



Voter Protection Program

ELECTION LITIGATION UPDATE OCTOBER 22, 2020

From: Voter Protection Program
To: Interested Parties
Re: **Election Litigation Update**
Date: 10/22/20

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 and describes some of the significant active cases. We hope it will be useful in keeping track of ongoing litigation. We plan to update it periodically as new cases are filed and new decisions come down.

RECENT DECISIONS

Important decisions came down this week 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.)
 - Late Monday evening, 10/19, the U.S. Supreme Court declined to stay a Pennsylvania Supreme Court decision that extended the state's absentee-ballot receipt deadline and established a presumption that unpostmarked ballots were cast on or before Election Day. Pennsylvania Republicans argued that the state court's order violated the U.S. Constitution's Elections and Electors Clauses, as well as a federal law establishing one national Election Day.
 - The U.S. Supreme Court's vote was 4-4, and no rationale was given for the denial. Justices Thomas, Alito, Gorsuch, and Kavanaugh noted that they would have granted a stay, which suggests that they agree with the Pennsylvania Republicans on the merits of the case. Chief Justice Roberts joined with Justices Breyer, Sotomayor, and Kagan to ensure that there was no majority to support a stay.

- So for now, Pennsylvania absentee ballots will be accepted until November 6, and ballots do not necessarily need a postmark in order to be counted. The case may live on, however: A petition for certiorari could be filed soon after a ninth justice (presumably Judge Amy Coney Barrett) is confirmed.

2. *Merrill v. People First of Alabama*, No. 20A67 (U.S.)

- 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.
- On 10/21, the Supreme Court voted 5-3 to grant the Secretary of State's application. The majority did not give its reasoning. Justice Sotomayor penned a dissent, joined by Justices Breyer and Kagan, arguing that the District Court's decision was amply justified by the need to impose COVID-19 related safety precautions. She ended her opinion by quoting one of the case's plaintiffs to explain what was at stake: "Plaintiff Howard Porter, Jr., a Black man in his seventies with asthma and Parkinson's Disease, told the District Court: '[S]o many of my [ancestors] even died to vote. And while I don't mind dying to vote, I think we're past that - we're past that time.' Election officials in at least Montgomery and Jefferson Counties agree. They are ready and willing to help vulnerable voters like Mr. Porter cast their ballots without unnecessarily risking infection from a deadly virus. This Court should not stand in their way. I respectfully dissent."

3. *Moore v. Circosta*, No. 20-2107 (4th Cir.) and *Wise v. North Carolina State Board of Elections*, No. 20-2104 (4th Cir.)

- Late Tuesday evening, 10/20, the full Fourth Circuit declined to enjoin a set of changes to North Carolina election procedures ordered by the State Board of Elections pursuant to a state-court consent decree. Some Republican state legislators and voters had collaterally attacked those changes - including an extension of the ballot-receipt deadline - on the ground that they purportedly violate the U.S. Constitution's Equal Protection, Elections, and Electors Clauses. The district court declined to issue a preliminary injunction, despite finding a likely violation of the Equal Protection Clause.
- The Fourth Circuit's denied an injunction by an overwhelming vote - 12-3 - and rejected the plaintiffs' claims on multiple grounds: The plaintiffs lacked standing to raise their Elections and Electors Clause claims; they were unlikely to succeed on the merits of their Equal Protection claim; the district court should have abstained from hearing the case pending the resolution of outstanding state-law issues in

state court; and, in any event, an injunction would be improper in light of the Supreme Court's decision in *Purcell v. Gonzalez*. The plaintiffs may respond by filing an emergency application to the U.S. Supreme Court.

4. *Richardson v. Hughs*, No. 20-50774 (5th Cir.)

