* Docket Sheet, *supra* note 9194; *see* Intervention Motion, *Bennett*, No. 1:08-cv-468 (D.R.I. Dec. 1, 2008), D.E. 7.

9198. Transcript, *Bennett*, No. 1:08-cv-468 (D.R.I. Dec. 3, 2008, filed Jan. 27, 2009), D.E. 48; *Bennett*, 590 F. Supp. 2d at 276.

9199. Opinion at 16, *Bennett*, No. 1:08-cv-468 (D.R.I. Dec. 11, 2008), D.E. 29, *amended*, *Bennett*, 590 F. Supp. 2d at 281.

9200. *Bennett*, 590 F. Supp. 2d at 277.

9201. *Id.*

9202. *Id.*

9203. *Id.* at 279–88.

9204. *Id.* at 280–81.

9205. Interview with Judge William E. Smith, May 23, 2012.

9206. *Id.*

9207. Judgment, Bennett v. Mollis, No. 09-10083 (1st Cir. July 2, 2009).

9208. Stipulation, Bennett v. Mollis, No. 1:08-cv-468 (D.R.I. Dec. 11, 2008), D.E. 58.

enjoined senate action on the matter pending a hearing in a federal case filed by the newly elected senator and three voters who voted for her. Following a hearing, the judge issued a declaratory judgment in the plaintiffs' favor. The senate subsequently removed the senator from office, but at the end of the session the judge enjoined the naming of an interim replacement. The senator won the seat again at the next election, an appeal was deemed moot, and the judge awarded the plaintiffs $117,263 in attorney fees, costs, and expenses.

Topics: Election errors; attorney fees.

State Senator Ophelia Ford and three voters who voted for her in a September 15, 2004, special election filed a federal complaint in the Western District of Tennessee on January 18, 2006, to challenge a senate vote scheduled for the following day on whether her election should be voided.[9209]

District 29 Democratic Senator Ford won the election by thirteen votes to fill a vacancy created when John Ford, her brother, resigned in advance of his successful federal prosecution for bribery.[9210] Ophelia Ford's Republican challenger in the election pursued an election contest with the senate, which voted on January 17, 2006, to have a final vote on January 19 on whether the election should be voided because some ballots were of questionable validity.[9211] In the federal complaint, the plaintiffs named as defendants the other thirty-two senators, including Tennessee's lieutenant governor, and Ford's challenger in the election.[9212] The challenger was dismissed as a defendant by agreement on January 27.[9213]

On the day that the complaint was filed, following a fifty-minute evening telephone conference with the parties, Judge Bernice B. Donald issued a temporary restraining order against further senate action on the 2004 special election.[9214] She scheduled a hearing for January 25.[9215]

9209. Complaint, Ford v. Beavers, No. 2:06-cv-2031 (W.D. Tenn. Jan. 18, 2006), D.E. 1 [hereinafter *Ford* Complaint]; Ford v. Wilder, 469 F.3d 500, 501–02 (6th Cir. 2006); *see* Second Amended Complaint, *Ford*, No. 2:06-cv-2031 (W.D. Tenn. Jan. 27, 2006), D.E. 26; Amended Complaint, *id.* (Jan. 23, 2006), D.E. 6.

9210. *Ford*, 469 F.3d at 501–02; *see* Richard Locker, *Ford Resigns*, Memphis Com. App., May 29, 2005, at A1; *Longtime Tennessee State Senator Resigns After Bribery Sting*, N.Y. Times, May 29, 2005, at 22.

9211. *Ford*, 469 F.3d at 502; *see* Richard Locker, *Senate Acts to Oust Ford*, Memphis Com. App., Jan. 18, 2006, at A1.

9212. *Ford* Complaint, *supra* note 9209.

9213. Consent Order, *Ford*, No. 2:06-cv-2031 (W.D. Tenn. Jan. 27, 2006), D.E. 22.

9214. Temporary Restraining Order, *id.* (Jan. 18, 2006), D.E. 2; Docket Sheet, *id.* (Jan.

According to the *Commercial Appeal*, "The crowded courtroom was packed with Ford's supporters and political opponents—as well as 15 senators—who listened to a day's worth of mostly technical testimony on election laws and procedures. Because the courtroom was so crowded, 14 senators sat in the jury box."[9216]

On February 1, Judge Donald granted the plaintiffs a declaratory judgment that the contemplated senate action violated the plaintiffs' equal-protection and due-process rights, as well as voting rights under Tennessee's constitution.[9217] "[B]ecause the Tennessee Senate has failed to adopt and articulate a consistent standard that meets the uniformity requirement of the Equal Protection Clause, the Court finds that disenfranchisement of District 29 voters by excluding their votes and voiding the election would raise grave equal protection concerns."[9218] Moreover, "because the Senate's actions implicate the fundamental right to vote[,] the constituents of Senate District 29 are entitled to adequate notice and opportunity to be heard before any prospective disenfranchisement."[9219] And under Tennessee's constitution, "Defendants are required to conduct election contests by the same standards utilized in each of the State's districts."[9220]

18, 2006) [hereinafter *Ford* Docket Sheet] (minutes, D.E. 4); *Ford*, 469 F.3d at 502; *see* Chris Conley, *Both Parties Favored Donald*, Memphis Com. App., Feb. 1, 2006, at B1 (reporting also, "When a clerk used a Rolodex-type gadget to spin cards with the names of the district's four judges on them, it stopped at U.S. Dist. Judge Bernice Donald."); Bonna de la Cruz, *Judge Gives Ford Week's Reprieve*, Nashville Tennessean, Jan. 19, 2006, at 1B; Richard Locker, *Judge Halts Senate Vote on Ford*, Memphis Com. App., Jan. 19, 2006, at A1.

Judge Donald was elevated to the court of appeals on September 8, 2011, and she retired on January 20, 2023. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

9215. *Ford* Docket Sheet, *supra* note 9214 (D.E. 4); *see id.* (minutes, D.E. 25); *Ford*, 469 F.3d at 502; *see also* Bonna de la Cruz, *3 Lawmakers Get Court Summons in Ford Case*, Nashville Tennessean, Jan. 24, 2006, at 4B; Richard Locker, *Ford's Court Hearing Today*, Memphis Com. App., Jan. 25, 2006, at A1.

9216. Chris Conley, *No Rush to Judgment*, Memphis Com. App., Jan. 26, 2006, at A1; *see* Bonna de la Cruz, *Senate Ouster of Ford on Hold at Least a Week*, Nashville Tennessean, Jan. 26, 2006, at 1A ("Nearly half the Senate—13 Republicans and two Democrats—attended the daylong hearing at the Clifford Davis Federal Building in Memphis.").

9217. Opinion, *Ford*, No. 2:06-cv-2031 (W.D. Tenn. Feb. 1, 2006), D.E. 30 [hereinafter *Ford* Declaratory-Judgment Opinion]; *Ford*, 469 F.3d at 501–02.

9218. *Ford* Declaratory-Judgment Opinion, *supra* note 9217, at 19.

9219. *Id.* at 23.

9220. *Id.* at 27.

On April 19, the senate removed Senator Ford from office.[9221] On the day before, Judge Donald determined that "the record [was] not so compelling that [the] Court should step in."[9222] On April 25, the plaintiffs sought to void the senate's action with a third amended complaint filed as a new case.[9223] At a May 16 hearing, observing that the legislative session was concluding, Judge Donald granted a preliminary injunction against the appointment of an interim replacement for Senator Ford.[9224]

Senator Ford won her seat back on November 7.[9225]

On November 22, the court of appeals dismissed as moot an appeal from the declaratory judgment.[9226]

The second case was dismissed by consent on July 16, 2007.[9227] On October 24, 2008, Judge Donald awarded the plaintiffs $117,263 in attorney fees, costs, and expenses.[9228]

On April 27, 2007, John Ford was convicted of bribery by a Western District of Tennessee jury.[9229] Judge J. Daniel Breen sentenced him to five

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9221. *Ford*, 469 F.3d at 503; *see* Theo Emery, *Senate Voids Election*, N.Y. Times, Apr. 20, 2006, at A18; Richard Locker, *Senate Ousts Ford*, Memphis Com. App., Apr. 20, 2006, at A1; Travis Loller, *Election Won by Memphis Democrat "Incurably Uncertain,"* Nashville Tennessean, Apr. 20, 2006, at 1A.

9222. *Ford* Docket Sheet, *supra* note 9214 (minutes, D.E. 53); *see Ford*, 469 F.3d at 503; *see also* Lawrence Buser, *Senate Gets Nod for Ford Vote Today*, Memphis Com. App., Apr. 19, 2006, at A1.

9223. Complaint, Ford v. Wilder, No. 2:06-cv-2241 (W.D. Tenn. Apr. 25, 2006), D.E. 1; *Ford*, 469 F.3d at 503 & n.5; *see* Amended Complaint, *Ford*, No. 2:06-cv-2241 (W.D. Tenn. May 16, 2006), D.E. 12; Injunction Motion, *id.* (Apr. 26, 2006), D.E. 4; *see also* Chris Conley, *Ford Sues Senate to Regain Her Seat*, Memphis Com. App., Apr. 26, 2006, at A1; *Ousted Senator Sues*, N.Y. Times, Apr. 27, 2006, at A23.

9224. Preliminary Injunction, *Ford*, No. 2:06-cv-2241 (W.D. Tenn. filed May 30, 2006), D.E. 17; Docket Sheet, *id.* (Apr. 25, 2006) (D.E. 15, 17); *Ford*, 469 F.3d at 503; *see* Chris Conley, *Judge Grants Ford's Request*, Memphis Com. App., May 17, 2006, at A1.

9225. *Ford*, 469 F.3d at 503 & n.4.

9226. *Id.* at 507.

One judge would have also vacated the declaratory judgment. *Id.* at 507–08 (Circuit Judge John M. Rogers, concurring and dissenting).

9227. Consent Dismissal, *Ford*, No. 2:06-cv-2241 (W.D. Tenn. July 16, 2007), D.E. 47; *see Federal Judge Tosses Lawsuit Over Ford's Expulsion*, Knoxville News-Sentinel, July 17, 2007, at 8.

9228. Opinion, Ford v. Beavers, No. 2:06-cv-2031 (W.D. Tenn. Oct. 24, 2008), D.E. 73, 2006 WL 4724371; *see Ford*, 469 F.3d at 501, 507 (remanding for an award of attorney fees); *see also* Richard Locker, *Judge Orders Ford's Bill Paid*, Memphis Com. App., Oct. 31, 2008, at B4.

9229. Jury Verdict, United States v. Ford, No. 2:05-cv-20201 (W.D. Tenn. Apr. 27, 2007), D.E. 107; *see* Jury Instructions at 27, *id.* (filed May 2, 2007), D.E. 110; *see also* Unit-

years and six months.[9230] On April 14, 2011, the court of appeals reversed a July 18, 2008, Middle District conviction for failure to disclose financial interests.[9231]

Winner Take All in the Electoral College

Gordon v. Cheney (Henry H. Kennedy, Jr., D.D.C. 1:05-cv-6)

> Two days before the U.S. Senate was to count presidential electoral votes, a pro se plaintiff filed a federal complaint seeking to enjoin the count on the ground that electoral votes in several states were improperly allocated according to a winner-take-all rule. Two days later, the court denied immediate relief.
>
> *Topics:* Electoral College; enjoining certification; pro se party.

On January 4, 2005, two days before the Vice President, as president of the Senate, was to count the electoral votes for his and President Bush's reelection, a pro se plaintiff affiliated with the Green Party filed a federal complaint in the district court for the District of Columbia seeking to enjoin the count on the ground that electoral votes in several states were improperly allocated according to a winner-take-all rule.[9232] With his complaint, the plaintiff filed a motion for a temporary restraining order and a preliminary injunction.[9233] Judge Henry H. Kennedy, Jr., denied the plaintiff im-

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ed States v. Ford, 639 F.3d 718, 719 (6th Cir. 2011); Lawrence Buser, *Ford Denied Appeal of 5½-Year Sentence*, Memphis Com. App., Aug. 27, 2009, at B1; *Ex-Tennessee Lawmaker Is Guilty of Bribery*, N.Y. Times, Apr. 28, 2007, at A14; Marc Perrusquia, *John Ford Verdict—CONVICTED*, Memphis Com. App., Apr. 28, 2007, at A1; *USA vs. John Ford*, Memphis Com. App., Apr. 8, 2007, at A4.

9230. Redacted Amended Judgment, *Ford*, No. 2:05-cr-20201 (W.D. Tenn. Mar. 4, 2008), D.E. 172, *aff'd*, 344 F. App'x 167 (6th Cir. 2009); *see Ex-Lawmaker Sentenced*, N.Y. Times, Aug. 29, 2007, at A17; *see also* www.bop.gov (noting a release date of February 8, 2013, reg. no. 20286-076); Marc Perrusquia, *John Ford Enters Memphis Halfway House*, Memphis Com. App., Aug. 21, 2012, at 1.

9231. *Ford*, 639 F.3d 718 (finding no federal jurisdiction over disclosure obligations); *see* Judgment, United States v. Ford, No. 3:06-cr-235 (M.D. Tenn. Sept. 30, 2008), D.E. 268 (noting a sentence of fourteen years); Jury Verdict, *id.* (July 18, 2008), D.E. 245; *see also* Lawrence Buser, *Ruling Key to Freedom for Ford*, Memphis Com. App., Apr. 15, 2011, at A1; *Ex-Lawmaker Guilty*, N.Y. Times, July 19, 2008, at A13; *New Indictment Against Former State Senator*, N.Y. Times, Dec. 19, 2006, at A28.

9232. Complaint, Gordon v. Cheney, No. 1:05-cv-6 (D.D.C. Jan. 4, 2005), D.E. 1.

9233. Motion, *id.* (Jan. 4, 2005), D.E. 3.

On November 2, 2004, the plaintiff filed a federal pro se challenge to the District of Columbia's allocation of electoral votes, Complaint, Gordon v. Williams, No. 1:04-cv-1904 (D.D.C. Nov. 2, 2004), D.E. 1, which the court dismissed on May 11, 2005, for failure to prosecute it, Order, *id.* (May 11, 2005), D.E. 5. *See* Notice of Related Case, *Gordon*,

mediate relief on January 6: "it is apparent from [the motion's] face that plaintiff has not, and cannot, meet the rigorous requirements for obtaining such an extraordinary remedy."[9234] On March 22, the plaintiff dismissed the action voluntarily.[9235]

The plaintiff filed a similar pro se action on July 28, 2008.[9236] On March 26, 2009, Judge Kennedy granted to Vice President Biden Vice President Cheney's motion to dismiss the action.[9237] "The problem for [the plaintiff], among others, is that his claims are predicated on allegations of wrongdoing by third parties."[9238]

Challenging a Victor's Residence Qualification

Harris v. Diaz (Richard M. Berman, S.D.N.Y. 1:04-cv-9124)

> A district judge dismissed a postelection complaint that a victorious legislature candidate did not live in the district he was elected to represent. On the one hand, the appropriate proceeding would be a state-court quo warranto action; on the other hand, the time to challenge eligibility was before the election.
>
> *Topics:* Enjoining certification; matters for state courts; laches.

Sixteen days after the November 2, 2004, general election, a voter filed a federal complaint in the Southern District of New York alleging that the victor in an election for New York's senate did not live in his district.[9239]

On the following day, Judge Richard M. Berman held a conference with the parties and denied the voter immediate relief.[9240] Judge Berman

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No. 1:05-cv-6 (D.D.C. Jan. 4, 2005), D.E. 2.

9234. Order, *Gordon*, No. 1:05-cv-6 (D.D.C. Jan. 6, 2005), D.E. 4.

Judge Kennedy assumed senior status because of certified disability on November 18, 2011. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

9235. Stipulation, *Gordon*, No. 1:05-cv-6 (D.D.C. Mar. 22, 2005), D.E. 9.

9236. Complaint, Gordon v. Cheney, No. 1:08-cv-1294 (D.D.C. July 28, 2008), D.E. 1; Gordon v. Biden, 606 F. Supp. 2d 11, 12 & n.1 (D.D.C. 2009); *see* Motion for Temporary Restraining Order and Preliminary Injunction, *Gordon*, No. 1:08-cv-1294 (D.D.C. July 30, 2008), D.E. 3; Notice of Related Case, *id.* (July 28, 2008), D.E. 2.

9237. *Gordon*, 606 F. Supp. 2d at 12, *aff'd*, 364 F. App'x 651 (D.C. Cir. 2010).

9238. *Id.* at 14.

9239. Complaint, Harris v. Diaz, No. 1:04-cv-9124 (S.D.N.Y. Nov. 18, 2004), D.E. 1; *see* David Saltonstall & Christina Silva, *Home Away from "Home,"* N.Y. Daily News, Nov. 30, 2004, at 19 (reporting also that the victor spent only a handful of nights each month at the address he listed as his residence).

9240. Opinion at 3, *Harris*, No. 1:04-cv-9124 (S.D.N.Y. Dec. 14, 2004), D.E. 13 [hereinafter *Harris* Opinion], 2004 WL 2912888.

dismissed the complaint on December 13.[9241] On the one hand, the proper procedure to litigate the plaintiff's claims would be a quo warranto action in state court.[9242] On the other hand, the time to challenge the senator's qualifications was more properly before the election.[9243]

Dismissing a Defective Pro Se Application for a Temporary Restraining Order

Webb-Goodwin v. Butler (Lance M. Africk, E.D. La. 2:04-cv-2653)

> A candidate who came in sixth in an election rife with mechanical and logistical difficulties filed a pro se federal complaint to nullify the election. The district court denied the plaintiff a temporary restraining order because the plaintiff had shown neither service on defendants nor affidavit compliance with Federal Rule of Civil Procedure 65(b). A state-court action also was dismissed for lack of service.
>
> *Topics:* Enjoining elections; voting technology; pro se party; matters for state courts.

