



Voter Protection Program

ELECTION LITIGATION UPDATE OCTOBER 20, 2020

From: Voter Protection Program
To: Interested Parties
Re: **Election Litigation Update**
Date: 10/20/20

As November 3 draws near, the courts are busy with cases that impact the right to vote and the integrity of our election system. The Voter Protection Program is following scores of cases across the country. This memo summarizes key decisions from the past several days. We hope it will be useful in keeping track of ongoing litigation. We plan to update it periodically as new decisions come down.

RECENT DECISIONS

Last week, important decisions came down in cases that the VPP has been closely tracking, including:

1. *Scarnati v. Boockvar*, No. 20A53 (U.S.) & *Republican Party of Pennsylvania v. Boockvar*, No. 20A54 (U.S.)
 - The Pennsylvania Supreme Court ruled that local boards of election can collect ballots deposited at drop boxes; that ballots mailed by 8 pm on November 3 can be counted so long as they are received by 5 pm on November 6; that ballots received during that post-Election Day period are presumed valid, even if they lack a postmark; and that the state's poll watcher residency requirement is valid and enforceable.
 - The state Republican Party and some legislators asked the U.S. Supreme Court to stay the state Supreme Court's ruling. On the evening of October 19, an equally divided Court voted 4-4 not to grant a stay. This ruling allows the state Supreme Court's ruling to take effect.

2. *Democracy North Carolina v. North Carolina State Board of Elections*, No. 20-cv-457 (M.D.N.C.)
 - On 10/14, Judge Osteen in the Middle District of North Carolina issued an order preventing the North Carolina State Board of Elections from allowing voters to use a certification form to cure the lack of a witness signature. This order followed on an August order in which the Judge upheld the state's witness-signature requirement but ordered the state to establish a cure process for certain absentee-ballot deficiencies.
 - The court's most recent order was issued pursuant to the All Writs Act to enforce the terms of its August order. In Judge Osteen's view, allowing a cure process for a missing witness signature would effectively abrogate the signature requirement that his prior order had upheld. The court did not enjoin any other aspect of North Carolina's new cure process.

3. *Moore v. Circosta*, Nos. 20cv911 (M.D.N.C.), 20-2062 (4th Cir.), and *Wise v. North Carolina State Board of Elections*, Nos. 20cv912 (M.D.N.C.), 20-2063 (4th Cir.)
 - On 10/14, Judge Osteen declined to issue preliminary injunctions in two related cases, *Moore v. Circosta* and *Wise v. North Carolina State Board of Elections*. Those cases collaterally attacked recent changes to state election procedures – including an extension of the ballot-receipt deadline and a ballot-deficiency cure process – that the North Carolina State Board of Elections made pursuant to a state-court consent decree.
 - In Judge Osteen's view, the plaintiffs lacked standing to challenge the changes under the Elections and Electors Clauses of the U.S. Constitution. He allowed some of the individual plaintiffs to raise Equal Protection claims because the changes were made *after* those plaintiffs had already voted. On the merits, he found that those plaintiffs were likely to succeed on their claims that changes to the ballot-receipt deadline and witness-signature cure process resulted in arbitrary and disparate treatment. Notwithstanding this finding, Judge Osteen relied on the *Purcell* principle that federal courts should not alter election rules near the time of the election and declined to order injunctive relief.
 - Plaintiffs are now appealing the ruling to the Fourth Circuit.

4. *Memphis A. Philip Randolph Institute v. Hargett*, No. 20-6046 (6th Cir.)
 - On 10/15, a split panel of the Sixth Circuit affirmed the denial of a preliminary injunction in a Tennessee case where voting rights advocates challenged the state's signature verification procedures and lack of a cure process for signature-mismatch issues.

- The Sixth Circuit affirmed the district court’s order on standing grounds, finding that it was speculative that any of the plaintiffs’ ballots would be rejected, erroneously or not, based on a signature mismatch. Judge Karen Nelson Moore wrote a blistering dissent, decrying a “concentrated effort to restrict the vote” and asserting that many courts recently “have sanctioned a systematic effort to suppress voter turnout and undermine the right to vote.”
5. *Wisconsin Voters Alliance v. City of Racine*, No. 20-cv-01487 (E.D. Wis.)
- On 10/14, a federal district judge in the Eastern District of Wisconsin denied a TRO in a case that sought to block the city from accepting municipal election administration grants from the Center for Tech and Civic Life. The plaintiffs argued that the cities were prohibited from accepting and using such grants by the Elections Clause of the U.S. Constitution, as well as other state and federal laws.
 - In denying a TRO, the district court found that the plaintiffs were unlikely to succeed on the merits of their claims. The court characterized the plaintiffs’ arguments as “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.” It also cited the *Purcell* principle that courts should not change elections rules close to an election.
5. *Minnesota Voters Alliance v. City of Minneapolis*, No. 20-cv-2049 (D. Minn.)
- Plaintiffs challenged municipal grants from the Center for Tech and Civic Life as violations of the Elections Clause.
 - On 10/16, the district court denied plaintiffs’ injunction request, finding that they had no standing to sue since they alleged “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.”
6. *Yazzie v. Hobbs*, No. 20-16890 (9th Cir.)
- On 10/15, the Ninth Circuit affirmed a district court order that declined to extend Arizona’s absentee-ballot receipt deadline for Navajo Nation tribal members. The plaintiffs argued that socioeconomic factors and slow mail service, among other things, meant that tribe members would face severe burdens on their right to vote in the November election.
 - The Ninth Circuit’s decision rested on standing grounds. While the complaint contained many allegations about general hardships for Navajo Nation members, the court found nothing in the record to suggest that the plaintiffs, who were tribe

members, experienced those specific hardships and thus would face particularized harm from the absentee-ballot receipt deadline.