- On Monday, 10/19, a split panel of the Fifth Circuit stayed a district court order that would have prevented Texas elections officials from rejecting ballots based on mismatching signatures or, alternatively, required them to establish a process for voters to address any concerns about their signatures.
- In the panel majority's view, the district court overstepped its authority by rewriting state law. The majority also found that the district court erred by applying *Mathews v. Eldridge* to evaluate the plaintiffs' due process claims, instead of the *Anderson-Burdick* framework for constitutional challenges to state elections laws. And under *Anderson-Burdick*, the majority found that Texas's signature-verification requirement does not impose a severe burden and is justified by Texas's interest in preserving the integrity of its elections.
- Judge Higginbotham concurred, suggesting that the majority went too far in addressing the merits of the state's arguments: Instead, he would have relied on the equitable principle embodied in *Purcell v. Gonzalez* that federal courts should not change election rules on the eve of an election.

5. *Memphis A. Philip Randolph Institute v. Hargett*, No. 20-6141 (6th Cir.)

- Also on Monday, 10/19, a unanimous panel of the Sixth Circuit denied a motion to stay a district court order that preliminarily enjoined a Tennessee statutory requirement that would have required first-time voters who registered by mail or online to vote in person.
- In its decision, the appellate court emphasized that a stay pending appeal is a matter of judicial discretion and found that, notwithstanding any probability of success on the merits of the plaintiffs' claim, an injunction was not warranted. The court noted that reliance interests counseled against an injunction: Voting was ongoing, and many voters might have relied on communications from Tennessee's secretary of state and other elections officials who instructed first-time voters that they were not required to vote in person. Moreover, the state had delayed in requesting a stay, and the public interest in orderly elections weighed against a change in the rules.
- Judge Karen Nelson Moore concurred to emphasize this last point, noting that "[a]t least where disturbing a lower court order that has been in place for a substantial period of time in the lead up to an election could result in voter confusion and the

state has not offered sound reasons to justify that risk, the equities do not support staying the order pending appeal, even with an election looming.” Slip. Op. at 5.

6. *Carson v. Simon*, No. 20-cv-2030 (D. Minn.)

- In a state court consent decree, the Minnesota Secretary of State agreed not to enforce the state’s Election Day deadline to receive mail-in ballots. That agreement was attacked in federal court by voting rights opponents.
- On 10/11, the district court refused to issue a preliminary injunction blocking the Secretary’s agreement. On Monday, 10/19, the district court issued a new order declining to block the order pending appeal.
- In denying the injunction pending appeal, the district court doubled down on its standing analysis: Though the plaintiffs argued that the Secretary of State violated federal law and the Elections Clause by not enforcing the absentee ballot deadline, any injury that they might suffer from the Secretary’s action was either speculative or too generalized and broadly shared by all Minnesota voters.

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

- In light of a decision issued by the Michigan Court of Appeals in *Michigan Alliance for Retired Americans v. Benson*, No. 354993 (Mich. Ct. App.) – where the Court of Appeals reversed a lower court’s order extending the deadline to receive absentee ballots and permitting collection of ballots by third parties – the federal district court has ordered that this case will be held in abeyance pending the outcome of any appeal to the Michigan Supreme Court. The Michigan Secretary of State has filed a copy of guidance she issued to clerks’ offices, which instructs them to comply with the Court of Appeals’ order.

8. *Trump v. Way*, 20- 10753 (D. N.J.)

- On 10/22, Judge Shipp of the New Jersey federal district court dismissed a suit filed by the Trump campaign that sought to block a New Jersey law expanding mail-in voting. Under the law, all active registered voters in the state were sent a ballot at least 29 days before the election. Plaintiffs claimed that the mail-in voting expansion “guaranteed “ voting fraud.
- Judge Shipp dismissed the case after finding that Plaintiffs could not clear the threshold for litigation by showing that the law inflicted a concrete and non-speculative injury on them. The court found that Plaintiffs’ fraud allegations were “conclusory” and not backed by allegations of “impending” or “imminent” harm. Even if purported ballot fraud has occurred on scattered occasions in the past, as Plaintiffs alleged, it would still be speculative to assume the fraud would recur.

9. *Priorities USA v. Nessel*, No. 20-1931 (6th Cir.)