An unsuccessful candidate for Orleans Parish's school board filed a pro se federal complaint in the Eastern District of Louisiana on Friday, September 24, 2004, to nullify results of a September 18 election and enjoin an October 2 runoff election because of various alleged errors in election administration.[9244] The plaintiff came in sixth among six candidates for the second district.[9245] She also filed a pro se action in state court on September 23.[9246]

On September 27, Judge Lance M. Africk denied the plaintiff relief and dismissed the complaint without prejudice.[9247]

> Although plaintiff avers that she intends to serve the complaint on defendants, there is no evidence before the Court demonstrating that defendants have received notice of this action. . . .

9241. *Id.* at 11; *see* Bill Egbert, *Fed Judge Tosses Diaz Suit*, N.Y. Daily News, Dec. 17, 2004, at 3.

9242. *Harris* Opinion, *supra* note 9240, at 9–11.

9243. *Id.*

9244. Complaint, Webb-Goodwin v. Butler, No. 2:04-cv-2653 (E.D. La. Sept. 24, 2004), D.E. 1; *see* James Varney, *Candidates File Suits Over Polling Mix-Ups*, New Orleans Times Picayune, Sept. 25, 2004, Metro, at 1.

9245. *See* Aesha Rasheed & Brian Thevenot, *School Board Shake-Up*, New Orleans Times Picayune, Sept. 19, 2004, at 1 (reporting also, "Voting machine problems that left at least 90 precincts without voting machines well into election day caused problems in five of the seven districts, particularly the 2nd District.").

9246. Webb-Goodwin v. Butler, 883 So. 2d 534, 536 (La. App. 2004).

9247. Order, *Webb-Goodwin*, No. 2:04-cv-2653 (E.D. La. Sept. 27, 2004), D.E. 3.

> Plaintiff has not submitted an affidavit nor verified the allegations in her complaint. Therefore, plaintiff's application for an *ex parte* temporary restraining order requesting the above-mentioned relief is not in compliance with [Federal Rule of Civil Procedure] 65(b).[9248]

The state-court action also was dismissed, and the court of appeal affirmed one of the reasons: lack of effective service on all defendants.[9249]

Unsuccessful Challenge to Close Election Defeats in New Rochelle

McLaughlin v. Allen (Charles L. Brieant, S.D.N.Y. 7:03-cv-9886)

> A district judge denied immediate relief to two city-council candidates trailing by handfuls of votes after unsuccessful state-court challenges to election results. Nearly a year later, the judge granted the defendants summary judgment.
>
> *Topics:* Enjoining certification; matters for state courts; case assignment.

Two candidates for different seats on New Rochelle's city council and ten voters supporting the candidates filed a federal complaint in the Southern District of New York on December 12, 2003, seeking federal relief from the candidates' close defeats in the November 4 election.[9250] The federal action followed unsuccessful proceedings by the candidates in state court.[9251]

The court assigned the case to Judge Charles L. Brieant, who had issued an opinion two days before in litigation over the council's district lines.[9252] Following a hearing on the day the candidates' complaint was

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9248. *Id.* at 2; *see* Order, *id.* (Oct. 1, 2004), D.E. 6 (denying reconsideration).

9249. *Webb-Goodwin*, 883 So. 2d 534, *review denied*, 883 So. 2d 1041 (La. 2004) (noting failure to timely file); *see* Susan Finch, *Judicial Election to Be Rerun*, New Orleans Times Picayune, Oct. 15, 2004, Metro, at 1.

9250. Complaint, McLaughlin v. Allen, No. 7:03-cv-9886 (S.D.N.Y. Dec. 12, 2003), D.E. 1; *see* Defendant's Summary-Judgment Brief at 9, *id.* (July 17, 2004), D.E. 20 [hereinafter *McLaughlin* Defendant's Summary-Judgment Brief] (reporting that ultimately one plaintiff lost by eighteen votes and another lost by eight votes); *see also* Len Maniace, *Democrats Repel GOP Challenge of 2nd, 4th District Wins*, Westchester Cty. J. News, Oct. 9, 2004, at 3B.

9251. *See McLaughlin* Defendant's Summary-Judgment Brief, *supra* note 9250, at 14–15; Elizabeth Ganga, *Republicans Challenge Council Election Results*, Westchester Cty. J. News, Nov. 27, 2003, at 3B.

9252. Order, *McLaughlin*, No. 7:03-cv-9886 (S.D.N.Y. Dec. 12, 2003), D.E. 2; *see* New Rochelle Voter Defense Fund v. City of New Rochelle, 308 F. Supp. 2d 152 (S.D.N.Y. 2003) (ordering redistricting); Docket Sheet, New Rochelle Republican Comm. v. City of New Rochelle, No. 7:03-cv-3965 (S.D.N.Y. May 30, 2003); Docket Sheet, New Rochelle Voter Rights Defense Fund v. City of New Rochelle, No. 7:03-cv-3764 (S.D.N.Y. May 27,

filed, Judge Brieant denied the plaintiffs immediate relief.[9253] Following a hearing on October 8, 2004, Judge Brieant granted the defendants summary judgment.[9254]

Incorrect Election Results Because of a Malfunctioning Voting Machine

Shannon v. Jacobowitz (David N. Hurd, N.D.N.Y. 5:03-cv-1413)

> After votes were counted in a November 2003 election for a town supervisor, a challenger was ahead of an incumbent by twenty-five votes. There was evidence, however, that a voting machine registered only one vote for the incumbent because it failed to advance its tally with each additional vote. Supporters of the incumbent filed a federal complaint alleging that a comparison of the malfunctioning machine to another machine at the same location implied that the incumbent was deprived of approximately 134 votes. The district judge enjoined certification of the election and enjoined the challenger from taking office. In January 2005, the court of appeals determined that the district court's interference with the election was error. The incumbent remained in office through 2007.
>
> *Topics:* Voting technology; enjoining certification.

On November 21, 2003, Matthew Shannon, the incumbent town supervisor in Whitestown, New York, filed a federal constitutional action contesting the election of a challenger for his office, David Jacobowitz, in the November 4 election.[9255] Apparently, a single voting machine malfunctioned and registered only one vote for the incumbent on the Democratic Party line, because the counter failed to advance with each vote on that line.[9256] (The incumbent was listed on the Democratic, Independence, and Conservative party lines; the challenger was listed on the Republican and Working Families party lines.[9257]) After the votes were counted, the chal-

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2003).

Judge Brieant died on July 20, 2008. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

9253. Order, *McLaughlin*, No. 7:03-cv-9886 (S.D.N.Y. Dec. 15, 2003), D.E. 4; Docket Sheet, *id.* (Dec. 12, 2003) [hereinafter *McLaughlin* Docket Sheet].

9254. Judgment, *id.* (Oct. 14, 2004), D.E. 32; *McLaughlin* Docket Sheet, *supra* note 9253; *see* Maniace, *supra* note 9250.

9255. Complaint, Shannon v. Jacobowitz, No. 5:03-cv-1413 (N.D.N.Y. Nov. 21, 2003), D.E. 1 [hereinafter *Shannon* Complaint]; Shannon v. Jacobowitz, 394 F.3d 90 (2d Cir. 2005); Shannon v. Jacobowitz, 301 F. Supp. 2d 249, 251 (N.D.N.Y. 2003).

9256. *Shannon*, 394 F.3d at 91–92; *Shannon*, 301 F. Supp. 2d at 252–53.

9257. *Shannon*, 394 F.3d at 91; *Shannon*, 301 F. Supp. 2d at 252; *see Shannon* Com-

lenger was ahead of the incumbent by twenty-five votes.[9258] Comparing the malfunctioning machine to another machine at the same location, the plaintiffs estimated that the incumbent was deprived of approximately 134 votes.[9259] The plaintiffs included five voters who said they voted for the incumbent on the Democratic line at the malfunctioning machine.[9260]

On the complaint's filing, a general order set a status conference before a magistrate judge for March 2004.[9261] On December 4, 2003, the plaintiffs submitted a brief, a proposed order to show cause, and affidavits of seventy voters who said that they voted for the incumbent on the Democratic line at the malfunctioning machine.[9262] That day, Judge David N. Hurd issued an order to show cause why the incumbent should not be declared the winner of the election.[9263] At a hearing on December 18,[9264] Judge Hurd issued a temporary restraining order enjoining the county board of elections from certifying a winner of the election and enjoining the challenger from taking the office.[9265]

On December 30, Judge Hurd converted the temporary restraining order into a preliminary injunction.[9266] He determined that federal relief was appropriate because the only possible state remedy was a quo warranto action,[9267] which could be so slow as to take the entire term of office and which would be discretionary with the attorney general.[9268] On January 27, 2004, Judge Hurd granted the plaintiffs a summary judgment.[9269]

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plaint, *supra* note 9255, at 4.

9258. *Shannon*, 394 F.3d at 91; *Shannon*, 301 F. Supp. 2d at 252.

9259. *Shannon* Complaint, *supra* note 9255, at 5.

9260. *Id.* at 3; *Shannon*, 301 F. Supp. 2d at 251.

9261. Docket Sheet, Shannon v. Jacobowitz, No. 5:03-cv-1413 (N.D.N.Y. Nov. 21, 2003).

9262. *Id.*; *Shannon*, 394 F.3d at 92; *Shannon*, 301 F. Supp. 2d at 253; Order to Show Cause, *Shannon*, No. 5:03-cv-1413 (N.D.N.Y. Nov. 21, 2003), D.E. 8 [hereinafter *Shannon* Order to Show Cause].

9263. *Shannon* Order to Show Cause, *supra* note 9262.

9264. Minutes, *Shannon*, No. 5:03-cv-1413 (N.D.N.Y. Dec. 18, 2003), D.E. 23; *Shannon*, 301 F. Supp. 2d at 251.

9265. Temporary Restraining Order, *Shannon*, No. 5:03-cv-1413 (N.D.N.Y. Dec. 18, 2003), D.E. 22; *Shannon*, 301 F. Supp. 2d at 251.

9266. *Shannon*, 301 F. Supp. 2d at 258.

9267. "A common-law writ used to inquire into the authority by which a public office is held or a franchise is claimed . . . ." Black's Law Dictionary 1371 (9th ed. 2009).

9268. *Shannon*, 301 F. Supp. 2d at 254–58.

9269. Opinion, *Shannon*, No. 5:03-cv-1413 (N.D.N.Y. Dec. 18, 2003), D.E. 48, 2004 WL 180253.

On January 7, 2005, the court of appeals reversed the judgment, holding that Judge Hurd was wrong to consider the adequacy of the quo warranto remedy without a showing of intentional state action against the plaintiffs.[9270] Judge Hurd, therefore, dismissed the action on February 2.[9271]

The incumbent, nevertheless, held his office through 2007.[9272]

Crossover Votes

Foster v. Salaam (Ira De Ment, M.D. Ala. 2:02-cv-1093)

> A federal complaint alleged that Republicans were improperly permitted to vote in a June 2002 runoff Democratic primary election for a seat in Alabama's house of representatives. The district judge determined that the claim under section 5 of the Voting Rights Act was not valid, so a three-judge district court did not need to be appointed. The plaintiffs sought voluntary dismissal and pursued the matter in state court.
>
> *Topics:* Primary election; enjoining certification; enjoining elections; section 5 preclearance; three-judge court.

Three months after a June 25, 2002, runoff primary election for Democratic nominee for a seat in Alabama's house of representatives, fourteen voters filed a federal complaint against the declared winner and the Democratic Party claiming that Republicans were improperly permitted to vote in the election.[9273] The complaint included a motion for a preliminary injunction against certification of the winner of the runoff election.[9274] The complaint also included a claim that the primary-election runoff procedures had not been cleared pursuant to section 5 of the Voting Rights Act.[9275] Five days later, the plaintiffs filed a motion to stay the November 5

9270. Shannon v. Jacobowitz, 394 F.3d 90, 97 (2d Cir. 2005).

"We have no occasion to consider, and therefore express no opinion on, whether the New York Attorney General's refusal to bring a quo warranto action on facts such as these might constitute intentional state action of the sort necessary to create a potential due process violation." *Id.* at 93 n.2.

9271. Judgment, *Shannon*, No. 5:03-cv-1413 (N.D.N.Y. Feb. 2, 2005), D.E. 66.

9272. *Compare* Whitestown Town Board Minutes, Jan. 1, 2008, town.whitestown.ny.us/content/MinuteCategories/View/1/2008:field=minutes;/content/Minutes/View/138 (identifying Charles Gibbs as supervisor), *with* Whitestown Town Board Minutes, Dec. 19, 2007, town.whitestown.ny.us/content/MinuteCategories/View/1/2007:field=minutes;/content/Minutes/View/156 (identifying Matthew Shannon as supervisor).

9273. Complaint, Foster v. Salaam, No. 2:02-cv-1093 (M.D. Ala. Sept. 25, 2002), D.E. 1.

9274. *Id.* at 10, 11, 13, 14; Docket Sheet, *id.* (Sept. 25, 2002).

9275. *Foster* Complaint, *supra* note 9273, at 8–10; *see* Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (requiring preclear-

election for the house seat in dispute.[9276] On October 15, Judge Ira De Ment granted the plaintiffs' motion to add Alabama's secretary of state and a probate judge as defendants.[9277]

On October 2, Judge De Ment set the matter for hearing on October 17.[9278] On October 9, Judge De Ment ruled that the plaintiffs had not stated a section 5 claim requiring the empaneling of a three-judge district court to hear it: "There is no allegation that the Alabama Democratic Party has instituted a new procedure, practice or party rule; rather, the Complaint contains accusations that the Alabama Democratic Party violated Alabama election laws that already have received preclearance."[9279] Following the hearing, Judge De Ment granted the plaintiffs' motion to voluntarily dismiss their complaint without prejudice to seek relief in state court.[9280]

The defendant candidate was elected to Alabama's house in November.[9281]

Customary Right of Appointment

Holley v. City of Roanoke (W. Harold Albritton, M.D. Ala. 3:01-cv-775)

> A federal complaint challenged a refusal by a city council to reappoint a board-of-education member in violation of a customary practice in which each member of the council named the board member for the council member's district. A three-judge district court was appointed to hear a claim that the alleged change in practice violated section 5 of the Voting Rights Act. After a hearing, the court dismissed the section 5 claim because it concerned appointment rather than voting. The original district judge dismissed other claims because the evidence was that the deviation from custom was motivated by policy disagreements

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ance of changes to voting procedures in jurisdictions with a certified history of discrimination and requiring that preclearance disputes be heard by a three-judge district court).

On June 25, 2013, the Supreme Court declined to hold section 5 unconstitutional, but the Court did hold unconstitutional the criteria for which jurisdictions require section 5 preclearance. Shelby County v. Holder, 570 U.S. 529 (2013).

9276. Motion, *Foster*, No. 2:02-cv-1093 (M.D. Ala. Sept. 30, 2002), D.E. 2.

9277. Order, *id.* (Oct. 15, 2002), D.E. 18.

Judge De Ment died on July 16, 2011. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

9278. Order, *Foster*, No. 2:02-cv-1093 (M.D. Ala. Oct. 2, 2002), D.E. 5; Minutes, *id.* (Oct. 17, 2002), D.E. 32.

9279. Opinion at 8, *id.* (Oct. 9, 2002), D.E. 10.

9280. Order, *id.* (Oct. 22, 2002), D.E. 36; *see Defeated Candidate Denied Relief*, Montgomery Advertiser, Oct. 23, 2002, at C3.

9281. *See Clash Breaks Out at Polls*, Montgomery Advertiser, Nov. 6, 2002, at B1.

rather than by race. A remaining claim was dismissed voluntarily.

Topics: Section 5 preclearance; three-judge court; equal protection.

On June 25, 2001, plaintiffs filed a federal challenge in the Middle District of Alabama to a refusal by Roanoke's city council to reappoint Cheryl Sims to the city's board of education in violation of a customary practice in which each member of the council named the board member for the council member's district.[9282] The plaintiffs were Sims, the council member who selected her, the county commissioner whose district included the board-of-education district at issue, and three additional voters.[9283] The defendants were the city, its mayor, and the three council members who voted to block Sims's reappointment.[9284] With their complaint, the plaintiffs filed a motion for a temporary restraining order, a preliminary injunction, and the designation of a three-judge district court to decide their claim that the change in procedure violated section 5 of the Voting Rights Act.[9285]

On July 2, at the request of Judge W. Harold Albritton, the circuit's chief judge designated a three-judge court.[9286] Added to the court were local Judge Myron H. Thompson and Tampa Circuit Judge Charles R. Wil-

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9282. Complaint, Holley v. City of Roanoke, No. 3:01-cv-775 (M.D. Ala. June 25, 2001), D.E. 1 [hereinafter *Holley* Complaint]; Holley v. City of Roanoke, 162 F. Supp. 2d 1335, 1337 (M.D. Ala. 2001).

9283. *Holley* Complaint, *supra* note 9282, at 5; *Holley*, 162 F. Supp. 2d at 1338; Holley v. City of Roanoke, 149 F. Supp. 2d 1310, 1312 (M.D. Ala. 2001).

9284. *Holley* Complaint, *supra* note 9282, at 5–6; *Holley*, 162 F. Supp. 2d at 1338; *Holley*, 149 F. Supp. 2d at 1312.

9285. Motion, *Holley*, No. 3:01-cv-775 (M.D. Ala. June 25, 2001), D.E. 2; *see* Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (2015) (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination and requiring that preclearance disputes be heard by a three-judge district court).