7. *Michigan Alliance for Retired Americans v. Benson*, No. 354993 (Mich. Ct. App.)
 - On 10/16, a three-judge panel of the Michigan Court of Appeals blocked a lower court ruling that allowed for the collection of ballots by third parties and required clerks to accept late ballots if they were postmarked before Election Day and received within 14 days after Nov. 3.
 - The Michigan Alliance for Retired Americans, which brought the suit, has not yet appealed to the Michigan Supreme Court.

UPCOMING DECISIONS

Over the coming week, we will be keeping an eye out for further action, including in the following cases:

1. *Merrill v. People First of Alabama*, No. 20A67 (U.S.)
 - At Issue: On 10/15, the Alabama Secretary of State filed an emergency application to the U.S. Supreme Court, seeking to stay a preliminary injunction that permits Alabama counties to implement curbside voting. The Eleventh Circuit upheld the curbside-voting injunction, although it stayed other aspects of the order that dealt with witness and photo-ID requirements.
 - Status: The application for a stay, a response, and a reply have been filed with Justice Thomas. Respondent People First of Alabama are supported by a multistate amicus brief led by the District of Columbia.
2. *Swenson v. Wisconsin State Legislature*, No. 20A64 (U.S.), and *Gear v. Wisconsin State Legislature*, No. 20A65 (U.S.)
 - At Issue: On Tuesday, (10/13), voting rights plaintiffs filed an emergency motion with the U.S. Supreme Court. They seek to vacate a stay issued by the 7th Circuit, which lifted a district court order that extended the absentee-ballot receipt deadline and allowed poll workers to work in counties other than where they live.
 - Status: Petitions and responses have been filed, and a decision could come at any time.
3. *Wise v. Circosta*, No. 20-2104 (4th Cir.), and *Moore v. Circosta*, No. 20-2107 (4th Cir.)
 - At Issue: Various plaintiffs, including state legislators, challenge the authority of the state board of elections to enter into a state-court consent decree that, among other things, extended the absentee ballot receipt deadline. A district judge in the

Eastern District of North Carolina granted a TRO and transferred the case to the Middle District of North Carolina. Judge Osteen in the Middle District denied a preliminary injunction Wednesday (10/14), finding that the plaintiffs lacked standing to raise many of their claims and that, notwithstanding possible violations of equal protection, an injunction should not issue in light of the *Purcell* principle.

- Status: On the evening of October 19, the Fourth Circuit consolidated the appeals for consideration before the *en banc* court. Briefing on the request for an appellate injunction is completed, and a Fourth Circuit's decision could come at any time.

4. *Carson v. Simon*, No. 20-3139 (8th Cir.)

- At Issue: Two Republican electors argue that the Secretary of State violated federal law and the Elections Clause by entering into a state-court consent decree in which he agreed not to enforce Minnesota's Election Day deadline to receive absentee ballots. On 10/11, the district court denied a preliminary injunction on standing grounds.
- Status: Plaintiffs have filed an emergency motion for an injunction pending appeal with the Eighth Circuit.

5. *In re Nov. 3, 2020 General Election*, No. 149 MM 2020 (Pa.)

- At Issue: The Pennsylvania Secretary of State has asked the state supreme court to decide whether state law allows ballots to be rejected based on a purported signature mismatch.
- Status: The state supreme court has accepted the case. Briefing concluded 10/16, and a decision could come at any time.

6. *Johnson v. Benson*, No. 1:20-cv-948 (W.D. Mich)

- At Issue: Acting under court order, the Michigan Secretary of State has instructed clerks' offices that they must accept absentee ballots that are postmarked by November 2 and received by November 17. Plaintiffs contend that the Secretary's actions violate the Elections Clause of the U.S. Constitution by usurping legislative authority and violate 3 U.S.C. § 1 by permitting Michigan voters to vote for president after Election Day.
- Status: The plaintiffs' motion for a preliminary injunction was fully briefed on 10/15. A hearing on the motion is scheduled for 10/20, and a decision could come shortly after.

7. *Pennsylvania Voters Alliance v. Centre County*, No. 20-cv-1761 (M.D. Pa.)

- At Issue: Plaintiffs challenge municipal grants from the Center for Tech and Civic Life as violations of the Elections Clause.

- Status: A TRO hearing was held 10/16, and a decision could come at any time.
8. *Election Integrity Fund v. City of Lansing*, No. 20-cv-950 (W.D. Mich.)
- At Issue: Plaintiffs challenge municipal grants from the Center for Tech and Civic Life as violations of the Elections Clause.
 - Status: TRO briefing was completed on 10/13, and no hearing is currently scheduled. A decision could come at any time.
9. *Iowa Voter Alliance v. Black Hawk County*, No. 6:20-cv-2078 (N.D. Iowa)
- At Issue: Plaintiffs challenge municipal grants from the Center for Tech and Civic Life as violations of the Elections Clause.
 - Status: TRO briefing was completed on 10/15, and a hearing is scheduled for Tuesday (10/20) at 9:30am.