- On Wednesday, 10/21, a divided panel of the Sixth Circuit stayed a district court order that preliminarily enjoined Michigan's prohibition on transporting non-disabled persons to the polls. The district court found the prohibition was preempted by the Federal Election Campaign Act. While Attorney General Nessel had declined to appeal that decision, both houses of the Michigan legislature, among others, intervened and sought a stay from the circuit.
- The panel majority determined, as a threshold matter, that the legislature has standing to appeal. The legislature claimed that, as an institution, it was injured by the district court's suspension of the voter-transportation prohibition. The panel majority agreed with the legislature that it had suffered an institutional injury, but also analogized the case to *United States v. Windsor*, where legislative agents were allowed to stand in and defend the validity of a law where executive officials declined to do so.
- On the merits, the majority rejected the district court's preemption analysis and found that the equities weighed in favor of staying the injunction. In the majority's view, the FECA's preemption provision did not apply to laws, like Michigan's voter-transportation prohibition, that are aimed at preventing vote-bribing and voter fraud.
- Chief Judge Cole dissented, emphasizing that the legislature lacked a cognizable interest in the case sufficient to confer standing, and criticized the majority for finding, without evidence, that the voter-transportation prohibition prevents voter fraud.

UPCOMING DECISIONS AND SIGNIFICANT NEW CASES

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

1. *Swenson v. Wisconsin State Legislature*, No. 20A64 (U.S.), and *Gear v. Wisconsin State Legislature*, No. 20A65 (U.S.)
 - At Issue: Last Tuesday, 10/13, voting-rights plaintiffs filed an emergency motion with the U.S. Supreme Court, seeking 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: The application is pending before Justice Kavanaugh, who ordered a response. Briefing concluded on Saturday, 10/17, and a decision could come at any time.

2. *Wise v. Circosta*, No. 20A71 (U.S.), and *Moore v. Circosta*, No. 20A72 (U.S.)
 - At Issue: Applicants, having been denied an appellate injunction by the federal Fourth Circuit in a decision described above, now seek relief from the Supreme Court.
 - Status: The applications for injunctive relief were filed 10/22, and the Chief Justice has requested responses by 3 pm on 10/24.

3. *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, and on 10/19, it denied a stay pending appeal.
 - Status: On 10/15, the plaintiffs filed an emergency motion for an injunction pending appeal with the Eighth Circuit. Responses were filed on Tuesday, 10/20, and a decision could come at any time.

4. *Minnesota Voters Alliance v. Walz*, No. 20-3072 (8th Cir.)
 - At Issue: Plaintiffs seek to enjoin an executive order signed by Governor Walz that requires Minnesotans to wear a face covering in indoor public settings, including polling places. The plaintiffs argue that this executive order conflicts with a Minnesota law that makes it a crime to wear a mask in public, and that the order violates the First Amendment by restricting a form of political expression – not wearing a mask – in and around polling places.
 - Status: Plaintiffs have filed an emergency motion for an injunction pending appeal with the Eighth Circuit. Briefing is set to conclude on Friday, 10/23, and we expect the court to act soon after.

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. *Council on Am.-Islamic Relations – Minnesota v. Atlas Aegis*, No. 20-cv-2195 (D. Minn.)
 - At Issue: Voting rights plaintiffs have sued a private company and associated individuals for sending armed ex-soldiers to “secure” polling sites in Minnesota.

The plaintiffs argue that the defendants' recruiting efforts, public statements, and "patrol" actions constitute voter intimidation in violation of the Voting Rights Act.

- Status: The plaintiffs filed a complaint and motion for a TRO on Tuesday, 10/20, and the district court has scheduled a hearing for Monday, 10/26 at 3pm. We expect a decision to issue shortly thereafter.

7. *Mi Familia Vota Education Fund v. Trump*, No. 20-cv-3030 (D.D.C.)

- At Issue: On 10/21, a voting rights group sued the President, Attorney General Barr, and Department of Homeland Security Secretary Wolf, arguing that their actions around the 2020 elections, taken together, constitute voter intimidation in violation of the Voting Rights Act, the Ku Klux Klan Act of 1871, and the First, Fifth, and Fourteenth Amendments to the U.S. Constitution.
- Status: The plaintiffs filed a motion for TRO on 10/21. The court has not yet set a briefing schedule, but we expect the case to proceed rapidly.