On June 25, 2013, the Supreme Court declined to hold section 5 unconstitutional, but the Court did hold unconstitutional the criteria for which jurisdictions require section 5 preclearance. Shelby County v. Holder, 570 U.S. 529 (2013).

9286. Designation Order, *Holley*, No. 3:01-cv-775 (M.D. Ala. July 2, 2001), D.E. 11 [hereinafter *Holley* Designation Order].

Tim Reagan interviewed Judge Albritton for this report by telephone on June 18, 2013.

son.[9287] That same day, Judge Albritton set the matter for hearing on July 11.[9288]

On July 3, however, the three-judge court ordered the parties to brief the court by July 9 on whether section 5 applied to the case so that the court could determine whether to proceed with a hearing before the three-judge court.[9289] After briefing, including on the defendants' motion to dismiss the action, the three-judge court decided to proceed with a two-day hearing beginning on July 11.[9290] Judge Wilson traveled to Montgomery for the hearing.[9291] On July 12, the court dismissed the section 5 claim because the allegations concerned appointment rather than voting.[9292]

On July 16, Judge Albritton denied the plaintiffs immediate injunctive relief, finding that the plaintiffs' "evidence, unchallenged and taken as true for purposes of this motion, tends to show not that the Defendants changed any existing practice because of [the council member's] race, but rather because they disagreed with Plaintiff Sims' vocal support of continued federal court supervision over the Roanoke City School System."[9293] Judge Albritton also declined jurisdiction over the plaintiff's state claims, finding that "these claims raise complex issues of state law."[9294]

After additional briefing, Judge Albritton dismissed, on September 21, many of the plaintiffs' claims, but he declined to dismiss a claim against the city for a possible unconstitutional deviation from the custom of allowing each council member to select one member of the board of education.[9295]

On January 24, 2002, Judge Albritton granted the plaintiffs a voluntary dismissal.[9296]

9287. *Holley* Designation Order, *supra* note 9286.

9288. Order, *Holley*, No. 3:01-cv-775 (M.D. Ala. July 2, 2001), D.E. 12.

9289. Order, *id.* (July 3, 2001), D.E. 13.

9290. Order, *id.* (July 9, 2001), D.E. 19; Minutes, *id.* (July 24, 2001), D.E. 26 (single-judge hearing); Minutes, *id.* (July 24, 2001), D.E. 25 (three-judge hearing).

9291. Interview with Judge W. Harold Albritton, June 18, 2013.

9292. Holley v. City of Roanoke, 149 F. Supp. 2d 1310 (M.D. Ala. 2001); Holley v. City of Roanoke, 162 F. Supp. 2d 1335, 1337 (M.D. Ala. 2001).

9293. Opinion, *Holley*, No. 3:01-cv-775 (M.D. Ala. July 16, 2001), D.E. 24.

9294. Order, *id.* (July 16, 2001), D.E. 23; *see Holley*, 162 F. Supp. 2d at 1337.

9295. *Holley*, 162 F. Supp. 2d at 1342–43.

9296. Order, *Holley*, No. 3:01-cv-775 (M.D. Ala. Jan. 24, 2002), D.E. 37.

Unsuccessful Attempt to Block Electoral College Votes

Shtino v. Carlin (Alexander Williams, Jr., D. Md. 8:00-cv-3699)

The district court denied a December 21, 2000, pro se complaint to enjoin presentation of Florida's electoral votes.

Topics: Electoral College; enjoining certification; pro se party.

A pro se plaintiff filed a federal complaint in the District of Maryland on December 21, 2000, to enjoin the Archivist of the United States, whose office is in Maryland, from presenting Florida's Electoral College votes.[9297] Judge Alexander Williams, Jr., denied the plaintiff relief that same day.[9298]

Following Congress's January 6, 2001, certification[9299] of the December 18, 2000, Electoral College vote in favor of George W. Bush,[9300] Judge Williams dismissed the action on January 8.[9301] Judge Williams denied a motion for reconsideration on February 21.[9302]

9297. Docket Sheet, Shtino v. Carlin, No. 8:00-cv-3699 (D. Md. Dec. 21, 2000) [hereinafter *Shtino* Docket Sheet] (D.E. 1); Dismissal Order, *id.* (Jan. 8, 2001), D.E. 3 [hereinafter *Shtino* Dismissal Order].

9298. *Shtino* Docket Sheet, *supra* note 9297 (D.E. 3).

Judge Williams retired on January 3, 2014. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

9299. *See* Alison Mitchell, *Over Some Objections, Congress Certifies Electoral Vote*, N.Y. Times, Jan. 7, 2001, at 17.

9300. *See* Charles Babington, *Electors Reassert Their Role*, Wash. Post, Dec. 19, 2000, at A1.

9301. *Shtino* Dismissal Order, *supra* note 9297.

9302. Reconsideration Denial, *Shtino*, No. 8:00-cv-3699 (D. Md. Feb. 21, 2001), D.E. 6.

18. Recounts

Close elections often result in recounts, and because every vote really counts in close elections, recounts can sometimes result in litigation. Because recounts occur in relatively narrow slivers of time, recount litigation is typically emergency litigation.[9303]

If a candidate or a candidate's supporters conclude that some element of the recount method might have an impact on who wins, the method might be litigated. This was the reason for one of four lawsuits by a narrowly unsuccessful 2018 campaign to reelect a U.S. senator from Florida.[9304] In 2008, plaintiffs complained that a switch from punch-card ballots to voting machines would result in a failure to properly count emphasis votes—casting both a straight-party vote and specific votes for various offices.[9305] In 2004, a complaint alleged that the incumbent gubernatorial party in Puerto Rico was proceeding quickly with the transition but slowly with election certification.[9306]

In a 2004 Washington gubernatorial recount, a lawsuit claimed that ballots were being recounted differently in different counties.[9307] The judge determined that emergency relief was not necessary, because ballots in question could be examined later.[9308]

In another 2018 Florida case, one county's equipment could only recount one race at a time, and there were several close races.[9309] The plaintiffs sought a recount extension so that the recount for a more local and down-ballot race could be finished in time, but the judge helped the parties to understand that election officials had discretion to do that recount first, and in the event, all recounts were finished on time in that county.[9310]

9303. *See, e.g.*, "The 2000 Election of the President," *infra* page 1266.

9304. *See* "Multiple Suits After an Election to Relax the Standards for Counting and Recounting Votes," *supra* page 812.

9305. *See* "Emphasis Votes," *infra* page 1254.

9306. *See* "Close Vote in Puerto Rico," *infra* page 1262.

9307. *See* "Unequal Recount Procedures in a Gubernatorial Election," *infra* page 1260.

9308. Transcript at 19, Wash. State Republican Party v. Reed, No. 2:04-cv-2350 (W.D. Wash. Nov. 21, 2004, filed Dec. 3, 2004), D.E. 27.

9309. *See* "2018 Recount Deadlines in Florida," *infra* page 1242.

9310. Opinion, Jim Bonfiglio Campaign v. Detzner, No. 4:18-cv-527 (N.D. Fla. Nov. 16, 2018), D.E. 53.

In a 2006 school-bond race, the bond apparently prevailed by three votes before a recount.[9311] The federal court was not persuaded that seven voters' choices should be included in the recount on a claim that they had wrongfully been turned away from the polls.[9312] But a district judge did order a recount in 2020 for a judicial election on evidence of vote-count errors related to unprecedented extensive voting by mail.[9313]

There are limits on who has standing to litigate a recount. In the 2016 presidential election, in which the candidate with the most votes nationwide failed to win a majority of Electoral College votes, recounts were litigated in the three states that the Electoral College victor won most narrowly.[9314] Some courts determined that a minor-party presidential candidate did not have standing to litigate the recounts because she had no chance of prevailing in the election.[9315] A federal judge had come to a similar conclusion in 2004.[9316]

A Recount Ordered Because of Evidence That Write-In Votes Were Not Counted

Curtis v. Oliver (James O. Browning, D.N.M. 1:20-cv-748)

> A write-in Libertarian Party primary-election candidate for New Mexico's court of appeals was only a few votes short of the number needed to advance to the general election. But there were indications of counting errors related to extensive absentee voting because of the social distancing made necessary by a global infectious pandemic. There was sufficient evidence of an undercount in one county for the district judge to order a recount. After the recount, the candidate qualified for the general election.

9311. *See* "Turned-Away Voters in a Close Election," *infra* page 1256.

9312. Opinion, Bennink v. City of Coopersville, No. 5:06-cv-82 (W.D. Mich. June 5, 2006), D.E. 26, 2006 WL 1547279.

9313. Curtis v. Oliver, 479 F. Supp. 3d 1039, 1148 (D.N.M. 2020), *as reported in* "A Recount Ordered Because of Evidence That Write-In Votes Were Not Counted," *infra* page 1240.

9314. *See* "Swing-State Recounts in the 2016 Presidential Election," *infra* page 1246.

9315. Stein v. Cortés, 223 F. Supp. 3d 423, 426, 431–34 (E.D. Pa. 2016); Att'y Gen. v. Bd. of State Canvassers, 318 Mich. App. 242, 252, 896 N.W.2d 485, 490 (Mich. Ct. App.), *review denied*, 887 N.W.2d 786 (Mich. 2016); *see also* Transcript at 12–13, Great America PAC v. Wis. Elections Comm'n, No. 3:16-cv-795 (W.D. Wis. Dec. 9, 2016, filed Dec. 9, 2016), D.E. 37 ("The only question that I have is whether this case has to be dismissed for lack of standing because it's clear that on the merits I will deny your request for an injunction.").

9316. Rios v. Blackwell, 345 F. Supp. 2d 833, 836 (N.D. Ohio 2004), *as reported in* "Complete Ohio 2004 Presidential Recount," *infra* page 1257.

Topics: Election errors; primary election; voting technology; recounts; absentee ballots; early voting; matters for state courts; Covid-19; attorney fees.

A write-in candidate for New Mexico's court of appeals in the Libertarian Party's June 2, 2020, primary election filed a federal complaint in the District of New Mexico on July 23, 2020, against New Mexico's secretary of state, including as plaintiffs the Libertarian Party of New Mexico, its chair, and a voter, alleging that election officials failed to tabulate all votes for the first plaintiff, denying him qualification for the general-election ballot.[9317] According to the complaint, the candidate plaintiff "was credited with receiving only 204 votes by Defendant, twenty-six votes short of the number required."[9318] Six days later, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction requiring recounts in seven counties.[9319]

Judge James O. Browning set the case for a videoconference hearing on August 7, noting in the public docket sheet that the passcode would be provided to participants by email.[9320] The hearing lasted from 1:29 to 3:47 p.m.[9321] "The Court noted that, at the moment, the record indicates that one voter believes her vote was not counted."[9322] There was specific evidence of at least one vote not counted in Bernalillo County.[9323]

There were indications of vote-count errors related to extensive voting by mail because of social distancing made necessary by the global Covid-19 infectious pandemic.[9324] There also was controversy over whether the candidate would have to post a bond of about $3.5 million for a recount.[9325] On Friday, August 14, Judge Browning ordered a recount in Bernalillo County.[9326] He issued an agreed final order on Monday recog-

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9317. Complaint, Curtis v. Oliver, No. 1:20-cv-748 (D.N.M. July 23, 2020), D.E. 1 [hereinafter *Curtis* Complaint]; Curtis v. Oliver, 479 F. Supp. 3d 1039, 1059–60 (D.N.M. 2020); *see* Phaedra Haywood, *Judge Candidate Sues Secretary of State Over Primary*, Santa Fe New Mexican, July 25, 2020, at A1.

9318. *Curtis* Complaint, *supra* note 9317, at 5.

9319. Motion, *Curtis*, No. 1:20-cv-748 (D.N.M. July 29, 2020), D.E. 7; *Curtis*, 479 F. Supp. 3d at 1060.

9320. Docket Sheet, *Curtis*, No. 1:20-cv-748 (D.N.M. July 23, 2020) (D.E. 9).

9321. Minutes, *id.* (Aug. 7, 2020), D.E. 13.

9322. *Curtis*, 479 F. Supp. 3d at 1074.

9323. *Id.*

9324. *Id.* at 1050–54, 1061–63, 1074, 1081–85.

9325. *Id.* at 1056, 1058–59, 1062–65.

9326. *Id.* at 1148.

nizing that an accounting of the write-in votes in Bernalillo County established that the candidate plaintiff qualified for the general election.[9327]

The last filing in the case was a September 18 extension of time to September 30 for a motion for fees or costs.[9328]

In November, the candidate plaintiff did not prevail over the incumbent.[9329]

2018 Recount Deadlines in Florida

Jim Bonfiglio Campaign v. Detzner (4:18-cv-527) and Bill Nelson for U.S. Senate v. Detzner (4:18-cv-536) (Mark E. Walker, N.D. Fla.)

> After a state judge indicated that she would provide a candidate with relief in an action seeking a deadline extension for a recount in one county, but before the state judge actually ruled, the state's secretary of state removed the action to federal court. After taking evidence from county defendants, the federal judge issued an order declaring that county election officials had discretion to recount the plaintiffs' race for the state legislature ahead of statewide races, because the plaintiffs' race could be recounted more quickly. Based on evidence in this case, the district judge determined in a second removed case involving a U.S. senate race that court relief was not required.
>
> *Topics:* Recounts; removal; intervention; matters for state courts.

State actions seeking deadline extensions for recounts—in a state legislature race and in a U.S. senate race—were removed to federal court, and the recounts were completed on time with limited relief provided by the federal judge.

The State Legislature Race

One week after the November 6, 2018, general election, Florida's secretary of state removed an action filed on the previous day in Florida's circuit court for Leon County, the county that includes the state capital: a candidate for the state legislature and his campaign sought a recount extension for Palm Beach County.[9330] Initial election returns showed the plaintiff

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9327. Agreed Final Order, Curtis v. Oliver, No. 1:20-cv-748 (D.N.M. Aug. 17, 2020), D.E. 29; *see Three Parties on the Ballot for Court of Appeals Seat*, Santa Fe New Mexican, Oct. 17, 2020, at A8.

9328. Order, *Curtis*, No. 1:20-cv-748 (D.N.M. Sept. 18, 2020), D.E. 32.

9329. *See* Phaedra Haywood, *Democrats Poised to Continue Domination of State Judiciary*, Santa Fe New Mexican, Nov. 4, 2020, at A7.

9330. Notice of Removal, Jim Bonfiglio Campaign v. Detzner, No. 4:18-cv-527 (N.D. Fla. Nov. 13, 2018), D.E. 1; *see* Daniel Chang, Alex Daugherty & Maya Kaufman, *Dade*

candidate trailing his opponent by thirty-seven votes out of more than eighty thousand votes cast.[9331]

Following a case-management conference in state court on November 13, the state judge indicated that she would grant the plaintiffs relief, but the secretary removed the case that afternoon before she could do so.[9332]

Judge Mark E. Walker ordered the defendants, which also included Palm Beach County's canvassing board and its supervisor of elections, to respond by 5:00 p.m. on November 14 to the plaintiffs' request for immediate declaratory and injunctive relief.[9333] Judge Walker granted motions to intervene filed by the National Republican Senatorial Committee[9334] and the campaigns for the Democratic Party's gubernatorial[9335] and senate nominees[9336] (races that also were facing recounts).

Following the briefing, Judge Walker determined that he needed evidence from the county defendants "on the status and expected completion dates of the various ordered recounts," so he set an evidentiary hearing for November 15 at 4:00 p.m.[9337]

The hearing lasted from 5:12 to 6:23.[9338] Judge Walker heard testimony from Palm Beach County's supervisor of elections, but he did not require her to fly to Tallahassee at a time when the time pressure on her work was

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Finishes Its Machine Recount as Broward Starts Process, Miami Herald, Nov. 14, 2018, at 1A; Jeffrey Schweers, *Seven Lawsuits and Counting: Tallahassee Is Ground Zero*, Tallahassee Democrat, Nov. 14, 2018, at A6; David Smiley, Kyra Gurney, Steve Bousquet & Emily L. Mahoney, *It's "Prayer Mode" as Legal Decisions and Deadlines Loom*, Miami Herald, Nov. 15, 2018, at 1A.

9331. Opinion at 1–2, *Jim Bonfiglio Campaign*, No. 4:18-cv-527 (N.D. Fla. Nov. 16, 2018), D.E. 53 [hereinafter *Jim Bonfiglio Campaign* Opinion].

9332. *Id.* at 2–3; *see* Frances Robles & Patricia Mazzei, *Aging Machines and Legal Wrench Could Make Recount "a Little Messy,"* N.Y. Times, Nov. 15, 2018, at A16.

9333. Order, *Jim Bonfiglio Campaign*, No. 4:18-cv-527 (N.D. Fla. Nov. 13, 2018), D.E. 4.

Tim Reagan interviewed Judge Walker for this report by telephone on December 12, 2018.

9334. Order, *Jim Bonfiglio Campaign*, No. 4:18-cv-527 (N.D. Fla. Nov. 13, 2018), D.E. 5; *see* Intervention Motion, *id.* (Nov. 13, 2018), D.E. 2.

9335. Order, *id.* (Nov. 14, 2018), D.E. 17; *see* Intervention Motion, *id.* (Nov. 14, 2018), D.E. 13.

9336. Order, *id.* (Nov. 15, 2018), D.E. 36; *see* Intervention Motion, *id.* (Nov. 14, 2018), D.E. 32.

9337. Order, *id.* (Nov. 15, 2018), D.E. 42; *see* Minutes, *id.* (Nov. 15, 2018), D.E. 49 (noting that the hearing ran from 5:12 to 6:23 p.m.).

9338. Transcript, *id.* (Nov. 15, 2018, filed Nov. 15, 2018), D.E. 52 [hereinafter *Jim Bonfiglio Campaign* Transcript].

the very subject of the lawsuit.[9339] Nor did he require her to provide testimony from a local courthouse.[9340] An advantage of her providing testimony from her election site was that she could pause during her testimony to obtain additional information from her staff.[9341] The plaintiffs' lawyer was with the witness, and the other lawyers were in the courtroom.[9342]

On November 16, Judge Walker granted the plaintiffs limited interim relief.[9343] Reluctant to rewrite statutory deadlines, Judge Walker nevertheless recognized that "the extremely limited functionality of Palm Beach County's tabulating machines" would make it difficult for the county to complete recounts for the plaintiffs' race and three statewide races in time.[9344] The relief that Judge Walker ordered was a declaration that the order in which the county conducted the recounts was within the sound discretion of the canvassing board; the recounts did not have to be conducted in the order in which the races appeared on the ballot; and evidence showed that the legislature race could be recounted more quickly than the others because it involved fewer precincts.[9345]

The board did vote to reorder the recounts, and it completed the recount for the legislature race on time.[9346] The plaintiffs then voluntarily dismissed the action.[9347]

The U.S. Senate Race

On the morning of Friday, November 16, the secretary removed another action regarding the Palm Beach County recount, this one filed in state

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9339. Interview with Judge Mark E. Walker, Dec. 12, 2018.

9340. *Id.*

9341. *Id.*

9342. *Jim Bonfiglio Campaign* Transcript, *supra* note 9338, at 4–6.

9343. *Jim Bonfiglio Campaign* Opinion, *supra* note 9331.

9344. *Id.* at 2, 5–6 (noting that the statewide races were for senator, governor, and commissioner for agriculture); *see* Daniel Chang, Elizabeth Koh & Nicholas Nehamas, *Legal Sparring Continues; Recounts Get Uneven Start*, Miami Herald, Nov. 13, 2018, at 1A; David Smiley & Douglas Hanks, *Game On: Recount Ordered in Three Statewide Races*, Miami Herald, Nov. 11, 2018, at A1.

"Adding to the legal woes, Palm Beach County Supervisor of Elections Susan Bucher told [Secretary of State] Detzner that her voting equipment, certified by his office, can't recount ballots in more than one race at one time." Steve Bousquet, *Memories of Chads Hang Over State as Lawyers Line Up*, Miami Herald, Nov. 9, 2018, at 2A; *see* Robles & Mazzei, *supra* note 9332 ("Palm Beach County does not own the modern, high-speed tabulation machines required to conduct recounts in multiple races simultaneously").

9345. *Jim Bonfiglio Campaign* Opinion, *supra* note 9331, at 6–9.

9346. Order Supplement, Jim Bonfiglio Campaign v. Detzner, No. 4:18-cv-527 (N.D. Fla. Nov. 19, 2018), D.E. 56.

9347. Notice of Dismissal, *id.* (Nov. 19, 2018), D.E. 55.

court on the previous day by the ultimately unsuccessful campaign to reelect U.S. Senator Bill Nelson.[9348] On the day that the case was removed, Judge Walker granted the National Republican Senatorial Committee's motion to intervene in opposition to the case.[9349]

Because of testimony on November 15 in the other case—in which Senator Nelson's campaign had intervened—expressing informed optimism about the completion of the recount in Palm Beach County, Judge Walker ordered the parties to "file briefs no later than 4:00 p.m. on November 16, 2018 to clarify whether there is a live issue in this matter."[9350]

The campaign "respectfully request[ed] that the Court enter an order compelling Palm Beach County to release the results of the machine recount by no later than 6:00 p.m. so as to allow the parties to evaluate those numbers and to report to the Court whether a continuing controversy exists."[9351] Judge Walker set the case for a telephonic hearing at 6:00 p.m.[9352]

After conversations among counsel before the hearing and at the hearing, the plaintiff's counsel expressed reassured confidence: "Based on the representations on the record, we are satisfied that Palm Beach County has represented that it will be using the machine recount figures, and we will wait for those results."[9353] On Monday, Judge Walker noted, "During the hearing, the parties indicated that Palm Beach County's use of its machine recount totals was appropriate. Accordingly, this Court directs the parties to explain if there remains a justiciable issue in this matter."[9354] Ten days later, the campaign voluntarily dismissed its case.[9355]

9348. Notice of Removal, Bill Nelson for U.S. Senate v. Detzner, No. 4:18-cv-536 (N.D. Fla. Nov. 16, 2018), D.E. 1; Transcript at 3, 5, *id.* (Nov. 16, 2018, filed Nov. 16, 2018), D.E. 24 [hereinafter *Bill Nelson for U.S. Senate* Transcript].

9349. Order, *id.* (Nov. 16, 2018), D.E. 4; *see* Intervention Motion, *id.* (Nov. 16, 2018), D.E. 3.

9350. Order, *id.* (Nov. 16, 2018), D.E. 12.

9351. Response, *id.* (Nov. 16, 2018), D.E. 20.

9352. Order, *id.* (Nov. 16, 2018), D.E. 21; *see Bill Nelson for U.S. Senate* Transcript, *supra* note 9348, at 3 ("THE COURT: . . . Given the timing of this action, as well as the deadlines that are implicated associated with the recount, I thought it appropriate to immediately set this matter for a hearing . . . ."); Minutes, *Bill Nelson for U.S. Senate*, No. 4:18-cv-536 (N.D. Fla. Nov. 16, 2018), D.E. 23.

9353. *Bill Nelson for U.S. Senate* Transcript, *supra* note 9348, at 15.

9354. Order, *Bill Nelson for U.S. Senate*, No. 4:18-cv-536 (N.D. Fla. Nov. 19, 2018), D.E. 26.

9355. Voluntary Dismissal, *id.* (Nov. 29, 2018), D.E. 28.

Swing-State Recounts in the 2016 Presidential Election

Great America PAC v. Wisconsin Elections Commission (James D. Peterson, W.D. Wis. 3:16-cv-795), Stein v. Thomas (Mark A. Goldsmith, E.D. Mich. 2:16-cv-14233), and Stein v. Cortés (Paul S. Diamond, E.D. Pa. 2:16-cv-6287)

> Following the 2016 presidential election in which a candidate earned more votes in the Electoral College than the candidate who received the most popular votes, a minor-party candidate sought recounts in the three states that the Electoral College victor won by the smallest margins. The matter was litigated in state courts and in federal courts in the Western District of Wisconsin, the Eastern District of Michigan, and the Eastern District of Pennsylvania, with mixed results for the minor-party candidate's litigation efforts and no change in the Electoral College outcome. The Pennsylvania case ended with a settlement agreement requiring a change in voting technology and a payment of attorney fees.
>
> *Topics:* Recounts; election errors; voting technology; matters for state courts; laches; intervention; recusal; case assignment; Electoral College; attorney fees.

In the 2016 presidential election, Donald Trump earned 306 electoral votes, and Hillary Clinton earned only 232 electoral votes, but Clinton received over 2.8 million more popular votes than Trump did.[9356] Green Party candidate Jill Stein sought recounts in Michigan, Pennsylvania, and Wisconsin, the three states that Trump won by the smallest margins.[9357] A computer scientist had called into question the reliability of some voting machines used in those states.[9358]

According to the *New York Times*,

> An effort to recount the votes . . . led by Jill Stein, the Green Party candidate, was never viewed as very likely to change Donald J. Trump's election to the presidency, but it revealed something else in stark terms:

9356. *See* Jonathan Martin & Michael Wines, *Trump's Win, but Little Else, Is Now Settled*, N.Y. Times, Dec. 20, 2016, at A1; Jo Craven McGinty, *The Numbers: Popular-Vote Push Faces Some High Hurdles*, Wall St. J., Dec. 3, 2016, at A2; Ed O'Keefe, *Electoral College Casts Votes for Trump*, Wash. Post, Dec. 20, 2016, at A1; Susan Sullivan & Ed O'Keefe, *Electors for Trump Urged to Have Second Thoughts*, Wash. Post, Dec. 7, 2016, at A4.

9357. *See* Michael A. Memoli, *A Look at Wisconsin's Recount, and Why It's Unlikely to Change a Thing*, L.A. Times, Nov. 30, 2016, at A2; Byron Tau, *Green Candidate Requests a Recount*, Wall St. J., Nov. 26, 2016, at A4.

9358. *See* Tau, *supra* note 9357.

> 16 years after a different presidential recount in Florida dragged on for five agonizing weeks, bringing the nation close to a constitutional crisis, recounts remain a tangle of dueling lawyers, hyperpartisanship and claims of flawed technology.[9359]

Recount litigation in state and federal courts resulted in mixed results for Stein, and to the extent that recounts were conducted there was no change in the assignment of Electoral College votes.[9360] On December 19, 2016, Trump was elected President by the Electoral College by a vote of 304 to 227; seven electors strayed from their pledged votes.[9361]

Wisconsin

On December 1, two political action committees and a voter filed a federal complaint in the Western District of Wisconsin against the state elections commission to block a Wisconsin recount that might "unjustifiably cast doubt upon the legitimacy of President-Elect Donald J. Trump's victory."[9362] With their complaint, the plaintiffs filed a motion for a temporary restraining order.[9363] Judge Barbara B. Crabb recused herself from presiding over the case on the following day.[9364]

On December 2, Judge James D. Peterson denied the plaintiffs a temporary restraining order

> because plaintiffs have made no showing that they will be irreparably harmed by allowing the recount to continue during the time it would take to brief a motion for a preliminary injunction and give defendants an opportunity to respond to plaintiffs' motion. But enjoining the recount would very likely prevent defendants from completing the recount by the deadline.[9365]

9359. Monica Davey, Steve Eder & Julie Bosman, *Recounts Remain a "Political Horror Show,"* N.Y. Times, Dec. 10, 2016, at A11.

9360. *See* Jonathan S. Abady & Ilann M. Maazel, Op-Ed, *Lessons of the Recount*, Wash. Post, Dec. 18, 2016, at A23 (reflections by Stein's lead attorneys in the recount litigation).

9361. National Archives, 2016 Electoral College Results, www.archives.gov/electoral-college/2016 (compilation of the certificates of Electoral College votes); *see* Byron Tau, *Electors Line Up Behind Trump*, Wall St. J., Dec. 20, 2016, at A1.

9362. Complaint, Great America PAC v. Wis. Elections Comm'n, No. 3:16-cv-795 (W.D. Wis. Dec. 1, 2016), D.E. 1; *see* Monica Davey, Julie Bosman & Steve Eder, *Trump and Supporters Go to Court to Block Recounts in Three States*, N.Y. Times, Dec. 3, 2016, at A15.

9363. Temporary-Restraining-Order Motion, *Great America PAC*, No. 3:16-cv-795 (W.D. Wis. Dec. 1, 2016), D.E. 2.

9364. Recusal, *id.* (Dec. 2, 2016), D.E. 13.

9365. Opinion at 1, *id.* (Dec. 2, 2016), D.E. 17 [hereinafter W.D. Wis. *Great America PAC* Temporary Restraining Order Opinion]; *see* Davey et al., *supra* note 9362.

Judge Peterson decided to treat the motion as a motion for a preliminary injunction, ordered a response by December 7, and set the case for hearing on December 9.[9366]

> Jill Stein, the candidate who requested the recount, may seek to intervene. The court has not yet received such a motion from Stein, but if she files one, the court intends to grant that motion immediately. Stein's response to plaintiffs' motion, should she want to file one, will also be due Wednesday, December 7, 2016.[9367]

Stein elected to intervene,[9368] and she was represented at the hearing.[9369]

Judge Peterson told the parties at the hearing, "The only question that I have is whether this case has to be dismissed for lack of standing because it's clear that on the merits I will deny your request for an injunction."[9370] The plaintiffs voluntarily dismissed their action on December 19.[9371]

As a result of the Wisconsin recount, Trump's margin of victory increased by 162 votes.[9372]

Michigan

On Friday, December 2, Stein and a voter filed a federal complaint in the Eastern District of Michigan against Michigan's director of elections and board of state canvassers seeking an injunction requiring that a Michigan recount begin in time to be completed by the vote of the Electoral College.[9373] With their complaint, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction.[9374] Also on December 2, Trump and Michigan's attorney general filed actions in Michigan's court of appeals seeking a writ of mandamus against a Michigan recount.[9375]

9366. W.D. Wis. *Great America PAC* Temporary Restraining Order Opinion, *supra* note 9365, at 2; *see* Minutes, *Great America PAC*, No. 3:16-cv-795 (W.D. Wis. Dec. 9, 2016), D.E. 36.

9367. W.D. Wis. *Great America PAC* Temporary Restraining Order Opinion, *supra* note 9365, at 2.

9368. Intervention Motion, *Great America PAC*, No. 3:16-cv-795 (W.D. Wis. Dec. 2, 2016), D.E. 20.

9369. Transcript, *id.* (Dec. 9, 2016, filed Dec. 9, 2016), D.E. 37.

9370. *Id.* at 12–13.

9371. Notice, *id.* (Dec. 19, 2016), D.E. 38.

9372. *See Pennsylvania and Wisconsin End Recount Efforts*, N.Y. Times, Dec. 13, 2016, at A18.

9373. Complaint, Stein v. Thomas, No. 2:16-cv-14233 (E.D. Mich. Dec. 2, 2016), D.E. 1.

9374. Motion, *id.* (Dec. 2, 2016), D.E. 2.

9375. Docket Sheet, Trump v. Bd. of State Canvassers, No. 335958 (Mich. Ct. App. Dec. 2, 2016); Docket Sheet, Schuette v. Bd. of State Canvassers, No. 335947 (Mich. Ct.

The actions were filed following a deadlock in the board of canvassers' review of Trump's objections to the recount.[9376] Michigan law required at least two business days to pass following the completion of the canvassers' review, which would mean at least four calendar days because of the intervening weekend.[9377] "This four-day delay made unavailable about one-third of the time allocated to complete the recount, on the assumption that the recount would have to be completed by December 13, 2016—the so-called 'safe harbor' date for the selection of presidential electors."[9378]

On Saturday, December 3, Eastern District of Michigan Judge Mark A. Goldsmith set the federal case for hearing on Sunday morning.[9379] At the hearing, Judge Goldsmith granted a motion to intervene by Michigan's Republican Party.[9380] On Monday, Judge Goldsmith granted the plaintiffs an injunction against a recount delay.[9381] On Tuesday, the U.S. Court of Appeals for the Sixth Circuit affirmed the injunction by a two-to-one vote on appeals by intervenors Michigan's Republican Party and attorney general.[9382]

At 6:15 p.m. on the same day as the federal appellate ruling, Michigan's court of appeals decided that Stein could not seek a recount because she could not "allege a good faith belief that but for mistake or fraud, the candidate would have had a reasonable chance of winning the election."[9383] Stein and the voter filed an amended complaint in federal court that same evening alleging additional grounds for a recount.[9384]

App. Dec. 2, 2016); Cases, Opinions & Orders, www.courts.michigan.gov/case-search/?r=1; Brief, *Schuette*, No. 335947 (Mich. Ct. App. Dec. 2, 2016), web.archive.org/web/20161216111228/http://moritzlaw.osu.edu/electionlaw/litigation/documents/2016.12.01_Schuette_Brief_on_Recount_544177_7.pdf; *see* Davey et al., *supra* note 9362.

9376. Stein v. Thomas, 222 F. Supp. 3d 539, 541–42 (E.D. Mich. 2016).

9377. *Id.* at 1–2; *see* Mich. Comp. Laws §168.882(3).

9378. *Stein*, 222 F. Supp. 3d at 2; *see* 3 U.S.C. § 5.

9379. Order, *Stein*, No. 2:16-cv-14233 (E.D. Mich. Dec. 3, 2016), D.E. 4.

9380. Docket Sheet, *id.* (Dec. 2, 2016) [hereinafter E.D. Mich. *Stein* Docket Sheet].

9381. *Stein*, 222 F. Supp. 3d at 545.

9382. Stein v. Thomas, 672 F. App'x 565 (6th Cir. 2016).

The court of appeals granted intervention to the attorney general, *id.* at 557 n.1, and Judge Goldsmith also granted the attorney's motion to intervene on December 6, 2016, E.D. Mich. *Stein* Docket Sheet, *supra* note 9380.

9383. Att'y Gen. v. Bd. of State Canvassers, 318 Mich. App. 242, 252, 896 N.W.2d 485, 490 (Mich. Ct. App. 2016); *see* Monica Davey, *Courts Duel Over Michigan Vote Recount*, N.Y. Times, Dec. 7, 2016, at A16.

9384. Amended Complaint, *Stein*, No. 2:16-cv-14233 (E.D. Mich. Dec. 6, 2016), D.E. 30.

On December 7, Judge Goldsmith dissolved his injunction.[9385] The plaintiffs were not entitled to a recount outside of Michigan's statutory scheme because, "There is no case law recognizing an independent federal right to a recount that either this Court or the parties have come across, in the absence of actual deprivation of voting rights."[9386]

Although the recount was stopped,[9387] litigation remained pending in Michigan's supreme court.[9388] Two justices recused themselves because they had been named during the presidential campaign by Trump as two of twenty-one persons on a list of top contenders for the United States Supreme Court.[9389] Justice Joan L. Larsen "conclude[d] that the unique circumstances of this case demand my recusal," although "I did not seek inclusion on the list, had no notice of my inclusion before its publication, and have had no contact with the president-elect, or his campaign, regarding the vacancy."[9390] Chief Justice Robert P. Young, Jr., also acknowledged his inclusion on "the president-elect's infamous list of United States Supreme Court potential appointees" and recused himself "[w]ith reluctance," noting, "The conflict supposed by intervening defendant is both speculatively hypothetical and, in my case, improbable [because of age]."[9391] Chief Justice Young's service as chief ended on January 6, 2017,[9392] and he retired from the bench in April.[9393] Justice Larsen was con-

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9385. Opinion, *id.* (Dec. 7, 2016), D.E. 36 [hereinafter E.D. Mich. *Stein* Opinion Dissolving Injunction]; *see* Monica Davey, *3 Days Into Michigan's Presidential Recount, a Federal Judge Clears the Way to End It*, N.Y. Times, Dec. 8, 2016, at A23.

9386. E.D. Mich. *Stein* Opinion Dissolving Injunction, *supra* note 9385, at 7.

9387. *See* Byron Tau, *Michigan Suspends 2016 Election Recount*, Wall St. J., Dec. 9, 2016, at A6.

9388. Docket Sheets, Nos. 154862, 154868, 154886, and 154887 (Mich. Dec. 2, 2016).

9389. Statement, Att'y Gen. v. Bd. of State Canvassers, No. 154862 (Mich. Dec. 8, 2016), D.E. 63 [hereinafter Young Recusal], publicdocs.courts.mi.gov/sct/public/orders/154886_63_01.pdf (Young); Statement, *id.* (Dec. 8, 2016), D.E. 64 [hereinafter Larsen Recusal], publicdocs.courts.mi.gov/sct/public/orders/154886_64_01.pdf (Larsen); *see* Donald J. Trump Finalizes List of Potential Supreme Court Justice Picks, www.donaldjtrump.com/press-releases/donald-j.-trump-adds-to-list-of-potential-supreme-court-justice-picks, *archived at* web.archive.org/web/20170314010805/donaldjtrump.com/press-releases/donald-j.-trump-adds-to-list-of-potential-supreme-court-justice-picks; Alan Rappeport & Charlie Savage, *Trump Offers a List of Possible Supreme Court Nominees Who Reflect His Principles*, N.Y. Times, May 19, 2016, at A16.

9390. Larsen Recusal, *supra* note 9389.

9391. Young Recusal, *supra* note 9389.

9392. *See* Holly Fournier, *Markman to Be Chief Justice*, Detroit News, Jan. 7, 2017, at A3.

9393. *See* Michael Gerstein, *"One of a Kind" Justice to Retire from High Court*, Detroit

firmed as a circuit judge on the U.S. Court of Appeals for the Sixth Circuit on November 1.[9394]

On December 9, 2016, by a vote of three to two, Michigan's supreme court decided not to review the court of appeals' determination that Stein was not entitled to a recount.[9395] On March 31, 2017, Judge Goldsmith accepted a voluntary dismissal of the action.[9396]

Pennsylvania

Unsuccessful in Pennsylvania's state courts,[9397] Stein and a voter filed a federal complaint in the Eastern District of Pennsylvania on December 5 against state election officials that sought declaratory judgments against Pennsylvania's election procedures.[9398] The complaint alleged, "The Pennsylvania election system is a national disgrace. Voters are forced to use vulnerable, hackable, antiquated technology banned in other states, then rely on the kindness of machines. There is no paper trail. Voting machines are electoral black sites: no one permits voters or candidates to examine them."[9399] The plaintiffs also sought recounts in counties that used optical

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News, Mar. 30, 2017, at A6; Emily Lawler, *Justice Announces Retirement*, Grand Rapids Press, Mar. 30, 2017, at A14; *see also* Melissa Nann Burke, *Young Ends Senate Campaign*, Detroit News, Jan. 4, 2018, at A6 (reporting on a decision to drop out of Michigan's senate race because of lackluster fundraising); Melissa Nann Burke, *Young Set to Challenge Stabenow, Official Says*, Detroit News, June 21, 2017, at A5; Paul Egan, *Ex-Chief Justice Young Says He Is Joining U.S. Senate Race for GOP*, Detroit Free Press, June 21, 2017, at A4.

9394. PN371—Joan Louise Larsen—The Judiciary, www.congress.gov/nomination/115th-congress/371; *see* Melissa Nann Burke, *Senate Confirms Larsen for Appeals Court*, Detroit News, Nov. 2, 2017, at A3; *see also* Joe Paul Egan, *Trump Names Justice Larsen to U.S. 6th Circuit*, Livingston Cty. Press, May 9, 2017, at A4; Brent Kendall & Aruna Viswanatha, *Party-Line Vote Approves 3 Trump Picks*, Wall St. J., Oct. 6, 2017, at A4; Joe Palazzolo, *Conservatives Nominated for Appeals Courts*, Wall St. J., May 9, 2017, at A6.

9395. Att'y Gen. v. Bd. of State Canvassers, 887 N.W.2d 786 (Mich. 2016); *see id.* at 792 (Justice McCormack, dissenting: "The stakes in this case may be low, but the public significance of the issues presented could not be higher. I . . . would . . . give this Court an opportunity to consider the important legal questions implicated here."); *id.* at 794 (Justice Bernstein, dissenting: "I would reverse the Court of Appeals and allow the recount to resume."); *see also* Davey et al., *supra* note 9359.

9396. Order, Stein v. Thomas, No. 2:16-cv-14233 (E.D. Mich. Mar. 31, 2017), D.E. 41; *see* Notice, *id.* (Dec. 19, 2016), D.E. 38.

9397. *See* Stein v. Cortés, 223 F. Supp. 3d 423, 428–29, 437 (E.D. Pa. 2016); *Green Party Drops Penn. Recount Effort*, Miami Herald, Dec. 4, 2016, at 23A.

9398. Complaint, Stein v. Cortés, No. 2:16-cv-6287 (E.D. Pa. Dec. 5, 2016), D.E. 1 [hereinafter E.D. Pa. *Stein* Complaint]; *see Stein*, 223 F. Supp. 3d at 429; *see also* Steve Eder, *Call Rises for Recounts Outside Trump's Door*, N.Y. Times, Dec. 6, 2016, at A17.

9399. E.D. Pa. *Stein* Complaint, *supra* note 9398, at 1.

scan ballots and forensic analyses of electronic voting machines.[9400] On the day that the complaint was filed, Trump, his electors, and the state's Republican Party filed a motion to intervene.[9401] Judge Paul S. Diamond granted the motion on the next day.[9402] On December 6, the plaintiffs sought an expedited hearing on a preliminary-injunction motion.[9403]

Judge Diamond set the case for hearing on December 9.[9404] He allowed three amicus curiae briefs.[9405]

On December 12, Judge Diamond concluded, "There are at least six separate grounds requiring me to deny Plaintiffs' Motion. Most importantly, there is no credible evidence that any 'hack' occurred, and compelling evidence that Pennsylvania's voting system was not in any way compromised."[9406] Judge Diamond decided that two doctrines compelled him to abstain:[9407] (1) the *Rooker-Feldman* doctrine, which states that among federal courts only the Supreme Court has appellate jurisdiction over state-court proceedings,[9408] and (2) the *Younger* doctrine, which counsels against federal jurisdiction over controversies that would result in undue interference with state proceedings.[9409]

In addition, Stein lacked standing,[9410] and she inexcusably delayed bringing her suit.[9411] "Finally, granting the relief Plaintiffs seek would make it impossible for the Commonwealth to certify its Presidential Electors by December 13 . . ."[9412]

9400. *Id.* at 18.

9401. Intervention Motion, *Stein*, No. 2:16-cv-6287 (E.D. Pa. Dec. 5, 2016), D.E. 2.

9402. Order, *id.* (Dec. 6, 2016), D.E. 22; *Stein*, 223 F. Supp. 3d at 429; *see* Order, *Stein*, No. 2:16-cv-6287 (E.D. Pa. Jan. 9, 2017), D.E. 67 (granting the intervenors' postelection motion to withdraw from the case).

9403. Motion, *Stein*, No. 2:16-cv-6287 (E.D. Pa. Dec. 6, 2016), D.E. 4; *Stein*, 223 F. Supp. 3d at 429.

9404. Order, *Stein*, No. 2:16-cv-6287 (E.D. Pa. Dec. 6, 2016), D.E. 23; *see Stein*, 223 F. Supp. 3d at 429.

9405. Order, *Stein*, No. 2:16-cv-6287 (E.D. Pa. Dec. 8, 2016), D.E. 45; Order, *id.* (Dec. 8, 2016), D.E. 40; Order, *id.* (Dec. 8, 2016), D.E. 36.

9406. *Stein*, 223 F. Supp. 3d at 426.

9407. *Id.* at 426, 434–37.

9408. D.C. Ct. of Appeals v. Feldman, 460 U.S. 462 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923); *see also* Martin A. Schwartz, Section 1983 Litigation 21–24 (Federal Judicial Center 3d ed. 2014).

9409. Younger v. Harris, 401 U.S. 37 (1971).

9410. *Stein*, 223 F. Supp. 3d at 426, 431–34.

9411. *Id.* at 426, 436–37.

9412. *Id.* at 426.

Reviewing an amended complaint,[9413] Judge Diamond held on September 7, 2018, that Stein and Pennsylvania voters had standing to challenge the accuracy of Pennsylvania's voting procedures for future elections.[9414]

Judge Diamond dismissed the case as settled on November 29, retaining enforcement jurisdiction at the parties' request.[9415] The settlement agreement required new voting systems in Pennsylvania to meet three criteria: "a. The ballot on which each vote is recorded is paper; b. They produce a voter-verifiable record of each vote; and c. They are capable of supporting a robust pre-certification auditing process."[9416] The defendants agreed to pay the plaintiffs $150,000 in attorney fees and costs.[9417]

Approximately one year later, the plaintiffs asked Judge Diamond to enforce the settlement agreement by forbidding Pennsylvania from using voting machines that produce a paper record of computer-entered votes rather than a computer record of paper-entered votes.[9418] Following a three-day evidentiary hearing in February 2020,[9419] Judge Diamond denied the motion on April 29.[9420] Regarding the motion as inexcusably delayed and the plaintiffs' expert theories as daft, Judge Diamond determined that the motion's hacking allegations were baseless and irrational.[9421]

9413. Amended Complaint, Stein v. Cortés, No. 2:16-cv-6287 (E.D. Pa. Feb. 14, 2017), D.E. 71.

9414. Opinion, *id.* (Sept. 7, 2018), D.E. 98.

9415. Order, *id.* (Nov. 29, 2018), D.E. 110; *see* Settlement Agreement at 4, *id.* (Nov. 28, 2018), D.E. 108-1 [hereinafter E.D. Pa. *Stein* Settlement Agreement] ("The parties agree that this Agreement between the parties must be considered a private settlement agreement, does not require court approval, and that the parties are not seeking Court approval.").

9416. E.D. Pa. *Stein* Settlement Agreement, *supra* note 9415, at 2 (footnote omitted); *see* Jan Murphy, *Pa. to Share Vote Machine Cost*, Harrisburg Patriot News, Dec. 2, 2018, at A18.

9417. E.D. Pa. *Stein* Settlement Agreement, *supra* note 9415, at 4.

9418. Motion, *Stein*, No. 2:16-cv-6287 (E.D. Pa. Nov. 26, 2019), D.E. 112.

9419. Minutes, *id.* (Feb. 21, 2020), D.E. 172 to 174; *see* Jonathan Lai, *Stein Asks Block of Vote Machines*, Phila. Inquirer, Nov. 27, 2019, at B5.

9420. Opinion, *Stein*, No. 2:16-cv-6287 (E.D. Pa. Apr. 29, 2020), D.E. 197, 2020 WL 2063470.

9421. *Id.*; *see* Jeremy Roebuck, *Jill Stein Gets a Lambasting by Judge*, Phila. Inquirer, Apr. 30, 2020, at B1.

Emphasis Votes

Texas Democratic Party v. Dallas County (Jorge A. Solis, N.D. Tex. 3:08-cv-2117)

> During a recount for a state legislative election, one political party and two voters filed a federal action complaining that emphasis votes—in which a voter casts both a straight-party vote and a vote for the specific office—would improperly not be counted because of the switch from punch-card ballots to voting machines. After the recount was completed, the plaintiffs dropped their claims with respect to the specific election, but more general claims remained. The district court found that election procedures with respect to emphasis votes did not discriminate in violation of section 2 of the Voting Rights Act, but they were in violation of section 5 because they had not been precleared. In time, the Justice Department precleared the changes.
>
> *Topics:* Voting technology; recounts; section 5 preclearance; three-judge court; section 2 discrimination; intervention.

After the votes were counted for the 2008 general election, the Republican incumbent for Texas house of representatives district 105 was ahead of her Democratic challenger by twenty votes,[9422] and a recount was planned.[9423] The Democratic Party and two voters filed a federal complaint on December 1 arguing that planned methods of recounting the votes would fail to include votes for the Democratic candidate by voters who both cast a straight-party vote for the Democratic Party and selected a Democratic candidate.[9424] This type of valid vote is referred to as an emphasis vote.[9425] The complaint alleged that this difficulty resulted from the replacement in 1998 of punch-card paper ballots with voting machines.[9426]

9422. *See* Brandon Formby & Marissa Alanis, *GOP Keeps House Seat in Squeaker*, Dallas Morning News, Nov. 11, 2008, at 1A (reporting that the result allowed the Republican party to keep a one-seat advantage in Texas's house of representatives).

9423. *See* Brandon Formby, *Challenger Plans to Pursue Recount*, Dallas Morning News, Nov. 12, 2008, at 1B; Brandon Formby, *Irving Democrat Seeks Recount in Close Race*, Dallas Morning News, Nov. 20, 2008, at 5B.

9424. Complaint, Tex. Democratic Party v. Dallas County, No. 3:08-cv-2117 (N.D. Tex. Dec. 1, 2008), D.E. 1 [hereinafter]; *see* Brandon Formby, *Democrats Sue as Recount Starts*, Dallas Morning News, Dec. 2, 2008, at 1B.

9425. Opinion at 2, *Tex. Democratic Party*, No. 3:08-cv-2117 (N.D. Tex. Apr. 17, 2009), D.E. 42 [hereinafter *Tex. Democratic Party* Opinion].

9426. *Tex. Democratic Party* Complaint, *supra* note 9424.

The incumbent moved to intervene on December 4,[9427] and Judge Jorge A. Solis granted intervention on December 8.[9428] After the recount, the incumbent's margin of victory decreased by one vote.[9429] On December 19, the plaintiffs dropped their claims with respect to the Texas house election.[9430]

On April 17, 2009, Judge Solis determined that the complaint did not allege valid claims under section 2 of the Voting Rights Act,[9431] pertaining to racial or ethnic discrimination in elections, but the complaint did allege a valid claim under section 5,[9432] requiring preclearance of election changes in jurisdictions with a certified history of election discrimination.[9433] On July 9, the circuit's chief judge named a three-judge district court to hear the section 5 claim.[9434]

On December 17, the three-judge court determined that the Justice Department had not precleared how the new voting machines registered votes for some voters who selected both straight-party choices and choices for individual candidates.[9435] On April 23, 2012, however, the court dismissed the section 5 claim in light of intervening Justice Department preclearance.[9436] An appeal was dismissed voluntarily on January 25, 2013.[9437]

9427. Intervention Motion, *Tex. Democratic Party*, No. 3:08-cv-2117 (N.D. Tex. Dec. 4, 2008), D.E. 6.

9428. Intervention Order, *id.* (Dec. 8, 2008), D.E. 9.

Judge Solis retired on May 1, 2016, and died on October 8, 2021. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

9429. *See Recount Confirms Republican's Slim Victory*, Dallas Morning News, Dec. 6, 2008, at 3.

9430. Stipulation, *Tex. Democratic Party*, No. 3:08-cv-2117 (N.D. Tex. Dec. 19, 2008), D.E. 17.

9431. Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437, *as amended*, 52 U.S.C. § 10301.

9432. *Id.* § 5, 79 Stat. at 439, *as amended*, 52 U.S.C. § 10304 (requiring that preclearance disputes be heard by a three-judge district court).

9433. *Tex. Democratic Party* Opinion, *supra* note 9425.

9434. Order, *Tex. Democratic Party*, No. 3:08-cv-2117 (N.D. Tex. July 9, 2009), D.E. 44.

9435. Order, *id.* (Dec. 17, 2009), D.E. 45; *see* Jason Trahan & Christy Hoppe, *Federal Judges Disallow Dallas County's Use of Voting Machines*, Dallas Morning News, Dec. 22, 2009.

9436. Order, *Tex. Democratic Party*, No. 3:08-cv-2117 (N.D. Tex. Apr. 23, 2012), D.E. 95; *see* Christy Hoppe, *Justice Department Upholds Voting Machines*, Dallas Morning News, Mar. 25, 2010, at B6.

On June 25, 2013, the Supreme Court declined to hold section 5 unconstitutional, but the Court did hold unconstitutional the criteria for which jurisdictions require section 5 preclearance. Shelby County v. Holder, 570 U.S. 529 (2013).

Turned-Away Voters in a Close Election

Bennink v. City of Coopersville (Robert Holmes Bell, W.D. Mich. 5:06-cv-82)

> Voters turned away from the polls in a close election on a school bond sued for the right to vote in the election immediately after the election was over. The court denied the plaintiffs the requested relief.
>
> *Topics:* Enjoining certification; registration procedures; provisional ballots.

On May 25, 2006, seven plaintiffs filed a federal complaint in the Western District of Michigan claiming that they had wrongfully been turned away from the polls at a May 2 election in which a school bond proposal received a three-vote majority with a recount pending.[9438] With their complaint, the plaintiffs filed a motion for a temporary restraining order.[9439]

On May 26, Magistrate Judge Joseph G. Scoville set the case for hearing on June 1 before District Judge Robert Holmes Bell.[9440] Following the hearing,[9441] Judge Bell dismissed some of the eleven defendants[9442] and ordered that Michigan be added as a necessary party.[9443]

On June 5, Judge Bell denied the plaintiffs a stay of the recount:

> The Court is not persuaded that Plaintiffs have shown a likelihood of success on the merits of their claim that they are entitled to the relief re-

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9437. Order, Tex. Democratic Party v. Dallas County, No. 12-10571 (5th Cir. Jan. 25, 2013).

9438. Complaint, Bennink v. City of Coopersville, No. 5:06-cv-82 (W.D. Mich. May 25, 2006), D.E. 1; *see* Amended Complaint, *id.* (June 5, 2006), D.E. 25; *see also Election Error Left Bond in Limbo*, Grand Rapids Press, May 4, 2006, at B3 (reporting on the three-vote margin); *Finding Votes*, Grand Rapids Press, June 4, 2006, at B1 (reporting that the plaintiffs supported the bond measure and were filing the complaint to protect the bond from a recount defeat).

9439. Temporary-Restraining-Order Motion, *Bennink*, No. 5:06-cv-82 (W.D. Mich. May 25, 2006), D.E. 2; Brief, *id.* (May 25, 2006), D.E. 3.

9440. Order, *id.* (May 26, 2006), D.E. 4.

Judge Scoville retired on July 31, 2014. Judicial Milestones, www.uscourts.gov/judicial-milestones/joseph-g-scoville.

9441. Minutes, *Bennink*, No. 5:06-cv-82 (W.D. Mich. June 1, 2006), D.E. 15.

9442. Order, *id.* (June 2, 2006), D.E. 18.

9443. Order, *id.* (June 2, 2006), D.E. 20.

> [I]t seems to this Court that the Secretary of State is an indispensable party to an action such as this beause the Secretary of State not only certifies the election, but the Secretary of State as I understand it is who the application to vote goes to, the Secretary of State's Office, and the Secretary of State then prepares the qualified voting list.

Transcript at 4, *id.* (June 1, 2006, filed June 2, 2006), D.E. 17.

> quested, i.e., that they should be allowed to cast their votes after the polls have closed, the votes counted and the results made public.
>
> . . .
>
> It is the public . . . that would suffer the most substantial harm from a stay of the recount. . . . The public has an interest in both the finality and stability of the election process.[9444]

The bond remained ahead in votes after the recount.[9445]

On July 14, Judge Bell approved a stipulated stay of the action pending a state-court action to nullify the election.[9446] In an agreement requiring the losing plaintiff to pay only half of the approximately $52,000 in fees assessed against her by the state court, the plaintiff waived appeal, so the bond sale could proceed.[9447]

Judge Bell granted a stipulated dismissal on October 31.[9448]

Complete Ohio 2004 Presidential Recount

Rios v. Blackwell (3:04-cv-7724) and Delaware County Prosecuting Attorney v. National Voting Rights Institute (3:05-cv-7286) (James G. Carr, N.D. Ohio) and Ohio ex rel. Yost v. National Voting Rights Institute (Edmund A. Sargus, S.D. Ohio 2:04-cv-1139)

> The Green and Libertarian candidates for President sought a complete recount of the 2004 presidential election in Ohio. After a teleconference, a federal district judge denied injunctive relief because neither candidate had a chance of prevailing in a recount. In Ohio's other district, a county sought an injunction against a recount there, and supporters of the recount removed the action to federal court. The district judge was reluctant to reach a decision inconsistent with the decision reached first by

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9444. Opinion at 2–3, 5, *id.* (June 5, 2006), D.E. 26, 2006 WL 1547279; *see* Order, *id.* (June 5, 2006), D.E. 27.

9445. *See* John Tunison, *Coopersville Survives Legal Fee Challenge*, Grand Rapids Press, Sept. 29, 2006, at B4; Ed White, *Coopersville Can Count on Millage*, Grand Rapids Press, June 7, 2006, at B1; *see also* Jodi Burck, *Ballot Snafus Will Lead to Changes*, Grand Rapids Press, June 22, 2006, at 4 (reporting that ballot irregularities prevented a complete recount).

9446. Stipulated Order, *Bennink*, No. 5:06-cv-82 (W.D. Mich. July 14, 2006), D.E. 35; *see Recount Lawsuit Filed*, Grand Rapids Press, July 10, 2006, at B1 (reporting that the state-court plaintiff had paid seventy dollars for the recount); *see also* Ron Cammel, *Tight School Bond Vote Gets Recount*, Grand Rapids Press, May 17, 2006, at B4 (reporting that the state-court plaintiff was a former school board member).

9447. *See Bond Sale Planned*, Grand Rapids Press, Oct. 11, 2006, at B1.

9448. Stipulated Dismissal, *Bennink*, No. 5:06-cv-82 (W.D. Mich. Oct. 31, 2006), D.E. 38.

the judge in the other district. The second judge transferred the action to the first judge.

Topics: Recounts; presiding remotely; intervention; Electoral College.

On Monday, November 22, 2004, the Green and Libertarian candidates for President, Common Cause Ohio, and seven voters filed a federal action against Ohio's secretary of state in the Northern District of Ohio's Toledo courthouse seeking a complete recount of the presidential vote in Ohio.[9449] The plaintiffs were concerned that the secretary's certification timetable left only one day between certification of election results and the deadline for resolution of disputes before the Electoral College vote.[9450] With their complaint, the plaintiffs filed motions for a temporary restraining order[9451] and a preliminary injunction.[9452]

The court assigned the case to Judge James G. Carr, who was spending Thanksgiving week with his family in Boston.[9453] After a teleconference with the parties on Tuesday, Judge Carr denied immediate injunctive relief.[9454] The only plaintiffs who had standing to demand a recount were the two candidates, and "[n]either candidate plaintiff can credibly maintain that he possesses even a remote chance of victory through a recount."[9455]

The candidates were pursuing recounts with each county's elections board; on November 23, Delaware County filed an action in state court to enjoin their "vain, purposeless, meaningless, wasteful, and useless" pursuit.[9456] One week later, the candidates removed this action to the U.S. Dis-

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9449. Complaint, Rios v. Blackwell, No. 3:04-cv-7724 (N.D. Ohio Nov. 22, 2004), D.E. 1 [hereinafter *Rios* Complaint]; Rios v. Blackwell, 345 F. Supp. 2d 833, 834 (N.D. Ohio 2004); *see* Terry Kinney, *Ohio Recount Suits Are Frivolous, Official Says*, Cincinnati Post, Nov. 23, 2004, at A13; Diane Suchetka, *Suit Asks Court to Hasten Ohio Presidential Recount*, Cleveland Plain Dealer, Nov. 23, 2004, at B5.

9450. *Rios* Complaint, *supra* note 9449; *Rios*, 345 F. Supp. 2d at 834–35.

9451. Temporary-Restraining-Order Motion, *Rios*, No. 3:04-cv-7724 (N.D. Ohio Nov. 22, 2004), D.E. 4; *Rios*, 345 F. Supp. 2d at 834.

9452. Preliminary-Injunction Motion, *Rios*, No. 3:04-cv-7724 (N.D. Ohio Nov. 22, 2004), D.E. 5; *Rios*, 345 F. Supp. 2d at 834.

9453. Transcript at 18, *Rios*, No. 3:04-cv-7724 (N.D. Ohio Nov. 23, 2004, filed Dec. 22, 2004), D.E. 13 [hereinafter *Rios* Transcript].

Tim Reagan interviewed Judge Carr for this report by telephone on June 18, 2012.

9454. *Rios*, 345 F. Supp. 2d 833; *Rios* Transcript, *supra* note 9453, at 32–34; *see* Mary Beth Lane, *Delaware County Court Blocks Recount,* Nov. 24, 2004, at 7B.

9455. *Rios*, 345 F. Supp. 2d at 836.

9456. Complaint at 5, State *ex rel.* Yost v. Nat'l Voting Rights Inst., No. 04-CVH-11-827 (Ohio C.P. Nov. 23, 2007), *attached to* Notice of Removal, Ohio *ex rel.* Yost v. Nat'l Voting Rights Inst., No. 2:04-cv-1139 (S.D. Ohio Nov. 30, 2004), D.E. 1 [hereinafter *Yost*

trict Court for the Southern District of Ohio,[9457] which assigned the case to Judge Edmund A. Sargus.[9458] On the morning after removal, Judge Sargus held a telephone conference with the parties.[9459]

Two days later, after the county had obtained a temporary restraining order from a state judge, Judge Sargus heard oral arguments on both sides' motions for preliminary injunctions.[9460] That day, the campaign for John Kerry and John Edwards moved to intervene in support of the recounts.[9461] At the hearing, however, the campaign backed away from the recount effort.[9462]

Judge Sargus denied the motions.[9463] Judge Sargus found that the county was not subject to irreparable harm; all an injunction would do is prevent the filing of a lawsuit.[9464] As for the candidates' request, Judge Sargus was reluctant to reach a conclusion different from Judge Carr's.[9465] "The Court has a high regard for Judge Carr and his abilities. But more importantly, the parties have a right to finality; that once a matter is decided by a judge, that the same issues aren't being re-litigated before another judge, hoping to get another result."[9466] In addition, time was fast running out for performance of a recount.[9467]

On May 9, 2005, Judge Sargus transferred his case to the Northern District for joinder with Judge Carr's case.[9468]

After Judge Carr's ruling in the first case, Ohio's Republican Party and two voters sought to intervene.[9469] The following June, they withdrew their

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Notice of Removal].

9457. *Yost* Notice of Removal, *supra* note 9456; *see* Transcript at 2, *Yost*, No. 2:04-cv-1139 (S.D. Ohio Dec. 3, 2004, filed Dec. 15, 2004), D.E. 28 [hereinafter *Yost* Transcript].

9458. Docket Sheet, *Yost*, No. 2:04-cv-1139 (S.D. Ohio Nov. 30, 2004).

Tim Reagan interviewed Judge Sargus for this report by telephone on August 8, 2012.

9459. *Yost* Transcript, *supra* note 9457, at 2.

9460. Minutes, *Yost*, No. 2:04-cv-1139 (S.D. Ohio Dec. 3, 2004), D.E. 19; *Yost* Transcript, *supra* note 9457; *see* Lane, *supra* note 9454; Mark Niquette, *Parties Ask Court to Get Ohio Going on Recount*, Columbus Dispatch, Dec. 3, 2004, at 4A.

9461. Intervention Motion, *Yost*, No. 2:04-cv-1139 (S.D. Ohio Dec. 3, 2004), D.E. 16.

9462. Interview with Judge Edmund A. Sargus, Jr., Aug. 8, 2012.

9463. Order, *Yost*, No. 2:04-cv-1139 (S.D. Ohio Dec. 3, 2004), D.E. 21; *see* Mark Niquette, *Recount OK'd But Will Be Too Late*, Columbus Dispatch, Dec. 4, 2004, at 1A.

9464. *Yost* Transcript, *supra* note 9457, at 83–84.

9465. *Id.* at 84–88.

9466. *Id.* at 85.

9467. *Id.* at 85–86.

9468. Order, *Yost*, No. 2:04-cv-1139 (S.D. Ohio May 10, 2005), D.E. 58; *see* Docket Sheet, Del. Cty. Prosecuting Att'y v. Nat'l Voting Rights Inst., No. 3:05-cv-7286 (N.D. Ohio July 8, 2005).

motion because the Republican candidate for President had been inaugurated.[9470]

In 2006, Judge Carr granted the secretary's motion to dismiss the actions on sovereign immunity grounds.[9471]

Unequal Recount Procedures in a Gubernatorial Election

Washington State Republican Party v. Reed (Marsha J. Pechman, W.D. Wash. 2:04-cv-2350)

> Supporters of a gubernatorial candidate filed a federal complaint over a weekend challenging recount procedures. The clerk of court was able to find a judge available to hear the case on an emergency basis, and the judge held a telephonic conference on Sunday. The judge determined that immediate relief was not required because the ballots in question would be preserved for later examination. Litigation in state and federal court continued as the recount continued, and the federal plaintiffs' candidate ultimately did not prevail.
>
> *Topics:* Recounts; equal protection; intervention; case assignment; matters for state courts.

Washington's Republican Party and a voter filed a federal complaint in the Western District of Washington's Seattle courthouse on Saturday, November 20, 2004, challenging intercounty inconsistencies in a gubernatorial recount and alleging that, as a result, "King County voters are more likely to have their votes count than voters outside of King County."[9472] According to the complaint,

> election workers in an optical scan county may review an undervote ballot, apply a subjective standard in evaluating any marks on the ballot to determine whether the voter intended to vote for a particular candidate, and then may enhance a mark or pattern made by the voter or duplicate

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9469. Intervention Motion, Rios v. Blackwell, No. 3:04-cv-7724 (N.D. Ohio Nov. 24, 2004), D.E. 10.

9470. Order, *id.* (June 16, 2005), D.E. 18.

9471. Rios v. Blackwell, 433 F. Supp. 2d 848 (N.D. Ohio 2006); *see* Rios v. Blackwell, 433 F. Supp. 2d 851 (N.D. Ohio 2006) (denying a motion to amend the judgment); *see also* John McCarthy, *Judge Dismisses Election Lawsuit*, Cincinnati Post, Feb. 10, 2006, at A6.

9472. Complaint at 2, Wash. State Republican Party v. Reed, No. 2:04-cv-2350 (W.D. Wash. Nov. 20, 2004), D.E. 1 [hereinafter *Wash. State Republican Party* Complaint]; *see* Steve Miletich & Brier Dudley, *GOP Files Suit Over Recount*, Seattle Times, Nov. 21, 2004, at B1.

After regular counting of votes, the Republican candidate was ahead of the Democratic candidate by 261 votes. *See It's Rossi by 261*, Seattle Times, Nov. 18, 2004, at A1.

> the ballot by making a mark on a different ballot that will then be counted.[9473]

With their complaint, the plaintiffs filed a motion for a temporary restraining order.[9474]

The first judge that the clerk of court could find to come in over the weekend to hear the emergency case was Judge Marsha J. Pechman.[9475] Court records then were not as available electronically as they are now, so Judge Pechman reviewed the papers at the courthouse, called in a couple of law clerks and a court reporter, and held a telephonic conference on Sunday.[9476] Judge Pechman granted an unopposed oral motion by Washington's Democratic Party to intervene.[9477] On representations by Washington's attorneys, Judge Pechman concluded that immediate relief was not required, because the ballots in question would be preserved for later examination.[9478] At the end of the hearing, Judge Pechman informed the parties that although she handled the emergency motion, the case would be permanently assigned to a judge at random.[9479]

The plaintiffs filed an amended complaint[9480] and a motion for a preliminary injunction on Monday.[9481] On Wednesday, with the Republican candidate ahead by forty-two votes after completion of the first recount,[9482]

9473. *Wash. State Republican Party* Complaint, *supra* note 9472, at 5.

9474. Temporary-Restraining-Order Motion, *Wash. State Republican Party*, No. 2:04-cv-2350 (W.D. Wash. Nov. 20, 2004), D.E. 2.

9475. Interview with Judge Marsha J. Pechman, Oct. 15, 2015.

Tim Reagan interviewed Judge Pechman for this report by telephone.

9476. Interview with Judge Marsha J. Pechman, Oct. 15, 2015; Transcript, *Wash. State Republican Party*, No. 2:04-cv-2350 (W.D. Wash. Nov. 21, 2004, filed Dec. 3, 2004), D.E. 27 [hereinafter *Wash. State Republican Party* Transcript].

9477. *Wash. State Republican Party* Transcript, *supra* note 9476, at 4–5.

9478. *Id.* at 19; Order, *Wash. State Republican Party*, No. 2:04-cv-2350 (W.D. Wash. Nov. 22, 2004), D.E. 5; *see* Lynn Thompson, *Judge Says No to GOP, Won't Halt Recount*, Seattle Times, Nov. 22, 2004, at B1; *see also* Susan Gilmore & Keith Ervin, *When Ballot Is in Question, Here's What Happens*, Seattle Times, Nov. 23, 2004, at A1 ("Enhanced ballots are logged with the precinct number, given an identification number and initialed by the election worker. While they are not separated from the rest of the ballots, . . . they will be easy to find if they come into question in legal proceedings.").

9479. *Wash. State Republican Party* Transcript, *supra* note 9476, at 19.

9480. Amended Complaint, *Wash. State Republican Party*, No. 2:04-cv-2350 (W.D. Wash. Nov. 22, 2004), D.E. 6.

9481. Preliminary-Injunction Motion, *id.* (Nov. 22, 2004), D.E. 7.

9482. *See* Ralph Thomas, *A Governor by Christmas?*, Seattle Times, Nov. 25, 2004, at A1; *see also* Blaine Harden, *Wash. Governor's Race Tightens*, Wash. Post, Dec. 15, 2004, at A9.

the plaintiffs voluntarily dismissed the action.[9483] Judge Ricardo S. Martinez approved the dismissal on the following Monday.[9484]

After a statewide hand recount, the Democratic candidate led by 129 votes.[9485] During the hand recount, Washington's supreme court denied, on December 14, mandamus intervention sought by the Democratic Party[9486] and reversed, on December 22, a temporary restraining order granted to the Republican Party.[9487] On December 30, the Democratic candidate was certified the winner of the election.[9488]

Close Vote in Puerto Rico

Rosselló v. Calderón (3:04-cv-2251) and Suárez Jimenez v. Comisión Estatal de Elecciones (3:04-cv-2288) (Daniel R. Domínguez, D.P.R.)

> The 2004 election of Puerto Rico's governor depended upon a recount. One of the candidates filed a federal complaint seeking enforcement of a prompt and just resolution of the recount. The district court began evidentiary hearings in mid-November. One issue to be resolved was how to count ballots in which a voter cast a vote for one party generally but for candidates of other parties for all individual offices. A commonwealth case on this issue was removed to the federal court before it was resolved, but Puerto Rico's supreme court resolved the case anyway. The district court vacated the commonwealth court's postremoval ruling and commenced additional hearings. The court of appeals determined that removal was improper. In December, the court of

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9483. Voluntary Dismissal, *Wash. State Republican Party*, No. 2:04-cv-2350 (W.D. Wash. Nov. 24, 2004), D.E. 22; Notice, *id.* (Nov. 24, 2004), D.E. 21 (withdrawing the injunction motion).

9484. Order, *id.* (Nov. 29, 2004), D.E. 25.

9485. Elections Search Results: November 2004 General, www.sos.wa.gov/elections/results_report.aspx?e=67&c=&c2=&t=&t2=&p=&p2=&y=; *see A Look Back at 58-Day Wait and 3 Counts*, Seattle Times, Dec. 31, 2004, at A18.

9486. McDonald v. Reed, 153 Wash. 2d 201, 103 P.3d 722 (2004); *see* Blaine Harden, *Wash. Governor's Race Tightens; Mostly Democratic King County Finds 561 Uncounted Votes*, Wash. Post, Dec. 15, 2004, at A9.

9487. Wash. State Republican Party v. King Cty. Div. of Records, 153 Wash. 2d 220, 103 P.3d 725 (2004); *see* Blaine Harden, *Democrat Takes Lead in Washington State; Supreme Court Allows Disqualified Absentee Ballots from King County*, Wash. Post, Dec. 23, 2004, at A4.

9488. *See* Sarah Kershaw, *Governor-Elect Declared in Washington Recounts*, N.Y. Times, Dec. 31, 2004, at 18 (reporting also that the victor declined the other candidate's offer of a runoff election); David Postman, *Doubts Linger as Gregoire Win Certified*, Seattle Times, Dec. 31, 2004, at A1 (same).

appeals ordered a halt to the district court's intervention in the local electoral dispute.

Topics: Matters for state courts; enjoining certification; removal; recounts; absentee ballots; intervention; attorney fees.

The November 2, 2004, election of Puerto Rico's governor was very close, and the result depended on a recount, including all absentee ballots.[9489] The prostate New Progressive candidate, former governor Pedro Rosselló, and eight other voters, filed a federal action at 4:25 p.m. on November 10 against the incumbent governor, Sila Calderón, and the apparent winner, Aníbal Acevedo-Vilá, both of whom were members of the Popular Democratic Party—the party favoring Puerto Rico's retaining its status as a territorial commonwealth—as well as the transition committee and the electoral commission, complaining that supporters of Acevedo-Vilá were proceeding quickly with the transition but slowly with the vote certification.[9490] The complaint included a prayer for a temporary restraining order.[9491]

The court assigned the case to Judge Daniel R. Domínguez, who issued an order on November 11 that on November 15 the defendants show cause why relief should not be granted and the plaintiffs provide specific jurisdictional bases for relief.[9492] At the defendants' request, Judge Domínguez ordered, on November 15, that the plaintiffs also file, on November 16, a brief supporting their prayers for relief.[9493]

On November 17, a lawyer and voter for Rosselló filed a pro se motion to intervene,[9494] which Judge Domínguez denied that day, because the lawyer's allegations were already included in the complaint.[9495]

After evidentiary hearings on November 18[9496] and 19,[9497] Judge Domínguez enjoined certification of the election pending resolution of

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9489. Rosselló-González v. Calderón-Serra, 398 F.3d 1, 4–6 (1st Cir. 2005); *see* Abby Goodnough, *Governor's Race Keeps Puerto Rico in Suspense*, N.Y. Times, Nov. 17, 2004, at A16.

9490. Complaint, Rosselló v. Calderon, No. 3:04-cv-2251 (D.P.R. Nov. 10, 2004), D.E. 1 [hereinafter *Rosselló* Complaint]; Roselló-González v. Acevedo-Vilá, 483 F.3d 1, 4 & nn.2–3 (2007); *Rosselló-González*, 398 F.3d at 5, 7; *see* Katie Zezima, *Puerto Rico Governor's Race Moves to Higher Court*, N.Y. Times, Dec. 14, 2004, at A20.

9491. *Rosselló* Complaint, *supra* note 9490, at 14–15; *see also* Motion, *Rosselló*, No. 3:04-cv-2251 (D.P.R. Nov. 16, 2004), D.E. 39; *Rosselló-González*, 398 F.3d at 7.

9492. Order, *Rosselló*, No. 3:04-cv-2251 (D.P.R. Nov. 11, 2004), D.E. 2.

9493. Order, *id.* (Nov. 15, 2004), D.E. 33.

9494. Motion to Intervene, *id.* (Nov. 17, 2004), D.E. 43.

9495. Docket Sheet, *id.* (Nov. 10, 2004) (D.E. 44).

9496. Transcript, *id.* (Nov. 18, 2004, filed Nov. 24, 2004), D.E. 103 [hereinafter Nov.

certain issues, including an issue pertaining to split ballots, on which Judge Domínguez decided to further explore his jurisdiction.[9498] Judge Domínguez also wanted more evidence on the extent to which the outcome of the election depended upon resolution of the plaintiffs' constitutional claims.[9499]

Meanwhile, on November 16, four voters filed an action in Puerto Rico's superior court in San Juan, seeking a ruling validating the split ballots.[9500] Puerto Rico's ballot allowed voters to vote for a party or for its individual candidates.[9501] The only two candidates on the ballot at issue were candidates for governor and for Puerto Rico's nonvoting representative to the U.S. Congress, known as Puerto Rico's resident commissioner.[9502] In addition to the New Progressive Party and the Popular Democratic Party, the Puerto Rico Independence Party appeared on the ballot.[9503] Voters could vote only for a party, in which case all of its candidates would receive votes.[9504] Or voters could mark only individual candidates, and they would receive the votes.[9505] Or voters could vote for a party and one or more individual candidates in other parties, in which case the individual candidates selected would receive votes and candidates in the selected party for other offices would receive votes.[9506] The biggest question for this election was how to count the several thousand ballots on which one party was selected but other parties' candidates were selected for both of the in-

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18, 2004, *Rosselló* Transcript]; Minutes, *id.* (Nov. 18, 2004), D.E. 79.

9497. Transcript, *id.* (Nov. 19, 2004, filed Nov. 26, 2004), D.E. 118 [hereinafter Nov. 19, 2004, *Rosselló* Transcript]; Minutes, *id.* (Nov. 19, 2004), D.E. 82.

9498. Second Amended Order, *id.* (Nov. 20, 2004), D.E. 84; Amended Order, *id.* (Nov. 20, 2004), D.E. 83; Order, *id.* (Nov. 19, 2004), D.E. 80.

9499. Transcript at 10, *id.* (Nov. 20, 2004, filed Nov. 29, 2004), D.E. 119 [hereinafter Nov. 20, 2004, *Rosselló* Transcript] ("I am not going to jump into that fray unless I realize that those votes are the votes that are going to decide the election"); Nov. 19, 2004, *Rosselló* Transcript, *supra* note 9497, at 159–60 ("the doctrine of case and controversy does not allow me to start writing opinions all over the place unless I am satisfied that the opinion will have an outcome determinative result"); Nov. 18, 2004, *Rosselló* Transcript, *supra* note 9496, at 227 ("the Court does not want to be making academic decisions").

9500. Rosselló-González v. Calderón-Serra, 398 F.3d 1, 5, 8 (1st Cir. 2005); *see* Zezima, *supra* note 9490.

9501. *Rosselló-González*, 398 F.3d at 5–6.

9502. *Id.* at 5, 21 & n.4.

9503. *Id.* at 5, 21.

9504. *Id.* at 5.

9505. *Id.* at 5–6.

9506. *Id.* at 6 n.6.

dividual offices.[9507] These became known as three-mark split-vote ballots.[9508]

The superior court dismissed its action as moot, but Puerto Rico's supreme court granted review.[9509] While that review was pending, at 11:09 a.m. on Saturday, November 20, the defendants removed the action to the federal court, which assigned the case to Judge Domínguez.[9510] That evening, Puerto Rico's supreme court purported to resolve the action by declaring the three-mark split-vote ballots valid votes for each of the candidates marked and also valid votes for the marked party for purposes of the party's status as a principal party.[9511]

On November 23, Judge Domínguez declared void the ruling by Puerto Rico's supreme court, because removal had stripped the supreme court of jurisdiction over the case.[9512] On November 26, Judge Domínguez set a hearing on December 10 for a pending remand motion.[9513] On December 15, the federal court of appeals determined that removal was improper.[9514] Rather than order a remand by mandamus, the appellate court expressed confidence "that the District Court will immediately remand the Suárez

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9507. *Id.* at 6–7; *see* Nov. 18, 2004, *Rosselló* Transcript, *supra* note 9496, at 37–47; *see also* Manuel Roig-Franzia, *Puerto Rico Is Caught in Throes of Recount*, Wash. Post, Dec. 11, 2004, at A3.

9508. *Rosselló-González*, 398 F.3d at 6.

9509. *Id.* at 5, 8.

9510. Notice of Removal, Suárez Jimenez v. Comisión Estatal de Elecciones, No. 3:04-cv-2288 (D.P.R. Nov. 20, 2004), D.E. 1; *Rosselló-González*, 398 F.3d at 5, 8 (noting that the notice of removal was filed with Puerto Rico's supreme court at 11:48 a.m.); *see* Nov. 20, 2004, *Rosselló* Transcript, *supra* note 9499, at 61, 223 (Judge Domínguez's in-court announcement of the removal and expression of doubt that there is a federal question in the removed case).

9511. Suárez v. Comisión Estatal de Elecciones, 163 D.P.R. 347 (2004); Orders, Rosselló v. Calderon, No. 3:04-cv-2251 (D.P.R. Nov. 29 & Dec. 1 & 8, 2004), D.E. 120, 158, 193 (English translation); *Rosselló-González*, 398 F.3d at 8; *see* Nov. 20, 2004, *Rosselló* Transcript, *supra* note 9499, at 218–19; *see also* Ray Quintanilla, *Recount Delayed in Puerto Rico*, Wash. Post, Nov. 25, 2004, at A11.

9512. Order, *Suárez Jimenez*, No. 3:04-cv-2288 (D.P.R. Nov. 23, 2004), D.E. 12; *see* Nov. 20, 2004, *Rosselló* Transcript, *supra* note 9499, at 220–25 (observing that the Puerto Rico court's deciding the question of removal was unprecedented and illegal); *see also* Quintanilla, *supra* note 9511.

The court of appeals agreed that the ruling by Puerto Rico's supreme court was void. *Rosselló-González*, 398 F.3d at 8 n.23.

9513. Order, *Suárez Jimenez*, No. 3:04-cv-2288 (D.P.R. Nov. 26, 2004), D.E. 17.

9514. *Rosselló-González*, 398 F.3d at 10–13.

action back to the Supreme Court of Puerto Rico without the need for mandamus."[9515]

For the first action, Judge Domínguez held proceedings on November 20, 22, and 23.[9516] On November 23, Judge Domínguez ordered a recount;[9517] he also ordered that the three-mark split-vote ballots be segregated but that their validity not yet be adjudged.[9518] Proceedings continued from November 29 through December 1 and on December 7.[9519]

On December 15, the federal court of appeals vacated the November 23 orders and ordered the action dismissed because "the federal courts will not intervene in a local electoral dispute such as this."[9520] Acevedo-Vilá was thereafter certified the winner.[9521]

On January 17, 2006, Judge Domínguez denied motions by both sides for attorney fees,[9522] a decision that the court of appeals affirmed on March 13, 2007.[9523]

The 2000 Election of the President

Siegel v. LePore (Donald M. Middlebrooks, S.D. Fla. 9:00-cv-9009) and Touchston v. McDermott (John Antoon II, M.D. Fla. 6:00-cv-1510)

> Among the litigation over who won the presidential contest in Florida in 2000 were two emergency actions filed in two of Florida's three districts seeking federal-court intervention in manual recounts. Both judges denied the plaintiffs immediate relief, and the court of appeals affirmed those decisions en banc. Reviewing a decision by the state's supreme court, however, the U.S. Su-

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9515. *Id.* at 13.

9516. Minutes, *Rosselló*, No. 3:04-cv-2251 (D.P.R. Nov. 23, 2004), D.E. 95; Minutes, *id.* (Nov. 22, 2004), D.E. 93; Nov. 20, 2004, *Rosselló* Transcript, *supra* note 9499; Minutes, *Rosselló*, No. 3:04-cv-2251 (D.P.R. Nov. 20, 2004), D.E. 85.

9517. Further Amended Order, *Rosselló*, No. 3:04-cv-2251 (D.P.R. Nov. 23, 2004), D.E. 102; Amended Order, *id.* (Nov. 23, 2004), D.E. 99; Order, *id.* (Nov. 23, 2004), D.E. 96; *see* Zezima, *supra* note 9490.

9518. Amended Order, *Rosselló*, No. 3:04-cv-2251 (D.P.R. Nov. 23, 2004), D.E. 100; Order, *id.* (Nov. 23, 2004), D.E. 98; *see* Quintanilla, *supra* note 9511; Zezima, *supra* note 9490.

9519. Minutes, *Rosselló*, No. 3:04-cv-2251 (D.P.R. Dec. 7, 2004), D.E. 191; Minutes, *id.* (Dec. 1, 2004), D.E. 171; Minutes, *id.* (Nov. 30, 2004), D.E. 157; Minutes, *id.* (Nov. 29, 2004), D.E. 135.

9520. *Rosselló-González*, 398 F.3d at 13–18; *see* Abby Goodnough, *Disputed Ballots in Governor's Race*, N.Y. Times, Dec. 16, 2004, at A40.

9521. *See* Abby Goodnough, *Officials Call Disputed Race for Governor of Puerto Rico*, N.Y. Times, Dec. 29, 2004, at A16.

9522. Minutes, *Rosselló*, No. 3:04-cv-2251 (D.P.R. Jan. 17, 2006), D.E. 245.

9523. Roselló-González v. Acevedo-Vilá, 483 F.3d 1 (2007).

preme Court determined that the manual recount procedures violated equal protection.

Topics: Recounts; matters for state courts; intervention; equal protection; military ballots; absentee ballots; election errors; voting technology; enjoining certification; Electoral College; voter identification.

At 9:50 a.m. on Saturday, November 11, 2000, at a time of uncertainty about the outcome of the 2000 presidential election in Florida and which presidential candidate would therefore receive a majority of Electoral College votes, George W. Bush, Dick Cheney, and seven voters filed a federal complaint in the Southern District of Florida seeking federal-court intervention in manual recounts that opponents had sought in four counties: Palm Beach, Miami-Dade, Broward, and Volusia.[9524] With their complaint, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction.[9525] On November 12, television news media sought permission to televise proceedings.[9526]

Judge Donald M. Middlebrooks set the case for hearing on Monday.[9527] He heard cases in both Miami and West Palm Beach at the time; he decided to hear this case in Miami because the courthouse there could accommodate more visitors.[9528] Because of advances in electronic filing, paperwork in emergency litigation is much easier to handle now than it was

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9524. Complaint, Siegel v. LePore, No. 9:00-cv-9009 (S.D. Fla. Nov. 11, 2000), D.E. 1; Siegel v. LePore, 234 F.3d 1163, 1169 (11th Cir. 2000); *see* David Firestone & Michael Cooper, *Bush Sues to Halt Hand Recount in Florida*, N.Y. Times, Nov. 12, 2000, at 1; Charles Lane, *Bush Seeks Federal Role in Matter of State Statute*, Wash. Post, Nov. 12, 2000, at A21; Martin Merzer & Caroline J. Keough, *Bush Goes to Court*, Miami Herald, Nov. 12, 2000, at 1A; Jay Weaver & Gail Epstein Nieves, *GOP Suit Given Low Chance*, Miami Herald, Nov. 12, 2000, at 24A. *See generally* Abner Greene, Understanding the 2000 Election 70–82 (2001).

9525. Motion, *Siegel*, No. 9:00-cv-9009 (S.D. Fla. Nov. 11, 2000), D.E. 2.

9526. Media Motion, *id.* (Nov. 12, 2000), D.E. 11; *see* Order, *id.* (Nov. 12, 2000), D.E. 18 (granting intervention).

9527. Order, *id.* (Nov. 12, 2000), D.E. 16; Minutes, *id.* (Nov. 13, 2000), D.E. 40; *Siegel*, 234 F.3d at 1169; *see* David S. Broder, *Both Sides Increase Legal Wrangling as Florida Begins Slow Hand Recount*, Wash. Post, Nov. 12, 2000, at A1; David Kidwell & Tyler Bridges, *Judge to Hear Testimony on Ballot Woes*, Miami Herald, Nov. 13, 2000, at 13A; Stephen Labaton, N.Y. Times, Nov. 13, 2000, at 18; Martin Merzer, *Federal Judge Enters Dispute Today*, Miami Herald, Nov. 13, 2000, at 1A; Merzer & Keough, *supra* note 9524.

Tim Reagan interviewed Judge Middlebrooks for this report by telephone on May 31, 2016.

9528. Interview with Judge Donald M. Middlebrooks, May 31, 2016.

then, and the court of appeals was asking for copies of the record while Judge Middlebrooks was considering the case.[9529]

On the day of the hearing, Judge Middlebrooks denied the plaintiffs immediate relief.[9530]

> Under the Constitution of the United States, the responsibility for selection of electors for the office of President rests primarily with the people of Florida, its election officials and, if necessary, its courts. The procedures employed by Florida appear to be neutral and, while not yet complete, the process seems to be unfolding as it has on other occasions.[9531]

Relying on clear Eleventh Circuit authority, Judge Middlebrooks also denied the media's motion to televise proceedings.[9532] The clerk's office and the marshals service responded to the considerable interest in the case so that Judge Middlebrooks did not have to worry about it.[9533]

At 3:15 p.m., "just hours after" Judge Middlebrooks issued his decision, three Broward County voters filed a similar action in the Middle District of Florida.[9534] With their complaint, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction.[9535] Judge John Antoon II set the case for hearing at 2:00 p.m. on the following day.[9536] Judge Antoon's chambers worked late into the night to resolve the motion.[9537]

9529. *Id.*

9530. Siegel v. LePore, 120 F. Supp. 2d 1041 (S.D. Fla. 2000); *see* Charles Lane & Serge Kovaleski, *Bush Legal Fight Faces Uncertain Future*, Wash. Post, Nov. 14, 2000, at A21; Martin Merzer, *State Sets Deadline*, Miami Herald, Nov. 14, 2000, at 1A; Todd S. Purdum & David Firestone, *A Vote Deadline in Florida Is Set for Today*, N.Y. Times, Nov. 14, 2000, at A1; Evan Sack, *Saying He Doesn't Expect to Be Final Arbiter, Judge Won't Stop Hand Recount*, N.Y. Times, Nov. 14, 2000, at A21; Jay Weaver, *Court Rejects Bid by GOP to Block Hand Tally of Votes*, Miami Herald, Nov. 14, 2000, at 1A; Jay Weaver, *Thorny Questions*, Miami Herald, Nov. 16, 2000, at 19A.

9531. *Siegel*, 120 F. Supp. 2d at 1044.

9532. Media Order, *Siegel*, No. 9:00-cv-9009 (S.D. Fla. Nov. 13, 2000), D.E. 34.

9533. Interview with Judge Donald M. Middlebrooks, May 31, 2016.

9534. Complaint, Touchston v. McDermott, No. 6:00-cv-1510 (M.D. Fla. Nov. 13, 2000), D.E. 1; Touchston v. McDermott, 120 F. Supp. 2d 1055, 1056 (S.D. Fla. 2000); *see* Order, *Touchston*, No. 6:00-cv-1510 (M.D. Fla. Nov. 15, 2000), D.E. 20 (denying a motion to transfer the case to Judge Middlebrooks).

9535. Motion, *Touchston*, No. 6:00-cv-1510 (M.D. Fla. Nov. 13, 2000), D.E. 3.

9536. *Touchston*, 120 F. Supp. 2d at 1056 n.1.

Tim Reagan interviewed Judge Antoon for this report by telephone on October 30, 2012.

9537. Interview with Judge John Antoon II, Oct. 30, 2012.

On November 17, Judge Antoon agreed with Judge Middlebrooks.[9538] "In summary, Plaintiffs have failed to set forth a valid basis for intervention by federal courts. They have not alleged that the Florida law is discriminatory, that citizens are being deprived of the right to vote, or that there has been fraudulent interference with the vote."[9539] The court of appeals and Judge Antoon denied the plaintiffs in both cases an injunction pending appeal.[9540]

On November 21, Florida's supreme court resolved ambiguities in Florida's election statutes and overruled a ruling by Florida's secretary of state that manual recounts must have been certified by November 14, setting November 26 as a deadline that would allow sufficient time for contests.[9541] The U.S. Supreme Court vacated this decision on December 4 and remanded the case for clarification of whether the state supreme court (1) was violating the U.S. Constitution by depriving Florida's legislature of plenary authority over the election of presidential electors when the state supreme court construed Florida's election statutes so as to promote a right to vote deemed both fundamental and supported by Florida's constitution and (2) by construing statutes after the election, was denying Florida a safe harbor provided by 3 U.S.C. § 5, which provides that a determination of an election controversy will be immune to attack in Congress if timely made pursuant to procedures established before the election.[9542]

9538. *Touchston*, 120 F. Supp. 2d at 1058.

9539. *Id.* at 1059.

9540. Siegel v. LePore, 234 F.3d 1162 (11th Cir. 2000); Touchston v. McDermott, 234 F.3d 1130 (11th Cir. 2000); Order, *Touchston*, No. 6:00-cv-1510 (M.D. Fla. Nov. 15, 2000), D.E. 19.

9541. Palm Beach Cty. Canvassing Bd. v. Harris, 772 So. 2d 1220, 1240 (Fla. 2000); *see* Dan Balz & Peter Slevin, *Fla. Justices Say Vote Totals Must Include Hand Recounts*, Wash. Post, Nov. 22, 2000, at A1; Dana Canedy, *Democrats Praise Ruling, and the Count Continues*, Nov. 22, 2000, at A23; William Glaberson, *Ruling Is Seen as Affirming Primacy of Will of Voters*, N.Y. Times, Nov. 22, at A24; Linda Greenhouse, *Decision Hews to Lines of Gore Team's Position*, N.Y. Times, Nov. 22, 2000, at A1; Martin Merzer & Lesley Clark, *Justices: Keep Counting*, Miami Herald, Nov. 22, 2000, at 1A.

9542. Bush v. Palm Beach Cty. Canvassing Bd., 531 U.S. 70 (2000); *see* U.S. Const. art. II, § 1, cl. 2; Bush v. Palm Beach Cty. Canvassing Bd., 531 U.S. 1004 (2000) (adding a question on 3 U.S.C. § 5 to the grant of certiorari); *see also* Frank Davies, *U.S. Supreme Court Justices Ask Florida Court for Clarification*, Miami Herald, Dec. 5, 2000, at 17A; Linda Greenhouse, *U.S. Justices Agree on Need to Clarify Case*, N.Y. Times, Dec. 5, 2000, at A1; Charles Lane, *Justices Return Case to Fla.*, Wash. Post, Dec. 5, 2000, at A1.

By a vote of eight to four sitting en banc, the court of appeals affirmed, on December 6, both district judges' decisions not to interfere with the manual recounts.[9543]

On Friday, December 8, Florida's supreme court decided an appeal arising from a contest filed by Albert Gore, Jr., and Joseph I. Lieberman and, by a vote of four to three, remanded the "cause for the circuit court to immediately tabulate by hand the approximate 9000 Miami-Dade ballots, which the counting machine registered as non-votes, but which have never been manually reviewed, and for other relief that may thereafter appear appropriate."[9544] The state supreme court also invited the state circuit court to order manual recounts in other counties as necessary.[9545] The U.S. Supreme Court stayed this decision on the following day and set the case for hearing on Monday.[9546]

On the day of oral argument in the U.S. Supreme Court, Florida's supreme court issued an opinion on a six-to-one vote resolving the December 4 remand from the U.S. Supreme Court.[9547] With respect to 3 U.S.C. § 5, the November 26 date was not a new deadline: "It was simply a date in accordance with the requirements that had been established prior to the election and in order to construe all the provisions of the Code as a con-

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9543. Siegel v. LePore, 234 F.3d 1163 (11th Cir. 2000); Touchston v. McDermott, 234 F.3d 1133 (11th Cir. 2000), *cert denied*, 531 U.S. 1061 (2001); *see* Charles Babington, *Little-Noticed Court Decision Held Political Promise for Gore*, Wash. Post, Dec. 11, 2000, at A11; *GOP Claim Delayed*, Miami Herald, Nov. 28, 2000, at 15A; Kevin Sack, *Appeals Court Gives Gore Victory, Rejecting Bush Request to Bar Manual Recounts*, N.Y. Times, Dec. 7, 2000, at A35.

9544. Gore v. Harris, 772 So. 2d 1243, 1262 (Fla. 2000); *see* Dan Balz, *Fla. Supreme Court Orders Partial Recount Across State*, Wash. Post, Dec. 9, 2000, at A1; Linda Greenhouse, *Spotlight Again Shifts to Justices in Washington*, N.Y. Times, Dec. 9, 2000, at A1; George Lardner, Jr., *Lawyers Eye Fla. Court's Surprising 4-3 Decision*, Wash. Post, Dec. 10, 2000, at A31; Martin Merzer & Lesley Clark, *New Hope for Gore*, Miami Herald, Dec. 9, 2000, at 1A.

9545. *Gore*, 772 So. 2d at 1262.

9546. Bush v. Gore, 531 U.S. 1046 (2000); *see Bush Loses Appeal*, Miami Herald, Dec. 7, 2000, at 31A; Dan Balz, *Divided U.S. Supreme Court Orders Freeze on Fla. Count*, Wash. Post, Dec. 10, 2000, at A1; Linda Greenhouse, *The Court Ruling: Bush Had Sought Stay*, N.Y. Times, Dec. 10, 2000, at 1; Martin Merzer, *Supreme Court Halts Recount*, Miami Herald, Dec. 10, 2000, at 1A; Alan Sipress & Ellen Nakashima, *A Scramble, Interrupted; Order to Stop Stuns Fla. Officials Rushing to Recount*, Wash. Post, Dec. 10, 2000, at A1.

9547. Palm Beach Cty. Canvassing Bd. v. Harris, 772 So. 2d 1273 (Fla. 2000); *see* Daniel de Vise, *Justices Defend Their Decision in Favor of Late Hand Recounts*, Miami Herald, Dec. 12, 2000, at 27A; David Firestone, *Top State Court Rewrites Opinion in Bush Case*, N.Y. Times, Dec. 12, 2000, at A26.

sistent whole."[9548] With respect to legislative control over presidential elections, the Florida court applied the tools of judicial interpretation: "Hence, based upon our perception of legislative intent, we have ruled that election returns must be accepted for filing unless it can clearly be determined that the late filing would prevent an election contest or the consideration of Florida's vote in a presidential election."[9549]

On the following day, the U.S. Supreme Court decided on a five-to-four vote that the contemplated county-by-county manual recounts in Florida hopelessly violated the Equal Protection Clause in the U.S. Constitution.[9550]

Federal courts in Florida received other actions concerning the presidential election of 2000.[9551]

A Palm Beach County voter filed a federal complaint in the Southern District of Florida on November 8, the day after the election, seeking a new vote for President in Palm Beach County because of the misleading design of the butterfly ballot: the candidate listed first—Bush—corresponded with the first hole to punch, but the candidate listed second on the left—Gore—corresponded with the third hole to punch, the second hole going to the candidate listed first on the right—Pat Buchanan.[9552] At a November 9 hearing, the plaintiff voluntarily dismissed the case.[9553]

On November 9, a voter filed a federal complaint in the Southern District challenging the winner-take-all allocation of Florida's electoral

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9548. *Palm Beach Cty. Canvassing Bd.*, 772 So. 2d at 1290.

9549. *Id.* at 1291.

9550. Bush v. Gore, 531 U.S. 98, 103 (2000); *see* Gore v. Harris, 773 So. 2d 524 (Fla. 2000) ("pursuant to the direction of the United States Supreme Court, we hold appellants can be afforded no relief"); *see* Dan Balz & Charles Lane, *Court Overturns Recounts, Giving Bush the Presidency*, Wash. Post, Dec. 13, 2000, at A1; Richard L. Berke, *By Single Vote, Justices End Recount, Blocking Gore After 5-Week Struggle*, N.Y. Times, Dec. 13, 2000, at A1; Martin Merzer, *Defeat for Gore: Recount Order Violates Constitution, Justices Say*, Miami Herald, Dec. 13, 2000, at 1A.

9551. *See* Notice of Related Actions, Touchston v. McDermott, No. 6:00-cv-1510 (M.D. Fla. Dec. 1, 2000), D.E. 33.

9552. Complaint, Miller v. Harris, No. 9:00-cv-9004 (S.D. Fla. Nov. 8, 2000, filed Nov. 9, 2000), D.E. 1; *see* Emergency Motion for Injunctive Relief, *id.* (Nov. 8, 2000, filed Nov. 9, 2000), D.E. 2; *see also* Edward B. Goley, Ballot Battles 279 (2016) ("Even Buchanan acknowledged, both then and subsequently, that Gore would have been president but for the butterfly ballot.").

9553. Order, *Miller*, No. 9:00-cv-9004 (S.D. Fla. Nov. 9, 2000, filed Nov. 13, 2000), D.E. 7; Minutes, *id.* (Nov. 9, 2000, filed Nov. 13, 2000), D.E. 6.

votes.[9554] On November 14, Judge William P. Dimitrouleas denied the plaintiff immediate relief.[9555]

Also on November 9, a voter filed a federal complaint in the Northern District alleging that he was wrongfully denied the vote for failure to show photo identification.[9556] Judge Robert L. Hinkle denied the plaintiff immediate relief that same day.[9557]

> In his papers in support of the request for a temporary restraining order, Mr. Dickens has produced no evidence that any requirement to produce photographic identification was applied differently to persons of different races. . . . He has made no showing that any requirement to produce photographic identification impacted the result of the Florida election.[9558]

Northern District Judge Lacey A. Collier ruled on December 8 that absentee ballots from overseas and military voters should be counted even if election officials did not have records of their being requested.[9559]

On December 21, Southern District Judge Alan S. Gold dismissed a settled November 27 action seeking alternatives to the pending certification of Bush as the victor in Florida.[9560] A November 28 Southern District

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9554. Complaint, May v. Harris, No. 0:00-cv-7671 (S.D. Fla. Nov. 9, 2000, filed Nov. 13, 2000), D.E. 1; *see* Preliminary-Injunction Motion, *id.* (Nov. 9, 2000, filed Nov. 13, 2000), D.E. 2; *see also* Elinor J. Brecher, *Suit Seeks to Challenge "Winner-Take-All" System*, Miami Herald, Nov. 14, 2000, at 23A.

9555. Opinion, *May*, No. 0:00-cv-7671 (S.D. Fla. Nov. 14, 2000, filed Nov. 15, 2000), D.E. 5; *see* Order, *id.* (Jan. 22, 2001), D.E. 11 (granting a voluntary dismissal); *see* Weaver, *Thorny Questions*, *supra* note 9530.

Before briefing an appeal, the plaintiff unsuccessfully sought certiorari in the Supreme Court, and then the appeal was dismissed for lack of prosecution. May v. Harris, 531 U.S. 1119 (2001); Dismissal, May v. Sec'y of the State of Fla., No. 00-16015 (11th Cir. Feb. 14, 2001).

9556. Complaint, Dickens v. Florida, No. 4:00-cv-420 (N.D. Fla. Nov. 9, 2000), D.E. 1; *see* Motion, *id.* (Nov. 9, 2000), D.E. 4.

9557. Opinion, *id.* (Nov. 9, 2000), D.E. 6 [hereinafter *Dickens* Photo-Identification Opinion]; *see* Steve Bousquet & Lesley Clark, *And Still Counting*, Miami Herald, Nov. 10, 2000, at 1A.

9558. *Dickens* Photo-Identification Opinion, *supra* note 9557, at 2; *see* Order, *Dickens*, No. 4:00-cv-420 (N.D. Fla. Nov. 16, 2000), D.E. 9 (approving a voluntary dismissal).

9559. Bush v. Hillsborough Cty. Canvassing Bd., 123 F. Supp. 2d 1305 (N.D. Fla. 2000); *see* Complaint, Bush v. Hillsborough Cty. Canvassing Bd., No. 3:00-cv-533 (N.D. Fla. Nov. 26, 2000), D.E. 1; *see also* Michael Cooper & Richard Pérez-Peña, *In a Shadow, Other Cases Go On*, N.Y. Times, Dec. 12, 2000, at A26; *Overseas Ballots: U.S. Judge to Hear Case in GOP Bid to Gain Votes*, Miami Herald, Dec. 5, 2000, at 22A; Robert Timothy Reagan, Overseas Voting: The Uniformed and Overseas Citizens Absentee Voting Act 15 (Federal Judicial Center 2016).

9560. Order, Williams v. Harris, No. 0:00-cv-7735 (S.D. Fla. Dec. 21, 2000, filed Dec.

action seeking to have machine-rejected ballots hand counted in Miami-Dade County was dismissed because the plaintiff's attorney did not identify a member of the court's bar to support his pro hac vice motion.[9561]

On January 3, 2001, Judge Middlebrooks granted a voluntary dismissal of his Southern District case.[9562] On February 23, plaintiffs in Judge Antoon's Middle District case filed an amended complaint seeking future curtailment of manual recounts.[9563] Judge Antoon granted a stipulated dismissal on June 19.[9564]

27, 2000), D.E. 9; *see* Complaint, *id.* (Nov. 27, 2000), D.E. 1.

9561. Order, Citizens for a Fair & Honest Election, No. 1:00-cv-4515 (S.D. Fla. Dec. 28, 2000, filed Jan. 2, 2001), D.E. 21; Order, *id.* (Dec. 7, 2000), D.E. 14; Report and Recommendation, *id.* (Dec. 6, 2000, filed Dec. 7, 2000), D.E. 12; Complaint, *id.* (Nov. 28, 2000, filed Nov. 29, 2000), D.E. 1; *see GOP Claim Delayed*, *supra* note 9543.

9562. Order, Siegel v. LePore, No. 9:00-cv-9009 (S.D. Fla. Jan. 3, 2001, filed Jan. 8, 2001), D.E. 77.

9563. Amended Complaint, Touchston v. McDermott, No. 6:00-cv-1510 (M.D. Fla. Feb. 23, 2001), D.E. 75.

9564. Order, *id.* (June 19, 2001), D.E. 112.

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